

THE FLOATING CHARGE ON LAND IN THE WESTERN PROVINCES

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1. Introduction

The implementation of personal property security legislation in the Western provinces brought about a unification and rationalization of the registry systems. The Personal Property Security Act created a single registry for security interests in personal property under provincial law. In Alberta and British Columbia, this process is covered by a transition period which will continue until October 1, 1993. For the most part, this transition presents few difficulties: existing security interests must be re-registered under the new system during this period.¹ However, a special problem arises as a result of the phasing out of the corporate securities registries. The legislation which formerly governed the registration of debentures and other corporate securities was not restricted to security interests in personal property, but was sufficiently wide to encompass security interests in real property.² This did not generally affect a corporate mortgage or charge that covered specified land. Such mortgages were registered against each parcel of land under the provincial land titles system, and matters of priority were governed by land titles law. The legislation was significant in respect of a floating charge that covered or included real property because the general practice was not to register the charge in the land titles system.³

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¹ Personal Property Security Act (hereafter "PPSA"), S.A. 1988, c. P-4.05, s. 75; PPSA, S.B.C. 1989, c. 36, s. 78.

² Business Corporations Act, S.A. 1981, c. B-15, s. 88.2(1); Company Act, R.S.B.C. 1979, c. 59, s. 75(5).

³ Although an uncrystallized floating charge could be registered against land in British Columbia and Alberta, the practice was that it was registered only in the corporate securities registry. In *C.I.B.C. v. W.G. Fahlman Ent. Ltd. (Receiver of) sub nom. Canadian Imperial Bank of Commerce v. Rogers* (1989), 66 Alta. L.R. (2d) 180 (C.A.), an uncrystallized floating charge was registered in the land titles system. This case is atypical since it was the intention of the parties to create a fixed mortgage on the property, but

In Manitoba and Saskatchewan, the elimination of the corporate securities registries did not appear to create any significant impact on financing patterns. The experience in Alberta and British Columbia has been different. British Columbia introduced consequential amendments which created a new registry system to govern the floating charge on land. The measures were introduced primarily to facilitate the financing of real estate developers.⁴ In Alberta, no special measures were introduced to provide a registry system for the floating charge on land. The initial stance was that the land titles system is the proper place for registration of security interests in real property. This caused some consternation in the oil and gas sector, where it is common to find financing on the security of floating charge debentures covering oil and gas properties. Legislation has been recently proposed in Alberta to provide a new registry for the floating charge on land.

I will begin by reviewing the status of the floating charge on land prior to the coming into force of the new personal property security regime. I will then discuss the current position in those provinces which did not take any measures to accommodate the floating charge on land following the coming into force of the Personal Property Security Act. I will next examine the approach taken in British Columbia. Finally, I will outline the legislative solution proposed for Alberta.

2. The Floating Charge on Land Under Prior Law

The priority position of a floating charge on land prior to the coming into force of personal property security legislation depended upon whether or not the floating charge also had been registered in the land titles system. It is therefore necessary to consider the status of a floating charge on land where there has been no registration in the land titles system, and then consider how registration of it in the land titles system might alter priorities.

A floating charge on land that was not registered in Alberta under the corporate securities registration legislation was void

through inadvertence a floating charge provision was included. See *Canadian Imperial Bank of Commerce v. Coopers & Lybrand Ltd. (Receiver)* (1987), 56 Alta. L.R. (2d) 353, 48 R.P.R. 219 (Q.B.), affd 57 D.L.R. (4th) 633, 66 Alta. L.R. (2d) 180 (C.A.).

⁴ Law Reform Commission of British Columbia, *Report on Floating Charges on Land* (January 1989), L.R.C. 103, at pp. 3-4.

against a liquidator, assignee, receiver or creditor of the corporation and against any subsequent *bona fide* purchaser or mortgagee for valuable consideration.⁵ In British Columbia, the only unsecured creditors who could avoid an unregistered interest were those who caused the collateral to be seized or attached under legal process,⁶ but a trustee in bankruptcy was given an independent status to set aside an unregistered interest.⁷ Section 75 of the Bankruptcy Act⁸ contains an additional provision which affects priorities:

75. Notwithstanding anything in this Act, a deed, conveyance, transfer, agreement for sale, mortgage, charge or hypothec made to or in favour of a *bona fide* purchaser or mortgagee for adequate valuable consideration and covering any real property affected by a receiving order or an assignment under this Act is valid and effectual according to the tenor thereof and according to the laws of the province in which the property is situated as fully and effectually and to all intents and purposes as if no receiving order or assignment had been made under this Act, unless the receiving order or assignment, or notice thereof, or caution, has been registered against the property in the proper office prior to the registration of the deed, conveyance, transfer, agreement for sale, mortgage, charge or hypothec in accordance with the laws of the province in which the property is situated.

The trustee in bankruptcy may register an assignment or receiving order in the land titles system.⁹ A competition may arise between a floating charge on land registered in the corporate securities registry and a trustee in bankruptcy who subsequently registers the assignment or receiving order in the land titles system. Cases from Manitoba¹⁰ and British Columbia¹¹ held that registration under the corporate securities legislation is sufficient to prevent subordination to a trustee in bankruptcy pursuant to s. 75. The clear implication is that if the charge had not been so registered, it would have been subordinate to the trustee in bankruptcy pursuant to s. 75.

These cases misinterpret the operation of s. 75. Under established bankruptcy law principles, the trustee in bankruptcy

⁵ Business Corporations Act, *supra*, footnote 2, s. 88.2(1).

⁶ Company Act, *supra*, footnote 2, s. 79(1)(b) to (d).

⁷ *Ibid.*, s. 79(1)(a).

⁸ R.S.C. 1985, c. B-3.

⁹ Bankruptcy Act, *ibid.*, s. 74.

¹⁰ *Schneeberger v. Quality Woodwork Co. Ltd.* (1965), 55 D.L.R. (2d) 139, 54 W.W.R. 321 (Man. Q.B.).

¹¹ *Daon Development Corp. v. National Trust Co. Ltd.*, [1982] 6 W.W.R. 452, 39 B.C.L.R. 341 (S.C.).

occupies a threefold position. The trustee in bankruptcy is said to step into the shoes of the bankrupt, and therefore has all the rights but obtains no better position than the debtor.¹² The trustee in bankruptcy is also the representative of creditors and thereby obtains whatever right the creditors might have possessed to set aside transactions.¹³ Finally, the trustee in bankruptcy may be given an independent right by federal or provincial law to set aside certain transactions.¹⁴ Accordingly, the trustee in bankruptcy obtains the right to set aside transactions only to the extent that that right is available to a creditor represented by the trustee or that right is given to the trustee by federal or provincial legislation.

The making of an assignment or receiving order does not give the trustee in bankruptcy priority over prior interests, but merely prevents the bankrupt from subsequently dealing with the estate.¹⁵ Section 75 provides that the transfer or mortgage is "valid and effectual . . . as if no receiving order or assignment had been made" unless the assignment or receiving order is registered. There is nothing in this section that gives the trustee in bankruptcy priority over a prior unregistered interest.¹⁶ Rather, s. 75 subordinates an assignment or receiving order that is not registered in the land titles system to a subsequent *bona fide* purchaser or mortgagee for adequate valuable consideration. It does so by giving the subsequent transfer or mortgage the status it would obtain under provincial law as if no assignment or receiving order had been made. In the absence of s. 75, subsequent purchasers and mortgagees would be subordinate to the trustee in bankruptcy

¹² *McEntire v. Crossley Bros. Ltd.*, [1895] A.C. 457 (H.L.) at p. 461; *Flintoff v. Royal Bank of Canada*, [1964] S.C.R. 631 at pp. 634-5, 47 D.L.R. (2d) 141 *sub nom. Re Canadian Western Millwork Ltd. Flintoff v. Royal Bank of Canada*.

¹³ *Paccar Financial Services Ltd. v. Sinco Trucking Ltd. (Trustee of)* (1989), 57 D.L.R. (4th) 438 at pp. 444-5, [1989] 3 W.W.R. 481 (Sask. C.A.). As a consequence, the trustee in bankruptcy as representative of creditors can invoke provincial fraudulent conveyance and fraudulent preference law. See *Robinson v. Countrywide Factors Ltd.*, [1978] 1 S.C.R. 753, 72 D.L.R. (3d) 500.

¹⁴ See Bankruptcy Act, *supra*, footnote 8, ss. 91 to 101; PPSA, S.A. *supra*, footnote 1, s. 20(1)(b); PPSA, S.B.C. *supra*, footnote 1, s. 20(b).

¹⁵ Bankruptcy Act, *supra*, footnote 8, s. 71(2).

¹⁶ The trustee in bankruptcy cannot obtain priority over a prior unregistered interest even if the assignment or receiving order is registered. See *John MacDonald & Co. Ltd. v. Tew* (1914), 32 O.L.R. 262 (C.A.) at pp. 265-6; *Craig v. McKay* (1906), 12 O.L.R. 121 (C.A.) at p. 125. Section 74(2) provides that the trustee may be registered as owner of the land or charge free from all encumbrances or charges mentioned in subsec. 70(1), but this only covers judgments, executions and other legal process of unsecured creditors and expressly excludes from its application the rights of secured creditors.

even though such interest did not appear against title, thus threatening the integrity of the land titles system.¹⁷ Nor is there anything in the land titles legislation which would give the trustee in bankruptcy priority by virtue of its becoming registered owner because the trustee is not a purchaser for value and therefore is unable to obtain the benefits of indefeasibility.¹⁸

Registration of a floating charge in the corporate securities registry does not give the charge holder any assurance that it will enjoy priority over a subsequent transferee or mortgagee. Registration merely protects the floating charge against invalidation. A competition between a floating charge and a subsequent transfer or mortgage is governed by land titles law which ranks the claims by their order of registration in the land titles system. A mortgage that is registered in the land titles system is not subject to a dual registration requirement: legislation in Alberta and British Columbia provides that no mortgage of or charge on land that is registered under the land titles system is void for non-registration in the corporate securities registry.¹⁹ Thus, a floating charge on land that is registered in the corporate securities registry is subordinate to a subsequent mortgage or transfer of land that is registered in the land titles system. A subsequent purchaser or mortgagee for value obtains priority even if the interest is taken with knowledge of the floating charge because the principle of indefeasibility protects the mortgagee or purchaser unless there has been actual fraud on the part of the land titles registrant.²⁰ Although somewhat less clear, it would seem that the mortgagee or purchaser obtains priority even if that person had actual

¹⁷ L. Duncan and W. Reilley, *Bankruptcy in Canada*, 2nd ed. (Toronto, Canadian Legal Authors Ltd., 1933), pp. 293-4.

¹⁸ *Kaup v. Imperial Oil Ltd.*, [1962] S.C.R. 170, 32 D.L.R. (2d) 112 (principle of indefeasibility operates only in favour of a purchaser for value); *Flintoff v. Royal Bank of Canada*, *supra*, footnote 12 (trustee in bankruptcy takes the property of the bankrupt merely as a successor in interest and not as an innocent purchaser for value without notice).

¹⁹ Business Corporations Act, *supra*, footnote 2, s. 88.2(7); Company Act, *supra*, footnote 2, s. 79(2). The Manitoba legislation contained no equivalent provision and it therefore appears that registration of a floating charge on land in the land titles system did not eliminate the need to register under the corporate securities registration legislation. See the Corporations Act, S.M. 1976, c. 40, ss. 362 to 369. In Saskatchewan, the Corporation Securities Registration Act, R.S.S. 1978, c. C-39 only imposed a registration requirement on debentures which covered chattels. See s. 3. Therefore, the repeal of the statute did not result in any change in respect of floating charges on land.

²⁰ Land Titles Act, R.S.A. 1980, c. L-5, s. 195; Land Title Act, R.S.B.C. 1979, c. 219, ss. 20, 22, 23.

knowledge of the existence of a restrictive covenant that prevented the owner from entering into the transaction.²¹ Registration of a writ of execution in the land titles system does not give the writ holder priority over a prior floating charge since a writ of execution binds only the interest of the debtor and is subject to any outstanding equitable interest.²²

The general practice is not to register a floating charge on land against each separate parcel of land in the land titles system. Under these circumstances, a priority competition between two floating charges on land is determined by the order of registration in the corporate securities registry.²³ However, an uncrystallized floating charge can be registered in the land titles system.²⁴ Priority would then be resolved on the basis of the order of registration in the land titles system. This represents the greatest weakness in the use of the floating charge on land as a security device. Registration of the floating charge in the corporate securities registry does not assure that it will obtain priority over a subsequent floating charge. The subsequent charge holder need only register in the land titles system in order to invert the priorities that otherwise would pertain. The situation is somewhat different in Alberta where Crown leases are involved. The Business Corporations Act does not contain a similar exemption respecting registrations under the Mines and Minerals Act.²⁵ As a consequence, dual registration under both registration systems is necessary to maintain priority.

Normally, the absence of any assurance of priority over subsequently created security interests would inhibit asset-based financing. This was not, however, the experience in Alberta.

²¹ It may be argued that knowledge of the existence of a restrictive provision amounts to knowing participation in the fraudulent conduct because the execution of the subsequent security agreement will necessarily induce a breach of contract under the prior security agreement. See T. Mapp, *Torrens' Elusive Title* (Alberta Law Review, 1978), pp. 115-16. This conclusion seems doubtful in light of the decision of the Alberta Court of Appeal in *Holt, Renfrew & Co. Ltd. v. Henry Singer Ltd.* (1982), 135 D.L.R. (3d) 391, [1982] 4 W.W.R. 481 (notice of an equitable interest combined with knowledge that the interest would be defeated did not constitute fraud).

²² *Re Westmoreland Capital Ltd.* (1986), 42 Alta. L.R. (2d) 391 (Q.B.).

²³ *Federal Business Development Bank v. Prince Albert Fashion Bin Ltd.*, [1983] 3 W.W.R. 464, 22 Sask. R. 111 (C.A.).

²⁴ *C.I.B.C. v. W.G. Fahlman Ent. Ltd. (Receiver of)*, *supra*, footnote 3; *Re The Land Registry Act* (1904), 10 B.C.L.R. 370 (Full Court); Ministry of Attorney General, *Land Title Practice Manual* (Victoria, 1988), pp. 299-300 and 1164-5.

²⁵ R.S.A. 1980, c. M-15, s. 140.

During the 1980s it became common for financial institutions to lend money to oil and gas corporations on the security of a floating charge debenture. The floating charge encompassed the corporation's inventory of oil and gas reserves, and was registered in the corporate securities registry. There is no indication that a priority competition between two floating charge holders has ever been resolved by the courts on the basis of a race to the land titles system. There are three reasons that might explain the widespread use of the floating charge in spite of the absence of an effective priority rule. First, it may be attributed to a lack of familiarity with the floating charge on land. The existing practice is that floating charges are not registered in the land titles system, and this may have produced a misapprehension that such charges cannot be so registered. Second, the very existence of the corporate registry may dissuade subsequent lenders from advancing money to the debtor. The lender has the means of ascertaining the existence of the prior floating charge, and usually would not advance moneys under these circumstances. Third, unless the holder of the second floating charge already has a list of the land descriptions in its possession, the holder of the first floating charge will be in a position to deny access to this information since the receiver-manager will typically be appointed by the first floating charge holder.

3. Abolition of the Corporate Securities Registries

The legislation creating the corporate securities registries was repealed upon the coming into force of the PPSA. In Alberta, Manitoba and Saskatchewan no alternative registry was set up for floating charges on land (this did not represent a change in law in Saskatchewan where the corporate securities registration legislation was always restricted to personal property).²⁶ As a result, a floating charge on land can only be registered in the land titles system. A floating charge on land that is not so registered remains effective as between the secured party and the debtor. An unregistered floating charge also obtains priority over a writ of execution that is registered in the land titles system, but otherwise is subordinate to other registered interests. Because the priority rules found in the corporate securities legislation no longer apply,

²⁶ See, *supra*, footnote 19.

priority between competing unregistered interests is determined on the basis of the first in time.²⁷ As in the past, registration of the floating charge in the land titles system gives priority to the first floating charge to be registered. A further consequence of the repeal of the corporate securities registration statutes is that an unregistered floating charge is no longer subordinate to a trustee in bankruptcy by virtue of provincial law. Thus, the priority status of a floating charge in competition with a trustee in bankruptcy depends upon the proper interpretation of s. 75 of the Bankruptcy Act. As indicated earlier, the better view is that s. 75 does not subordinate a prior unregistered interest to a trustee in bankruptcy.

Although the use of a floating charge on land may afford some additional comfort to a lender, it is doubtful that the lender would finance primarily on the security of this device in those jurisdictions that did not provide an alternative registry system. First, there is uncertainty over the position of the trustee in bankruptcy. Until such time as the cases from Manitoba and British Columbia are reconsidered, the prudent floating charge holder must ensure that its interest is registered prior to the registration of the assignment or receiving order in the land titles system. Second, there is no longer the means of determining the existence of prior floating charges so that lending practices similar to those in the oil and gas sector in Alberta are no longer tenable. Finally, there remains the risk that registration of a competing interest in land (other than a writ of execution) will defeat an unregistered floating charge.

4. The British Columbia Approach

In January 1989, the Law Reform Commission of British Columbia published its *Report on Floating Charges on Land*.²⁸ Its proposals were adopted as part of the consequential amendments to the Personal Property Security Act.²⁹ The British Columbia solution is to use the Personal Property Registry as the proper place for registration of an uncrystallized floating charge.³⁰ The

²⁷ *Re Household Products Co. Ltd. and Federal Business Development Bank* (1981), 124 D.L.R. (3d) 325, 33 O.R. (2d) 334 (H.C.J.).

²⁸ *Supra*, footnote 4.

²⁹ Personal Property Security Amendment Act, S.B.C. 1990, c. 11, s. 71, which added s. 198.1 to the Land Title Act, *supra*, footnote 20.

³⁰ Land Title Act, *supra*, footnote 20, as amended by the Personal Property Security Amendment Act, *supra*, footnote 29, s. 198.1(2) and (3).

system incorporates the salient features of the PPSA registry system.³¹ A notice registration system is used so that the security agreement containing the floating charge need not be registered.³² An uncrystallized floating charge no longer can be registered in a land titles office; only upon crystallization can it be so registered.³³ This is accomplished by providing the registrar with a sworn statement that the charge has crystallized and giving the circumstances under which the crystallization occurred.³⁴ Registration of a floating charge in the land titles system does not constitute a determination that crystallization has in fact occurred.³⁵ Priorities are determined according to the usual land titles rule which makes the charge subject to prior registered interests.³⁶ A special rule is created under which a dispute between two floating charges on land is resolved in favour of the first to register in the personal property registry or in the land titles system, whichever is the earlier.³⁷ This special rule applies only to a competition between two floating charges. A competition between a floating charge and a fixed charge or mortgage continues to be governed by the ordinary land titles rule. Further provisions provide for transition³⁸ and create a priority rule for breaking a potential circular priority problem.³⁹

³¹ *Ibid.*, s. 198.1(5) provides that s. 18 (the disclosure mechanism) and ss. 43(1) to (9), (12) to (15), 44 to 48 and 51 to 54 (the basic registry provisions) of the PPSA apply to an uncrystallized floating charge.

³² *Ibid.*, s. 198.1(3). Under s. 48 of the Personal Property Security Regulations, B.C. Reg. 279/90, the registering party shall describe the collateral as "uncrystallized floating charge on land" in the general collateral description field. Section 48(2) goes on to provide that "Where the registration relates to a security interest in personal property as well as an uncrystallized floating charge on land," all that is required is to give the information respecting the personal property. This produces an added burden on the part of a searching party since any prior registration could potentially encompass a floating charge on land. Furthermore, because the system utilizes a blanket registration system that permits a single registration to cover future security agreements, the potential secured party would be well advised to obtain a subordination agreement from all prior registered parties even though the security agreement then in existence does not cover land. See also Land Titles Act, s. 198.1(4).

³³ *Ibid.*, s. 198.1(8).

³⁴ *Ibid.*, s. 198.1(6).

³⁵ *Ibid.*, s. 198.1(7).

³⁶ *Ibid.*, s. 198.1(9).

³⁷ *Ibid.*, s. 198.1(10).

³⁸ *Ibid.*, s. 198.1(12) to (14).

³⁹ *Ibid.*, s. 198.1(11). The problem arises where SP1 registers an uncrystallized floating charge in the personal property registry and later SP2 registers a crystallized floating charge in the land titles office. This is followed by registration of an encumbrance by A in the land titles system. SP1 has priority over SP2 by virtue of its earlier registration

The provisions defining the scope of the registration requirement become critical under the British Columbia system. A failure to register under this new registration scheme will now result in subordination even though the security interest was the first to be registered in the land titles system. Section 198.1(1) defines two terms that are of crucial significance:

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

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

The term “floating charge” is used to describe which security interests are subject to the registration requirement.⁴⁰ The term “crystallization” is used to identify when the floating charge may be registered in the land titles system.⁴¹

In the first instance, one must determine if the security agreement creates a floating charge on land. In many cases this determination will not be difficult because the charging provision in the security agreement will expressly state that a floating charge is granted. In other cases, the determination may not be so easy. The British Columbia Court of Appeal has recognized that it is the existence of a licence that permits the debtor to deal with the property in the ordinary course of business which defines the essential nature of a floating charge.⁴² Accordingly, a mortgage of specifically described properties could nevertheless constitute a floating charge if the mortgagor was permitted to deal with these properties in the ordinary course of business.⁴³ However, if the

(s. 198.1(10)). SP2 has priority over A by virtue of SP2's earlier registration in the land titles system. But A has priority over SP1 because A was the first to register in the land titles system. As a result, SP1 has priority over SP2; SP2 has priority over A; and A has priority over SP1. The British Columbia approach is to give effect to the priorities under the land title system, but to treat SP1 as if it were subordinated to the claim of SP2.

⁴⁰ *Ibid.*, s. 198.1(2) and (3).

⁴¹ *Ibid.*, s. 198.1(6) to (8).

⁴² *B.C. v. Federal Business Development Bank* (1987), 43 D.L.R. (4th) 188, [1988] 1 W.W.R. 1 (B.C.C.A.). It seems that this view has not been accepted in other provinces where the chattel mortgage combined with a licence which permitted dealings in the ordinary course of business was viewed as something other than a floating charge. See *Toronto Dominion Bank v. Hayworth Equipment Sales Ltd.* (1987), 35 D.L.R. (4th) 413, 49 Alta. L.R. (2d) 193 (C.A.). And see R.J. Wood, “The Floating Charge in Canada” (1989), 27 Alta. L. Rev. 191, at pp. 195-202.

⁴³ A floating charge may be taken in a particular class of assets, and the class need not

consent of the mortgagee was required prior to each transaction, the security interest would not be regarded as a floating charge⁴⁴ even if the mortgage was not registered in the land titles system.

The definition of "floating charge" adopted by the legislation appears to be out of step with conventional legal principles governing the floating charge. The definition indicates that the security agreement must specify the events of crystallization. In fact, most floating charge debentures do not do so. A floating charge debenture will typically provide that the debenture becomes enforceable upon the occurrence of an event of default. This gives the secured party the right to realize upon the security by exercising its remedies (such as the appointment of a receiver-manager under the instrument). It is the appointment of a receiver-manager, and not default, that crystallizes the charge; and it is the decisional law, and not the security agreement, that identifies the appointment of a receiver as a crystallizing event.⁴⁵

The issue is important because the validity of a registration of a floating charge in the land titles system may be attacked on the basis that the charge had not in fact crystallized at the time of registration.⁴⁶ The fact that there had been a default and that the security was enforceable is not sufficient. The secured party must also demonstrate that a receiver-manager had been appointed (or that some other crystallizing event had occurred) at the time of the registration of the floating charge in the land titles office. The two-step process of crystallization followed by registration can be circumvented if automatic crystallization provisions are included in the floating charge debenture and upheld by the courts. In the past, courts in British Columbia have taken a hostile attitude towards automatic crystallization clauses.⁴⁷ Automatic crystalli-

encompass future assets. See *Re Bond Worth Ltd.*, [1979] 3 All E.R. 919 (Ch. D.) at p. 954.

⁴⁴ R. M. Goode, *Legal Problems of Credit and Security*, 2nd ed. (London, Sweet & Maxwell, Centre for Commercial Law Studies, 1988), pp. 55-9.

⁴⁵ Wood, *supra*, footnote 42, at pp. 204-6.

⁴⁶ Land Title Act, *supra*, footnote 20, as amended by Personal Property Security Amendment Act, *supra*, footnote 29, s. 198.1(7) provides that the fact of registration in the land titles system does not constitute a determination that crystallization has occurred. It is therefore important that the secured party ensure that crystallization has occurred prior to registration. It is unclear if improper registration of an uncrystallized charge completely invalidates the registration, or if it simply renders it inoperative until such time as crystallization actually occurs.

⁴⁷ *B.C. v. Consolidated Churchill Copper Corp.*, (1978), 90 D.L.R. (3d) 357, [1978] 5 W.W.R. 652 (B.C.S.C.). And see Wood, *supra*, footnote 42, at pp. 206-8.

zation clauses provide that the charge crystallizes automatically upon the occurrence of an event of default. The courts have refused to give effect to such clauses and have required some further act of intervention. The definition of "crystallized" in s. 198.1(1) suggests that automatic crystallization clauses are effective because a floating charge is considered to have crystallized if it has "fixed upon specific land in accordance with the terms of the instrument in which the charge is created and the applicable law".

These difficulties may be attributed to the fact that the system utilizes the traditional notion of the floating charge and such related concepts as crystallization. The complex vocabulary associated with the floating charge has finally been vanquished from the personal property security legislation. It would be unfortunate if it were to maintain a twilight existence on the outer fringes of the real property and personal property registry systems. This concern is reflected in the report of the British Columbia Law Reform Commission which viewed its recommendations as an interim measure.⁴⁸

While we firmly believe that the recommendations contained in this Report should be implemented without delay, given the narrow focus of our attention in this project, it is also our belief that this whole topic should be re-examined at some future time, say in 10 or 15 years. This would permit a more accurate assessment of the impact of the *Personal Property Security Act* on commercial financing generally, and on the floating charge as a security device. The provisions in place at that time could then be fine-tuned or replaced as circumstances require.

5. The Alberta Proposal

The proposed Alberta legislation adopts a minimalist approach to reform in this area.⁴⁹ The Personal Property Registry is modified to permit registration of a charge on land. The system is, for the most part, a modernized version of the corporate registry which it replaces. The system would not radically alter the priority rules that formerly governed when the corporate registry was

⁴⁸ *Report on Floating Charges on Land*, *supra*, footnote 4, at p. 6.

⁴⁹ The system would be implemented by the addition of a lengthy section to the Law of Property Act. The proposed amendment is set out in *Registration of Charges on Land — Proposed Amendments to the Law of Property Act* (Alberta Department of the Attorney General, 1991). The references to the Law of Property Act which follow are to the proposed amendments as set out in the discussion paper.

available for registration of debentures and floating charges on land. Clearly, a strong motivation for this approach was the desire to facilitate the established financing patterns currently employed in the oil and gas sector.

The scope of the proposed registration system is wider than that of British Columbia. The registry system will encompass any charge on land, which is defined to mean "an interest in real property given by a corporation that secures payment or performance of an obligation."⁵⁰ The registry is therefore not restricted to floating charges on land but will encompass fixed mortgages as well (whether or not they are combined with a licence to deal with the land in the ordinary course of business). This is roughly analogous to the present corporate registry which provides for registration of any mortgage or charge that secures a debenture.⁵¹

The proposed legislation adopts a notice registration system by incorporating through reference the major registration provisions contained in the PPSA.⁵² The registration requirements that are employed differ somewhat from those that apply to security interests in personal property. The regulations promulgated under the PPSA provide that the collateral may be described by item or kind.⁵³ The proposed legislation does not permit the use of itemized descriptions of land taken as collateral. Instead, the only information to be revealed is that the secured party claims a "charge on land". An interested party must then inquire through the disclosure system set out in s. 18 of the PPSA if any further information is required.⁵⁴ The obvious concern was that the introduction of charges on land into the registry should not significantly complicate the search procedures of the majority of users of the system. Most searching parties will be interested in discovering registered interests in personal property and should not have to wade through long lists of legal descriptions of land.

The proposed legislation adopts a first to register rule of priority to resolve priority disputes between registered interests.⁵⁵ This is similar to the residual priority rule in s. 35 of the PPSA. It also

⁵⁰ Law of Property Act, s. 59.2(1)(b).

⁵¹ Business Corporation Act, *supra*, footnote 2, s. 88.2(1)(a).

⁵² Law of Property Act, s. 59.2(3).

⁵³ Personal Property Security Regulation, Alta. Reg. 234/90, c. 28(2)(a).

⁵⁴ Law of Property Act, section 59.2(3) incorporates through reference subsecs. 43(4) and (5) of the PPSA, *supra*, footnote 1.

⁵⁵ Law of Property Act, s. 59.2(2).

incorporates the pre-registration (financing statement may be registered before a security agreement is executed) and blanket registration (a single registration may cover more than one security agreement) features of the PPSA.⁵⁶ The use of a blanket registration can cause some difficulties where a prior registered party takes a charge on specified parcels of land or on certain classes of land. A subsequent lender cannot assume that it is safe to make advances on the security of the land that is not encumbered. The prior registered party may subsequently enter into a second security agreement that creates a charge on that land, and it will be entitled to priority on the basis of its earlier registration. The subsequent lender may attempt to obtain a subordination agreement from the prior registered party.⁵⁷ If this cannot be obtained, the debtor may serve a written demand on the secured party requiring the secured party to register a financing charge statement either discharging the registration (where there is no security agreement or the obligation secured by it has been discharged) or amending it by identifying by date the agreement to which it relates (where the agreement does not confer an interest in all the present and after-acquired real property of the debtor).⁵⁸

The priority afforded to a charge through registration in the Personal Property Registry remains subject to the priority structure contained within the land titles system. Section 59.2(8) provides that “[t]his section is subject in all respects to the Land Titles Act and the Mines and Minerals Act, and the priority of any interest registered or filed under either Act shall be determined pursuant to that Act.” This means that the secured party who registers first in the land registration system will obtain priority regardless of whether or not another party had effected an earlier registration in the personal property registry (the term “land registration system” is used to encompass both the land titles system and the mines and minerals registration system). This is the same approach that was taken under the corporate securities registration legislation⁵⁹ except that it is extended to cover registrations under the Mines and Minerals Act as well. In practice, a lender who takes a security interest in specific parcels of land will

⁵⁶ Section 59.2(3) incorporated through reference subsecs. 43(4) and (5) of the PPSA.

⁵⁷ Section 59.2(3) of the Law of Property Act incorporates through reference s. 49 of the PPSA (effectiveness of subordination agreements).

⁵⁸ *Ibid.*, s. 59.2(4) to (7).

⁵⁹ Business Corporations Act, *supra*, footnote 2, s. 88.2(7).

generally register only in the land registration system. It is only where this is not feasible that registration in the personal property registry needs to be effected. This will generally occur where the debtor holds a circulating inventory of parcels of real property and the land titles procedure (a registration in respect of each parcel of land when it is acquired and a release upon its disposal) is too costly or administratively unworkable. Registration in the personal property registry will therefore not eliminate the risk that a competing interest holder (other than an execution creditor) may obtain priority by registering first in the land registration system.

The proposed legislation does not subordinate an unregistered charge to a trustee in bankruptcy or creditor. The charge will be subordinate to a trustee in bankruptcy only if s. 75 of the Bankruptcy Act is held to give priority to the trustee over prior unregistered interests in real property.⁶⁰ A number of transition rules are also provided. Charges registered under the corporate securities registration legislation remain effective until September 30, 1993 (the date that the registry is phased out under the PPSA).⁶¹ Charges that were taken after September 30, 1990 (the coming into force of the PPSA) but before the coming into force of the new registration legislation are deemed to be registered provided that actual registration is effected within 60 days.⁶²

6. Conclusion

Both the British Columbia and the proposed Alberta legislation use the personal property registry for registration of charges on land. Beyond this, the two systems have little in common. There are three major points of departure. First, the registry system in Alberta is not restricted to floating charges on land, but encompasses all charges on land, whether legal or equitable, fixed or floating. Second, in Alberta no restriction is placed upon the ability of a holder of a floating charge to register in the land titles system prior to crystallization. Third, the land registration systems are afforded priority in Alberta so that the first interest to be registered in the land titles system or mines and minerals registry system will obtain priority regardless of the order of registration in the personal property registry.

⁶⁰ See text, *supra*, at footnotes 8 to 18.

⁶¹ Law of Property Act, s. 59.2(9).

⁶² *Ibid.*, s. 59.2(10).

This third feature is the Achilles heel of the Alberta system. The problematic case concerns a competition between two floating charge holders. In such a case, priority will generally go to the first to register in the personal property registry. But if the second charge holder learns that the debtor is in financial difficulty and registers against each specific parcel of land owned by the debtor, the second charge holder will thereby benefit from an inversion of priorities over the first charge holder. A floating charge holder therefore remains subject to the risk that priorities will be disturbed by a race to the land registration office. Apparently Alberta lenders are comfortable with this risk since the old system also shared this characteristic and yet this did not inhibit the widespread use of the floating charge on land in the oil patch.

The British Columbia legislation handles this issue by providing that the registration of a charge in the personal property registry gives it priority over a crystallized floating charge that is registered in the land titles system. As a consequence, it is crucial that the British Columbia system limit the scope of its registry to floating charges. However, in doing so questions of scope become highly significant and it seems that the legislation has not been completely successful in dealing with this issue. It also produces the need for rules to resolve circular priority problems. The prohibition against registration of an uncrystallized floating charge in the land titles system may also prove to be ill-advised as it invites a host of problems centred upon the issue of time of crystallization.

Alberta and British Columbia have manufactured two distinct legislative products. The lack of uniformity should not be lamented at this stage. The contours of the Alberta scheme have been shaped by the existing practices of the oil and gas sector, and it may be that the same factors do not apply in other provinces. Moreover, the legislative schemes are new and untested, and further experimentation and innovation may be highly desirable. Eventually, the costs and benefits of each system will become better appreciated by the commercial community, and if the difference in the operational efficiencies of the two systems is substantial one may well anticipate that the weaker model will fall by the wayside as jurisdictions embrace the superior legislative scheme.