THE NATURE AND DEFINITION OF FEDERAL SECURITY INTERESTS

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I. INTRODUCTION

Security interests in personal property are typically governed by provincial law. However, there are occasions where federal law displaces provincial personal property security law. In some cases, the federal presence is so pervasive that it is possible to characterize the interest as a federal security interest. In other cases, the intrusion is more localized in that the federal statute displaces only a portion of the provincial system. The interaction between the federal and provincial systems produces problems that are both complex and difficult.

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In this article, I will examine two areas in which federal legislation provides for the creation of a federal security interest (the Bank Act security provisions and the Canada Shipping Act ship mortgage provisions). I will then examine two areas where the federal legislation pre-empts a major component of the provincial personal property security system (security interest in railway assets and in intellectual property). In each case I will discuss the nature and extent of the federal presence. I will then look at the kinds of problems that arise out of the interaction of this law with provincial law in jurisdictions that have enacted a Personal Property Security Act. I will conclude with some comments on how reform of the law might best be undertaken.

1. Methodology

The statutes that give rise to these federal security interests use a variety of different concepts, techniques and approaches. In order to bring some semblance of order into this discussion, I have attempted to come up with a terminology that defines and describes the nature of the federal security interest and its interrelationship with provincial law. I propose to examine and assess the federal security interests against four criteria: (1) completeness; (2) interstitiality; (3) congruence; and (4) compatibility.

Completeness describes the extent to which the answer to a particular legal controversy can be determined by reference to the text of the statute. The traditional approach in common law jurisdictions has been for the legislation to adopt a limited and localized intrusion into the corpus of the common law. Increasingly, common law jurisdictions are adopting a more systematic and comprehensive approach in the design of commercial law statutes. Although none of these can truly be considered to be in the nature of a true code, the Personal Property Security Act (hereafter "PPSA") goes furthest in providing a complete self-contained system. The federal statutes, as will be seen, display considerable variation in their completeness.

Interstitiality[1] is related to the notion of completeness. When the statute does not provide an answer, it is necessary to look to some

1. I am using this term in a wider sense than that used by Grant Gilmore. Gilmore refers to the "principle of interstitiality" as the incorporation of state law to fill the gaps in a federal statute, and contrasts it with the counter-principle that federal law carries with it a supporting body of federal common law. See G. Gilmore, *Security Interests in Personal Property* (Boston, Little Brown & Co., 1965), vol. 1, at p. 403. I use the term simply to

other body of law to fill in the gaps in the statute. When we talk about interstitiality, we are really asking about the identity of these gap-filling principles. Do we turn to provincial law? If so, does it include both statutory and non-statutory law? Or are there other principles, such as a non-statutory body of federal common law, that are to be used?

Congruence describes the extent to which the federal legislation adopts the same terminology, concepts and approaches as the provincial personal property security systems. There are two different dimensions across which comparisons can be drawn. The first concerns the degree to which the federal statute adopts the same language and conceptual framework as the provincial system. The second looks to the result and asks if the federal statute produces the same set of outcomes as the provincial system. Congruence is a desirable goal in so far as it reduces the complexity for lawyers and judges who are expected to have a mastery (or at least a working knowledge) of the operation of the law.

Compatibility describes the interaction between the federal system and the provincial system. It is possible theoretically to have two widely divergent systems of personal property security law premised on vastly different concepts, but which are nevertheless co-ordinated so as to produce commercially reasonable and predictable outcomes when the two systems come into contact with one another. Indeed, this was the strategy adopted by a working group that attempted to devise a priority rule that would create greater compatibility between the Bank Act and the provincial PPSAs. The effort did not seek to reform the Bank Act so as to bring it in line with the concepts of the PPSA, but adopted a more modest goal of seeking a priority rule that would produce a more commercially acceptable outcome than exists under the present law.[2]

2. Identifying the Interstitial Law

The issue of interstitiality is of critical importance in analyzing the operation of the federal statutes. It is convenient therefore to

denote an inquiry into the identity of the law that will be used to fill in the gaps or omissions in the federal statute.

2. The problem essentially was that a prior unregistered PPSA security interest obtains priority over a subsequent Bank Act security. The proposal was developed by a joint committee of the Canadian Bankers' Association and the Canadian Conference on Personal Property Security Law. As it turned out, the proposal failed to win the acceptance of the Ontario commercial bar, which advocated the outright repeal of the Bank Act provisions and was not pursued any further. See, *infra*, footnote 141.

provide at the outset a basic approach to the problem. When a question concerning the validity, priority or enforcement of a security interest arises, the first step is to examine the federal statute to see if it provides an answer to the question.[3] If it does not, it will be necessary to apply some other suppletive body of rules and principles to fill in the gaps in the federal statute. The usual approach is to look to provincial law. Provincial law is composed of the non-statutory background law (the common law in the case of common law provinces) together with any statute law in force in the province. Although commonly referred to as provincial law, this does not imply that the province has any kind of ownership over this body of background law, or that Parliament is in any way precluded from using its terminology or concepts as part of the design of a statute in an area of federal competence.[4] There is one instance where there is a body of non-statutory federal principles that can provide the background law in place of the provincial law. It takes the form of Canadian maritime law, and it provides the suppletive law in connection with the federal statutory regulation of ship mortgages.

It is constitutionally permissible for the Parliament of Canada to construct a statute that borrows these concepts and projects them into a legal system despite the fact that these concepts are foreign to that legal system. Thus, it is possible for Parliament to incorporate common law property, contract and trust concepts into a federal statute, and thereby import them into the civil law system of Quebec. If a federal statute adopts this approach, the suppletive law is sometimes referred to as a "federal common law" because it will not generally be affected by provincial statutes that modify the operation of these common law concepts. Of course, we should not be surprised to discover that a supercilious attitude towards the civil law system yields serious problems of compatibility and coherence that is attributable to the absence of a shared set of underlying legal concepts.[5]

It is also constitutionally permissible for a federal statute to utilize the background law of a province despite the fact that some

3. See *Landry Pulpwood Co., Ltd. v. La Banque Canadienne Nationale*, [1927] S.C.R. 605, [1928] 1 D.L.R. 493.
4. See R. Macdonald, "Encoding Canadian Civil Law" in *Mélanges* (Cowansville, Yvon Blais, 1997), p. 579 at pp. 613-14.
5. See R. Jukier and R. Macdonald, "The New Quebec Civil Code and Recent Federal Law Reform Proposals: Rehabilitating Commercial Law in Quebec?" (1992), 20 C.B.L.J. 380 at pp. 395-405.

or all of these principles may have been modified or abrogated by provincial statute. For example, the Bank Act could be amended so as to provide that a provincial PPSA does not apply to it. If that were done, the Bank Act would continue to draw upon the common law property concepts (or civil law concepts in a civil law jurisdiction) to fill in any gaps in the federal statute.

Often the federal statutes do not expressly identify the approach that is to be taken in matters of interstitiality. It then falls to the judiciary to determine the identity of the suppletive law. Professor Roderick Macdonald has argued that courts should not be too quick to interpret the statute as ousting provincial law:[6]

> [T]he constitutional presumption should be that Parliament intends to piggy-back its legislation on existing provincial concepts (as these exist from time to time and from place to place) until it chooses to adopt its own alternative definitions.

He argues that requiring Parliament to make its choices explicitly is the best guarantee that the distinctive civil law and common law traditions will be respected and that proper regard will be given to regional diversity.[7]

A limitation on the applicability of the provincial statute may also be derived from a limitation in the provincial statute. There is a strong version and a weak version of this approach. The strong version opts for a complete removal of the transaction from the scope of the provincial PPSA. For example, the British Columbia PPSA provides:[8]

> 4. Except as otherwise provided in this Act, this Act does not apply to the following:
>
> . . . . .
>
> (*b*) a security agreement governed by an Act of the Parliament of Canada that deals with rights of parties to the agreement or the rights of third parties affected by a security interest created by the agreement, including but without limitation
>
> (i) a mortgage under the *Canada Shipping Act*, and

6. "Provincial Law and Federal Commercial Law: Is "Atomic Slipper" a New Beginning?" (1991-92), 7 B.F.L.R. 436 at p. 442. See also R.A. Macdonald, "Security Under Section 178 of the Bank Act: A Civil Law Analysis" (1983), 43 R. du B. 1007 at p. 1016, where he first applied this approach to the interaction between the Bank Act and the civil law system.
7. "Provincial Law and Federal Commercial Law: Is "Atomic Slipper" a New Beginning?", *ibid.*, at pp. 450-51.
8. R.S.B.C. 1996, c. 359, s. 4.

(ii) any agreement governed by Part V, Division B of the *Bank Act* (Canada) . . .

A majority of the common law provinces adopt this approach.[9] If it is found that the federal statute deals with the rights of the parties to the agreement or with third party rights, the PPSA will completely vacate the field. The PPSA will not apply at all, and other provincial law principles (common law property principles in common law provinces) must therefore be used to fill any gaps in the statute. A weaker version of this approach is found in Article 9 of the Uniform Commercial Code, which provides that it does not apply "to the extent that a statute, regulation or treaty of the United States preempts this article".[10] Article 9 therefore contemplates a partial pre-emption of its provisions. For example, a federal statute may pre-empt Article 9's registration system, but retain the application of Article 9 on all other matters.

The provincial statute may be silent as to the issue of its applicability to federal security interests. Here, the question is whether, as a matter of statutory interpretation, a limitation ought to be read into the provincial statute. This issue is separate and distinct from the question as to the interstitiality of the federal statute.[11] Professor Ronald Cuming provides a justification for implying such a limitation into the PPSA:[12]

9. A similar exclusion is found in the legislation of Newfoundland, New Brunswick, Prince Edward Island and Nova Scotia. The PPSAs of Alberta and Saskatchewan contain a less detailed provision that does not contain an express exclusion of Canada Shipping Act mortgages. Ontario and Manitoba do not exclude federal security interests, although the revised Manitoba PPSA, which is not yet in force, contains such a provision.

10. Article 9-109(c)(1), *1998 Official Text and Comments* (American Law Institute and the National Conference of Commissioners on Uniform State Law). The 1972 Uniform Commercial Code Article 9-104 of the 1972 Official Text provided that Article 9 does not apply "to a security interest to the extent that such statute governs the rights of parties to and parties affected by transactions in particular types of property". The Official Comment to 1998 Revised Article 9 describes this change in language as merely a clarification. It has sometimes been referred to as a step-back clause in that Article 9 steps back only to the extent that there is federal rule that pre-empts it.

11. R.A. Macdonald, "Provincial Law and Federal Commercial Law: Is "Atomic Slipper" a New Beginning?", *supra*, footnote 6, at p. 439 suggests that this position views the Bank Act security device as "a federal enclave to which provincial law does not and cannot speak". I do not share this view. The federal statute looks to provincial law to fill in any interstices. The position merely accepts that it is open for a provincial statute to its application expressedly or implicitly.

12. "The Relationship Between Personal Property Security Acts and Section 178 of the Bank Act: Federal Paramountcy and Provincial Legislative Policy" (1988), 14 C.B.L.J. 315 at p. 334.

> It is suggested that when one looks at the completeness of the PPS Acts it is difficult to see why legislatures would want them applied in the fragmented way that is necessary in the context of their application to [Bank Act] securities . . . The very completeness of the system that the Acts prescribe sets them apart from prior Anglo-Canadian personal property security law. It is contrary to the implicit legislative policy of the Acts to conclude that they apply to certain types of transactions that, because of their federal origins, fall only under a very few aspects of the regulatory regime of the Acts.

As pointed out by Professor Jacob Ziegel, the "federal and provincial chattel security regimes conflict in almost every respect"[13] and it is therefore unlikely that a provincial legislature would have intended to include Bank Act security within the scope of the PPSA. Despite these arguments, the Courts of Appeal in Saskatchewan and Ontario have not been willing to read an implicit limitation into the PPSA.[14] We may therefore conclude that the presumption is that the PPSA will apply to a federal security interest unless there is an express exclusion in the Act or if its application is limited on constitutional grounds.[15]

II. BANK ACT SECURITY

1. The Characteristics of Bank Act Security

The Bank Act[16] security system is the most complete of the federal statutes governing security interests in personal property. Unlike the other federal provisions dealing with security interests in personal property, the Bank Act security provisions are not premised on the terminology and concepts of Victorian era, Anglo-Canadian chattel security law. In many respects, the Bank Act security device was far ahead of its time in introducing innovative features into the law of secured financing. Because of this, there is a greater degree of conceptual affinity between the approach to secured financing

13. J.S. Ziegel, "The Interaction of Section 178 Security Interests and Provincial PPSA Security Interests: Once More into the Black Hole" (1990-91), 6 B.F.L.R. 323 at p. 351. See also B. Crawford, "Must a Bank Comply With Provincial Legislation When Enforcing a Bank Act Security: *Bank of Montreal* v. *Hall*" (1991), 70 Can. Bar Rev. 142 at p. 156.
14. *Bank of Montreal v. Pulsar Ventures Inc.*, [1988] 1 W.W.R. 250, 42 D.L.R. (4th) 385 (Sask. C.A.); *Bank of Nova Scotia v. International Harvester Credit Corp. of Canada Ltd.* (1990), 74 O.R. (2d) 738, 73 D.L.R. (4th) 385 (C.A.).
15. The two means by which validly enacted provincial legislation may be constitutionally limited are federal paramountcy and interjurisdictional immunity. See P.W. Hogg, *Constitutional Law of Canada*, vol. 1, looseleaf ed. (Scarborough, Carswell, 1992) at pp. 15-25 to 15-34 and 16-1 to 16-19.
16. S.C. 1991, c. 46.

adopted in the Bank Act and the approach of the PPSA. These features, which are familiar to those who acquainted with the PPSA, are summarized below.[17]

(a) *Notice Filing System*: The early provincial chattel registries were document registration systems in which the actual security documents were filed at the registry. The Bank Act security system in 1923 became the first personal property registry system in Canada to adopt a notice filing system.[18] Instead of registering the security document, a bank registers a document called a notice of intention in the Bank of Canada registry.

(b) *Centralized Registry System*: The Bank Act registry system was more highly centralized than its provincial counterparts. At a time when local filings in the county or district were the norm,[19] the Bank Act provided a single registry within the province. In addition, multiple registrations or searches of the different Bank of Canada registries will not generally be required because the notice of intention is only required to be registered at the Bank of Canada registry in the province in which the principal place of business of the debtor is located.[20]

(c) *Fixed Security in After-Acquired Property*: The Bank Act permits the granting of a fixed security interest in the collateral.[21] The security attaches automatically to the debtor's after-acquired property, but does not carry the inferior priority status of an equitable interest or the subtle complexities of a floating charge.

(d) *Future Advances*: The Bank Act permits the lender to tack further advances.[22] It thereby abandoned the rule in *Hopkinson v. Rolt*[23] in favour of a rule that promotes inventory financing by

17. For a more detailed discussion of these and other aspects of the Bank Act security interest, see Crawford and Falconbridge, *Banking and Bills of Exchange*, 8th ed. (Aurora, Ont., Canada Law Book, 1986) pp. 403-62 and W.D. Moull, "Security Under Sections 177 and 178 of the Bank Act" (1986), 65 Can. Bar Rev. 242.

18. Bank Act, S.C. 1923, c. 32, s. 88A. See now, Bank Act, s. 427(4).

19. See R.J. Wood, "The Evolution of the Personal Property Registry: Centralization, Computerization, Privatization and Beyond" (1996), 35 Alta. L. Rev. 45. See also Crawford and Falconbridge, *supra*, footnote 17, at p. 407.

20. Bank Act, s. 427(4) and (5) definition of "agency", "appropriate agency" and "principal place of business".

21. Bank Act, s. 427(2)(*b*). This feature was first introduced in 1944. See Bank Act, S.C. 1944, c. 30, s. 88(2)(*b*).

22. *Royal Bank of Canada v. Bank of Montreal*, [1976] 4 W.W.R. 721, 67 D.L.R. (3d) 755 (Sask. C.A.). The court held that this result was dictated by the wording of what is now s. 429(1)(*b*).

23. (1861), 9 H.L. Cas. 514.

recognizing the efficacy of a security interest in circulating assets to secure a revolving credit facility.

(e) *Fixture Provisions*: The Bank Act contains fixture financing provisions that permit the bank to remove a fixture from real property to which it has become affixed. However, in order to have priority over subsequent real property interest holders, the bank is required to register a notice of it in the provincial land registry system.[24]

(f) *Commingled Property Rule*: The Bank Act provides that if the collateral is used to manufacture or produce goods, the security continues in those goods.[25] It does not, however, attempt to work out a system of priorities governing competing security in the product or mass.

(g) *Wage-Earner and Agricultural Product Priority*: There has been an ongoing and long-standing debate in Canada concerning the inferior priority status of wage-earners and agricultural producers who sell their livestock or crops to the debtor. The Bank Act introduced creative approaches to these problems by providing for wage-earner and agricultural product priority.[26] Canadian bankruptcy law is still attempting to find an acceptable approach to the resolution of these issues.[27]

Although the Bank Act possesses many of the features of secured financing law found in the PPSA, there are some elements that are noticeably absent and areas where the legislation is incomplete. As well, the legislation has a number of highly idiosyncratic features. The following summarizes the areas where there is a marked divergence from the approach of the PPSA:

(a) *Limited Scope*: Bank Act security is limited in that it can only be given to banks and it can only be given by certain classes of debtors on the security of certain types of collateral.[28] The list of eligible loans and eligible forms of collateral reflects a now outdated view of areas considered to be of particular importance to the Canadian economy in which secured lending

24. Bank Act, ss. 427(3) and 428(3).
25. Bank Act, s. 428(12).
26. Bank Act, s. 427(8) and (9). The wage-earner priority was first introduced in 1913. The agricultural supplier preference was added in 1967 and expanded to cover livestock in 1980.
27. See J.S. Ziegel, "The Modernization of Canada's Bankruptcy Law in a Comparative Context" (1999), 4 C.B.R. (4th) 151 at pp. 167-69 and 171-73.
28. Bank Act, s. 427(1).

by banks is viewed as legitimate and is sought to be encouraged.[29]

(b) *Antediluvian Anti-Fraud Provisions*: The Bank Act security interest evolved at a time when there was still a widespread suspicion of the chattel mortgage as a species of fraudulent conveyance.[30] The Bank Act was purposely drafted in a manner designed to differentiate it from the less reputable chattel mortgage. One measure used to reinforce this distinction was a provision that prevented Bank Act security from being used to secure past unsecured advances.[31] Although the general suspicion against security interests that secure past advances has since dissipated, this feature of the Bank Act lives on.[32]

(c) *Obscure Language*: The Bank Act contains a number of provisions that use outdated or obscure language.[33] For example, there is an express priority rule that provides that the bank has priority over an unpaid vendor unless the vendor had a lien on the property and the bank acquired the property without knowledge of it.[34] This has led to considerable debate on whether the provision covers conditional sales agreements or if it merely covers an unpaid seller's lien provided under sales law.[35] In some cases, the Bank Act gives the bank a "first and preferential lien and claim", while in other cases this right is not given. The

29. *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121 at pp. 134-40, 65 D.L.R. (4th) 361. It should be kept in mind that it was not until 1967 that banks were permitted to take provincial security interests to secure their loans. Therefore, the categories of debtors included in the Bank Act was a matter of great significance to these sectors of the economy. See Crawford and Falconbridge, *Banking and Bills of Exchange*, *supra*, footnote 17, at p. 345.

30. *Debates of the House of Commons* (1890), vol. 2, 4280, *per* Sir John Thompson.

31. Bank Act, s. 429(1).

32. The restriction has been undercut somewhat by *Canadian Imperial Bank of Commerce v. Fletcher* (1978), 82 D.L.R. (3d) 257, 18 O.R. (2d) 289 (H.C.J.), which held that a loan that was made to retire an earlier unsecured advance was considered a new loan.

33. J.S. Ziegel, in "Interaction of Personal Property Security Legislation and Security Interests under the Bank Act" (1986), 12 C.B.L.J. 73 at p. 80, comments that the Bank Act provisions "present us with a distressingly uncoordinated and frequently obscure set of clauses whose meaning often defies logical analysis".

34. Bank Act, s. 428(1).

35. In *Rogerson Lumber Co. v. Four Seasons Chalet Ltd.* (1980), 113 D.L.R. (3d) 671, 29 O.R. (2d) 193 (C.A.), Houlden J.A. held that this was only intended to cover an unpaid seller's lien and did not extend to a conditional sales agreement. However, in *Bank of Nova Scotia v. International Harvester Credit Corp. of Canada Ltd.*, *supra*, footnote 14, McKinley J.A. was of the view that the words include a vendor under a conditional sales contract.

effect of this lien and the reason why it is given in some cases but not others is unclear.

(d) *The Document of Title Fiction*: The rights obtained by a bank that holds a Bank Act security interest are deemed to be the same as if it had acquired a bill of lading or warehouse receipt covering the property.[36] This feature has spawned a line of cases that espouse the proposition that the bank thereby becomes the owner of the goods and that the debtor has a mere right to possession of the goods.[37] Although this notion is increasingly out of step with current jurisprudence,[38] it is still being used to argue that the security should not be treated the same as other forms of security interests.

(e) *Lack of a Complete Priority System*: The Bank Act does not directly link priorities to the state of the registry, nor does it adopt a first-to-register rule of priority. Lack of registration has a negative effect in that it deprives the secured party of the priority it would otherwise enjoy. The Bank Act contains a number of priority rules, but these are incomplete. In addition, the Act is silent on the question of proceeds. This incomplete framework makes it necessary to speculate upon the nature of the law that will be used to fill in the gaps in the legislation.

(f) *Lack of a Comprehensive Enforcement System*: The Bank Act does not contain a comprehensive system of rules and principles that govern the enforcement of the security.[39] This incompletely specified enforcement regime has created a number of problems concerning the applicability of provincial law.

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36. Bank Act, s. 427(2)(*c*) and (*d*).
37. See *Goodfallow (Re); Traders' Bank v. Goodfallow* (1890), 19 O.R. 299 (Ch. D.) and *Canadian Western Millwork Ltd. v. Royal Bank of Canada*, [1964] S.C.R. 631 at pp. 634-35 *sub nom. Flintoft v. Royal Bank of Canada*, 47 D.L.R. (2d) 141. See also *Richmac Interiors Ltd. (Re)* (1996), 38 Alta. L.R. (3d) 38 at p. 50, [1996] 6 W.W.R. 216 (Q.B.), in which a bank holding Bank Act security was characterized as an owner, and the debtor who had possession of the property or its proceeds was characterized as a bare trustee for the bank.
38. See *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 at pp. 459-60, 143 D.L.R. (4th) 385, in which the Bank Act security interest is characterized as a fixed charge.
39. The Supreme Court of Canada in *Bank of Montreal v. Hall*, *supra*, footnote 29, at p. 155, stated that Bank Act provided a "complete code" on the question of realization. Its subsequent decision in *Banque Nationale du Canada v. Atomic Slipper Co.*, [1991] 1 S.C.R. 1059, 80 D.L.R. (4th) 134, recognizes that in fact it is not a complete code and that provincial law will be used to fill in the gaps.

2. The Bank Act Priority Rules

The Bank Act contains a set of rules that establish a priority system. Section 427(2)(*a*) and (*b*) identify the property that is the subject of the security. The security interest covers all property that is owned by the debtor or of which the debtor thereafter becomes the owner. Section 427(2)(*c*) and (*d*) define the nature and extent of the bank's interest in such property. A bank obtains the same rights as if it had obtained a warehouse receipt or bill of lading that described the property.[40] Section 435(2)(*b*) provides that the holder of a warehouse receipt or bill of lading obtains "all the rights and title of the previous owner". By virtue of these provisions, a bank takes the property subject to any pre-existing interest held by a third party in the debtor's property.[41] Competitions with subsequent interests are governed by s. 428(1) which provides that the bank obtains priority "over all rights subsequently acquired in, on or in respect of, that property".[42] Section 427(4) provides for the invalidation of the bank's security interest in the event that it is not registered in the Bank of Canada registry. Section 427(7) provides for a partial subordination of the bank's security against the claims of unpaid employees and suppliers of agricultural products on a bankruptcy of the debtor.

A Bank Act security interest can cover after-acquired property. This creates the potential for a priority competition between a Bank Act security interest and a subsequent PPSA security interest in the form of a purchase-money security interest. If the PPSA security interest is taken by a seller, the Bank Act security interest will be subordinate to it. A Bank Act security interest gives the bank whatever right and title the debtor has in the property. The debtor obtains the property subject to the seller's security interest, and therefore the bank also takes subject to this interest.[43]

40. Although s. 427(2)(*d*) also gives the bank a first and preferential lien in respect of some of the categories of collateral, little significance has been given to this added language. See Crawford and Falconbridge, *supra*, footnote 17, at pp. 421-23.

41. *Royal Bank of Canada v. Agricultural Credit Corp. of Saskatchewan*, [1994] 7 W.W.R. 305, 115 D.L.R. (4th) 569 (Sask. C.A.).

42. Although the section also gives the bank priority over the claim of an unpaid vendor, this does give the bank priority over a prior conditional sales contract. There are two explanations for this. First, that the provision only covers an unpaid seller's lien and does not apply to a security interest. Second, that it yields to the more general rule that the bank only takes the interest of the debtor, and thus is subject to any pre-existing interests.

43. *Kawai Canada Music Ltd. v. Encore Music Ltd.* (1993), 10 Alta. L.R. (3d) 105, 101 D.L.R. (4th) 1 (C.A.), application to reargue appeal dismissed 103 D.L.R. (4th) 126, 46 W.A.C. 284 (C.A.), leave to appeal to S.C.C. refused 104 D.L.R. (4th) vii, 63 W.A.C.

If the Bank Act provided a comprehensive set of rules that governed the validity, priority and enforcement of a Bank Act security, problems of compatibility would not arise. The Bank Act would be a complete code, and the answer to every question would be determined by reference to its provisions.[44] Although the Bank Act is the most complete of all the federal statutes governing security interests in personal property, it lacks the comprehensiveness of a PPSA. The legislative scheme in respect of priorities is incomplete in some respects. For example, a priority competition may arise between a bank that has been given Bank Act security and another party who has been given a PPSA security interest. Where both the Bank Act security interest and the PPSA security interest cover after-acquired property, there is a hiatus in the express priority rules. The Bank Act does not specify a priority rule when the Bank Act security interest and a provincial interest arise simultaneously. It is necessary to look to some other source to provide the suppletive law. The analysis is complicated by the fact that some provinces have excluded Bank Act security from the scope of the PPSA while others, notably Ontario, have not done so.

The PPSA cannot provide the suppletive law in provinces that have excluded Bank Act security from the scope of the PPSA. In those provinces, one must look to the non-statutory background rules of the province to provide an answer. In provinces other than Quebec, it is the common law that will fulfil this role. The common law (and, in particular, the equitable principle *qui prior est tempore potior est jure*) ranks priorities in accordance to the time when the security agreements were executed. Therefore, where there is simultaneous attachment of the federal and provincial security interests, priority will be given to the secured party who was first to execute a security agreement.[45]

A similar issue arises when the competition is between a prior Bank Act security interest that covers after-acquired property and

159*n*; *YMCF Inc. v. 406248 B.C. Ltd.* (1998), 52 B.C.L.R. (3d) 359, 39 B.L.R. (2d) 130 (S.C.). See also *Rogerson Lumber Co. v. Four Seasons Chalet Ltd.* (1980), 113 D.L.R. (3d) 671, 29 O.R. (2d) 193 (C.A.), in which the judges reached the same result but divided on the reasons that supported it.

44. Although the Supreme Court of Canada has referred to the Bank Act provisions as a "complete code" this was only in reference to the portions of the Bank Act that were complete and did not require to be supplemented. There are clearly other instances where there are gaps. See *Bank of Montreal v. Hall*, *supra*, footnote 29.

45. R.C.C. Cuming and R.J. Wood, "Compatability of Federal and Provincial Personal Property Security Law" (1986), 65 Can. Bar Rev. 267 at pp. 275-77.

a PPSA security interest in the form of a purchase-money security interest that was given to a lender. The bank's Bank Act security interest and the PPSA security interest will both come into existence when the debtor acquires an interest in the new asset. Again we look to the common law. Although the usual approach in the case of simultaneous attachment is to give priority on the basis of the security agreement that was first to be executed, this does not apply against a subsequent purchase-money lender.[46]

This approach produces a reasonably predictable set of outcomes in interactions with the provincial systems. The real problem is that priority does not depend on perfection of the PPSA security interest.[47] A prior unperfected PPSA security interest will defeat a subsequent Bank Act security interest despite the fact that the bank has no means by which it can learn of its existence. A subsequent purchase-money security interest will also obtain priority despite the fact that it has never been perfected. Registration of a financing statement by the bank in the PPSA registry does not assist the bank in any way because the Bank Act security interest is excluded from the scope of the Act. The only method by which a bank is able to protect itself from subordination to an unperfected PPSA security interest is to take a PPSA security interest in addition to or in place of its Bank Act security interest.

A different approach must be adopted in jurisdictions, such as Ontario, that do not exclude Bank Act security from the scope of the Act. If our basic approach to interstitiality were followed, we would be led along the following trajectory. When the Bank Act is silent, one looks to provincial law to fill in the gaps. The difference is that it is now a provincial statute (the PPSA) rather than the common law that will provide the suppletive law. Unlike the common law, the PPSA does not differentiate between security interests in present and after-acquired personal property for priority purposes. Nor is time of attachment or time of execution of the security agreement of particular relevance. Priority is determined by applying the internal priority rules of the PPSA. Unless some special priority rule applies, priority will be given to the first to register or perfect, whichever is earlier. Registration of a notice of intention in

46. *Abbey National Building Society v. Cann*, [1991] 1 A.C. 56 (H.L.). There is still some uncertainty under English law on whether it is essential that the charge in favour of the purchase-money lender be given prior to the debtor's acquisition of the property. See R.M. Goode, *Commercial Law*, 2nd ed. (London, Penguin, 1995) at pp. 723-25.

47. Crawford and Falconbridge, *supra*, footnote 17, at p. 444.

the Bank of Canada registry would not qualify as registration within the meaning of the PPSA. It would therefore follow that the PPSA security interest would be entitled to priority under provincial law by virtue of the general PPSA priority rule.[48] Under this approach, registration of the Bank Act security in the PPSA registry would be advisable in order to give the Bank Act security the highest attainable priority. But registration under the PPSA would not be needed in every case. If the dispute was between a Bank Act security and a subsequent PPSA security interest, s. 428(1) would give priority to the Bank Act security whether or not a PPSA registration were effected.

When one examines the case law, it becomes readily apparent that this approach is not being used by the courts. In *Bank of Montreal v. Pulsar Ventures Inc.*,[49] a competition arose between a Bank Act security and a later PPSA security interest. The bank had registered in the Bank of Canada registry as well as in the PPSA registry. The court considered the question of competing security interests in after-acquired property. It did not look to PPSA priority rules to resolve this priority competition. Instead, it suggested that common law property rules be used to resolve the dispute.[50]

The Ontario Court of Appeal in *Bank of Nova Scotia v. International Harvester Credit Corp. of Canada Ltd.*[51] considered a priority competition between an unperfected PPSA security interest and a subsequent Bank Act security. The Bank Act security interest was limited by s. 178(2) (now s. 427(2)), which provides that the bank obtains only the debtor's interest in the property. Accordingly, the Bank Act security interest only attached to the collateral subject to the prior secured party's pre-existing security interest. This result

48. An alternative argument is that because the Bank Act provides that the bank has the same right and title as the holder of a document of title, the bank should be regarded as having perfected by possession. See Crawford and Falconbridge, *supra*, footnote 17, at pp. 444-45. One would then apply the appropriate PPSA priority rule.

49. *Supra*, footnote 14.

50. Although the court referred to Cuming and Wood, *supra*, footnote 45, to support its view that the answer is to be supplied by the common law, this article is clearly premised on the view that the PPSA contains an implicit limitation such that it does not apply to a Bank Act security interest and it is for this reason that common principles are to be used. The Saskatchewan Court of Appeal held that the PPSA is not so limited, but did not resort to it to provide the suppletive law. The revised Saskatchewan PPSA, S.S. 1993, c. P-6.2, s. 4 has limited the application of the Act so that it no longer applies to federal security interests.

51. *Supra*, footnote 14.

holds true whether or not the prior secured party has registered its security interest under the PPSA.

One might have concluded that this would be the end of the matter. There was no need to look to the PPSA, since the answer was found in the express provisions of the Bank Act. However, Houlden J.A. went on to discuss the availability of the PPSA to supplement the Bank Act provisions in cases where the Bank Act provides an express rule:[52]

> If the definition of "security interest" under the *P.P.S.A.* is interpreted so as to include a security interest under s. 178 of the *Bank Act*, then it would include a s. 178 security interest which was not registered in accordance with the *Bank Act*. Such a security interest would be unenforceable under the *Bank Act* but could be perfected under the *P.P.S.A.* by taking possession of the collateral. Counsel for I.H.C.C. contended that it was not the intention of the legislature in enacting the *P.P.S.A.* to create a process whereby an otherwise unenforceable security interest created by federal statute would become enforceable by operation of provincial law.
>
> With respect, I do not agree. Under the *P.P.S.A.*, a security interest in certain defined collateral may be perfected by possession. If the bank's s. 178 security interest creates a security interest in collateral coming within those defined categories, I see no reason why the bank should not be able to perfect its security interest by taking possession of the collateral, even though the bank has failed to comply with the registration provisions of the *Bank Act*. The security interest of the bank would be invalid under the *Bank Act*, so that the bank would be unable to claim the benefit of the priority provisions of that statute; but it would be perfected under the *P.P.S.A.*, and the bank, like any other holder of a security interest, could claim the benefit of the priority provisions of that statute.

He went on to state that if the bank has perfected its security interest under both statutes, it should be able to claim the benefit of the priority rules of both statutes.[53] However, the availability of the PPSA priority rules did not ultimately benefit the bank on the facts of this case. Normally, a perfected PPSA security interest would take priority over an unperfected security interest. However, this priority rule is subject to the more general principle that a security interest is effective according to its terms. The court held that the bank's Bank Act security document did not purport to give the bank anything other than the interest which the debtor had in the collateral. Although most PPSA security agreements would not produce this result, the Bank Act security document contained this limitation which precluded it from obtaining priority over a prior unperfected

52. *Ibid.*, at p. 751.
53. *Ibid.*, at p. 752.

security interest under the PPSA.[54] The bank was free to elect between its rights under the Bank Act and its rights under the PPSA. But in this case it did not matter, because both regimes gave priority to the prior unregistered security interest.

The proposition that a bank may rely on the PPSA to obtain priority in spite of the fact that the Bank Act denies it priority appears to violate the principle that primacy be given to the federal statute. The Bank Act contains an express priority rule that provides that the security is void, and yet a provincial statute is being asserted to give it priority. This would seem to constitute an operational conflict between the legislative provisions.[55] The Bank Act provides that an unregistered security interest is void. The PPSA provides that the security interest is not void. It is not a question of an election between the two regimes. If the security interest that is created by the security document is governed by the PPSA, then the priority and enforcement rules of the PPSA will apply to it. Their application will be limited only to the extent that they are constitutionally limited by the federal paramountcy doctrine.

I believe that the only possible explanation for this decision is that the Ontario Court of Appeal thought that the use of a Bank Act security document gives rise to two separate and distinct security interests. The first is a Bank Act security regulated by the Bank Act. The other is a PPSA security interest. On this view, the invalidity of the Bank Act security is of no relevance to the issue of the validity or priority of the PPSA security interest. The approach of the Ontario Court of Appeal proceeds from an entirely different conception of the interaction between federal and provincial law. It is not conceived as a search for the suppletive rules that apply when the federal statute is silent. Suppose that a bank chooses to rely on its rights under the Bank Act rather than on its rights under the PPSA in a competition with another PPSA security interest. What principle do we use to determine priorities when both interests arise simultaneously in respect of after-acquired property? Is it the common law? Or is it the PPSA (this time operating as suppletive law)? This question remains unanswered by the court.

54. *Ibid.*, at pp. 749-50 *per* McKinley J.A. and at p. 754 *per* Houlden J.A.
55. See *Bank of Montreal v. Hall*, *supra*, footnote 29, at pp. 150-55. And see Cuming, *supra*, footnote 12, who identifies other situations where there is an apparent conflict.

3. Bank Act Enforcement Rules

In addition to some gaps in the priority rules of the Bank Act, there are gaps in its scheme of enforcement remedies. The Bank Act enforcement provisions comprises the following components:

(1) Section 427(3) gives a bank a statutory right to seize the collateral, to care for it and to enter and remove it from any land to which it has become affixed. These statutory rights only arise in connection with loans referred to in s. 427(1)(*c*) to (*p*) (*i.e.*, they do not cover inventory held by a wholesaler retailer or manufacturer under s. 427(1)(*a*) or (*b*)). The statutory right of seizure is available only on the occurrence of one of six events of default. It is expressed to be in addition to any other rights or powers given to the bank.

(2) Section 427(8) gives a bank a statutory power of sale in the event of non-payment of a debt, liability, loan or advance. This power of sale must be by public auction, unless the debtor "has agreed to the sale of the property otherwise than as herein provided" or if the collateral is perishable.

(3) Section 428(9) provides that a buyer of the goods pursuant to a statutory power of sale vests in the buyer all right and title enjoyed by the bank.

(4) Section 428(10) provides that in exercising the statutory power of sale, the bank shall act honestly and in good faith and shall give the debtor reasonable notice unless the goods are perishable and to do so would result in a substantial reduction in the value of the property.

(5) Section 428(11) provides that where a statutory power of sale is exercised, the bank shall as soon as reasonably practical sell the property.

Again, we must distinguish between provinces that exclude Bank Act security from the scope of the PPSA, and provinces that do not do so. In provinces that limit the application of the PPSA, the common law provides the suppletive law. The common law permitted the exercise of a contractual right of seizure so long as it did not involve a breach of the peace.[56] Accordingly, a contractual right of seizure contained in the security document would give a bank the right to take possession of the collateral in those cases where the

56. *R. v. Doucette* (1960), 25 D.L.R. (2d) 380, [1960] O.R. 407 (C.A.).

statutory power to seize was not available.[57] Part 5 of the PPSA would not apply to the enforcement of a Bank Act security interest because of the limitation on application contained in the statute. Alberta, alone among the common law provinces, restricts the exercise of the self-help remedy of recaption and requires that the seizure be undertaken by a civil enforcement agency.[58] The Alberta legislation does not contain a limitation that would prevent it from applying to a Bank Act security interest. Therefore, it will apply to banks that exercise their contractual right to seize collateral covered by s. 427(1)(*a*) or (*b*). However, a bank that is exercising a statutory right of seizure under s. 427(3) probably will not need to comply with the Alberta statute since the paramountcy doctrine likely renders the provincial statute inoperative.[59]

In Ontario, the outcome will depend on what view is taken as to the identity of the suppletive law. If the PPSA provides the suppletive law, it would follow that any seizure under s. 427(1)(*a*) or (*b*) would be undertaken pursuant to Part 5 of the PPSA. The statutory power of sale provided for in s. 427(8) is not so limited, and therefore it would apply to all Bank Act realizations. Here, the issue is whether a bank is required to comply with the PPSA provisions when conducting a sale pursuant to s. 427(8). Section 63(4) of the Ontario PPSA provides that a secured party must give a notice of the intended sale to the debtor as well as to other secured parties who have perfected a security interest in the collateral. Section 428(10) of the Bank Act provides that a bank must give the debtor reasonable notice of the sale. The PPSA notice is more extensive in terms of the information that is required and it must be given to parties in addition to the debtor. It could be argued that a bank, in enforcing its Bank Act security, must also comply with the more burdensome provisions of the PPSA. The application of the provincial statute would likely not be constitutionally limited by the doctrine of paramountcy. There appears to be no operational conflict, since it is possible for the bank to comply with both notice requirements.[60]

57. *Banque Nationale du Canada v. Atomic Slipper Co.*, *supra*, footnote 39.

58. Civil Enforcement Act, S.A. 1994, c. C-10.5, s. 9(3). See R.J. Wood, "Enforcement Remedies of Creditors" (1996), 34 Alta. L. Rev. 783.

59. *Ibid.* It might be argued that there is not an operational conflict since it is possible to comply with both statutes (*i.e.*, undertake the seizure under s. 427(3) by using the services of a civil enforcement agency). On the other hand, the Bank Act states that a bank can through its officers and employees or agents seize the property, whereas the provincial statute states that it cannot.

60. Under this approach, a bank holding Bank Act security might also attempt to use the PPSA as a source of additional enforcement remedies. For example, the PPSA gives a secured party a right to retain the collateral in satisfaction of the obligation secured.

Again, an extension of the approach of the Ontario Court of Appeal leads us to a different conclusion. Their theory seems to be premised on the idea that a single document may give rise to two distinct types of security interests. Under this "mix and match" approach,[61] a bank would have the option of realizing under Part 5 of the PPSA or by proceeding under the Bank Act provisions. If the bank elects to proceed under its Bank Act security interest, we would then encounter a gap in the federal statute if the collateral fell under s. 427(1)(*a*) or (*b*). If the PPSA provides the suppletive law, a bank would have to conduct its seizure under Part 5. But if the Bank Act continues to draw on the common law to provide the suppletive law, the bank's right of seizure would be contractual and would be governed by the common law. Following the seizure, the bank could presumably choose to sell the collateral by utilizing the power of sale under the Bank Act or alternatively by exercising the right to sell the collateral under the PPSA.

4. Other Compatibility Problems

There are two other problems that arise out of the interaction between federal and provincial law. The first concerns the practice of double documentation under which a bank is given both a Bank Act security and a PPSA security interest in the same collateral to secure the same obligation. The bank may then assert one or the other against a third party depending on which is more favourable to the bank. The question that arises is whether the bank can obtain the best of both worlds by relying on its Bank Act security to defeat one competing third party and then asserting its PPSA security interest to defeat another. This problem is illustrated in the following scenario:

> A bank takes both a Bank Act security interest and a PPSA security interest in the same collateral to secure the same obligation. The Bank Act security is properly registered pursuant to the Bank Act, while the PPSA security interest is properly registered in the PPSA registry. SP has registered a financing statement

Although there is no Bank Act counterpart to this remedy, s. 428(11) provides that a bank that exercises its statutory right of seizure under s. 427(3) must sell the collateral as soon as reasonably practical. This would preclude the exercise of the retention of collateral option whenever the bank exercised its statutory right of seizure under s. 427(3).

61. R.C.C. Cuming, "PPSA — Section 178 Bank Act Overlap: No Closer to Solutions" (1991), 18 C.B.L.J. 135 at p. 141.

prior in time to the registration of the bank's PPSA security interest, but has not been granted a security agreement in the collateral at the time the bank's security agreements are executed. The debtor subsequently executes a security agreement in favour of SP. The debtor later goes into bankruptcy leaving unpaid employees.

The bank's PPSA security interest is subordinate to SP's security interest, since SP was the first to register under the PPSA. Section 429(1) of the Bank Act gives priority to the bank's Bank Act security over SP's subsequently created security interest. The bank will therefore wish to assert its Bank Act security against SP. However, its Bank Act security interest will be subordinate to the claims of the unpaid employees. The PPSA does not provide an equivalent priority rule in favour of employees and suppliers. The issue is whether the bank can assert its PPSA security interest against the unpaid employees and its Bank Act security interest against SP. Professor Ziegel suggests that the bank will be required to make an election between the two security interests,[62] and this approach has been adopted in Alberta.[63] However, the comments of the Ontario Court of Appeal in *Bank of Nova Scotia v. International Harvester Credit Corp. of Canada Ltd.*[64] strongly suggest that in Ontario a bank may allowed the best of both worlds.

Saskatchewan is the only province that has directly dealt with this issue in its PPSA. Section 9(2) of the Saskatchewan PPSA[65] provides that a security interest in collateral is void to the extent that it secures payment or performance of an obligation that is also secured by a Bank Act security. The use of overlapping security agreements will therefore result in the non-application of the PPSA in relation to any collateral upon which a bank holds Bank Act security.

62. *Supra*, footnote 13, at pp. 354-57. For another approach that would view the two security interests as consecutive thereby creating a primary interest and a secondary interest, see Cuming and Wood, *supra*, footnote 45, at pp. 298-92.
63. *Kassian v. National Bank of Canada* (1998), 61 Alta. L.R. (3d) 92, [1998] 10 W.W.R. 63 (Q.B.), affd [1999] 11 W.W.R. 500, 73 Alta. L.R. (3d) 56 (C.A.). A bank that held both Bank Act security and a PPSA security interest was not subject to subordination to wage claimants under s. 427(7) so long at it elected to proceed under its PPSA security interest. However, if it chose to proceed under its Bank Act security interest, it would be subordinated to such claims.
64. *Supra*, footnote 51.
65. S.S. 1993, c. P-6.2.

The second problem concerns the status of the bank's claim to the proceeds of a sale of collateral covered by the Bank Act. Unlike the PPSA, the Bank Act does not provide that its security interest extends to proceeds. As a result, the claim to proceeds will be governed by provincial law. Banks typically include in their security agreements a trust proceeds clause which requires the debtor to hold the proceeds in trust for the bank. If the claim to proceeds is founded on a contractual agreement to hold the property in trust, then it falls within the definition of a security interest and is governed by the PPSA. This would mean that it would be necessary to register under the PPSA in order to obtain priority over the debtor's trustee in bankruptcy. However, there is some authority to the effect that the bank's claim to proceeds arises automatically by virtue of the bank's ownership of the collateral.[66] On this view, the PPSA would not apply since the Act only applies to consensually created security interests.[67]

III. SECURITY INTERESTS IN SHIPS AND VESSELS

There are three highly distinctive features that are associated with transactions involving security interests in ships and vessels. The first is the existence of statutory provisions in the Canada Shipping Act[68] that provide a framework for the registration and, to a lesser extent, the enforcement of mortgages on ships. The second is the recognition of Canadian maritime law as a uniform and comprehensive body of non-statutory federal principles. The third feature concerns the statutory grant of admiralty jurisdiction to the Federal Court of Canada and the availability of the *in rem* action against ships.

1. Statutory Ship Mortgages

The Canada Shipping Act (hereafter "CSA") ship mortgage provisions were drawn largely from the British Shipping Act, 1894.[69] The recent amendments[70] to this statute modernize the language of the ship mortgage provisions and provide for the centralization of the

66. *Supra*, footnote 37.
67. See Cuming and Wood, *supra*, footnote 45, at pp. 292-301.
68. R.S.C. 1985, c. S-9.
69. 57 & 58 Vict., c. 60.
70. S.C. 1998, c. 16, s. 3. The provisions came into force on February 25, 2000. On June 8, 2000, Bill C-35 (Canada Shipping Act, 2000) was given first reading. If enacted, this statute would renumber, but would not substantially change, the recently amended ship mortgage provisions.

ship registry, but for the most part the amendments were not intended to introduce any major substantive changes to the law governing statutory ship mortgages.[71]

The CSA provides a system for the registration of the ownership of ships or of shares in a ship.[72] Transfers of ownership are recorded in this registry, as are mortgages of the ship or a share of it. The registry also permits the recording of mortgages against ships that are under construction.[73] These mortgages will be referred to as statutory ship mortgages in order to distinguish them from other types of security interest that can be granted in a ship. A statutory ship mortgage can only be granted if the ship is registered under the CSA. The CSA does not require that all ships be registered.[74] Smaller vessels are not required to be registered, but registration is permitted if the owner wishes to effect it.[75] There are approximately 47,000 ship registrations under the CSA and 22,000 registered mortgages. In many cases, a ship is subject to more than one registered mortgage.

The CSA adopts a form of document registration system[76] in relation to ship mortgages. The mortgage must be prepared in the proper prescribed statutory form. This single page document contains only the barest of details concerning the contractual terms of the mortgage. It sets out the following:[77]

(a) the official number and name of the ship, time and date of registration, its place of registration and a few details concerning its dimensions and tonnage;
(b) the name and address of the debtor;
(c) the name and address of the secured party;
(d) the amount secured by the mortgage; and
(e) the signature or other form of execution of the debtor.

71. Professor William Tetley cautions that fiddling the established meanings that have been attributed to these sections in previous cases may well cause a court to conclude that a change in the law was intended. See W. Tetley, *Maritime Liens and Claims*, 2nd ed., (Montreal, Yvon Blais, 1998) at p. xix.
72. Sections 12 to 36.
73. CSA, s. 37(1).
74. Section 37.
75. CSA, s. 17 sets out an optional registration facility for any ship that does not exceed 15 tons.
76. A document registration system is one in which the actual security document is filed at the registry. It can be contrasted with notice registration systems (such as the Bank Act and PPSA registries) where only a notice containing the debtor name, secured party name and other pertinent details is filed.
77. Registry of Shipping Forms 11, 11A, 12 and 12A.

The details concerning the terms of the mortgage (the representations, warranties, covenants, events of default, acceleration clauses and remedy provisions standard in personal property security agreements) are typically included in a collateral loan agreement which is not registered.[78] It is the usual practice for the statutory mortgage to make reference to the collateral loan agreement, but likely a failure to do so is not of any legal significance.

Until recently, the executed statutory mortgage was filed with the registrar of the ship's port of registry.[79] The CSA now provides a single, centralized registry system.[80] This eliminates the risk that a searching party may inadvertently conduct a search at the wrong registry. The unique name and number of registered ships eliminates the similar name problem that arises under other PPSA registration systems. The registrar records the mortgages in the order in which they are produced and assigns a number, time and date to the registration.[81] The CSA provides that priority between registered statutory mortgages is to be determined on the basis of the order of registration "notwithstanding any express, implied or constructive notice".[82] Although the section only purports to deal with priority competitions between registered statutory mortgages, it seems to be accepted that the registered statutory mortgage will also have priority over a prior or subsequent unregistered security interest in the ship.[83] The amendments to the CSA permit an alteration to the priority ranking if all mortgagees file their written consent.[84]

The CSA contains further provisions for a discharge of a mortgage[85] and a transfer of a mortgage.[86] The mortgagee is not considered to be the owner by virtue of the mortgage except to the extent

78. See J.D. Buchan, *Mortgages of Ships: Marine Security in Canada* (Toronto, Butterworths, 1986) at pp. 33-40 and 209-24. The document is also referred to as a "collateral deed".
79. R.S.C. 1985, c. S-9, s. 47(1).
80. CSA, s. 13(1).
81. CSA, s. 37(3).
82. CSA, s. 39(1). The prior provision stated that this priority operated "notwithstanding any express, implied or constructive knowledge". This language has been dropped in the re-enacted version, but it is unlikely that there was any intention to reintroduce the concept of notice into the priority structure.
83. *Royal Bank of Canada v. 273050 B.C. Ltd.* (1991), 86 D.L.R. (4th) 551, 12 C.B.R. (3d) 263 (B.C.S.C.). A competition between a statutory ship mortgage and an invalid Bank Act security which might nevertheless be treated as an unregistered equitable mortgage was resolved by the application of the first-to-register principle in s. 49 (now s. 39(2)) of the CSA.
84. Section 39(2).
85. Section 38.
86. Sections 43 and 44.

necessary to make the ship or share available as security under the mortgage.[87]

Registration of a security agreement not in the form of a statutory mortgage is not permitted. The one exception to this rule is created by s. 428(5) of the Bank Act which provides for the registration of a s. 427 Bank Act security covering a fishing vessel in the CSA ship registry.[88]

The CSA ship mortgage provisions have very little to say about the enforcement of the statutory ship mortgage. The CSA gives the holder of a registered ship mortgage a statutory power of sale, and provides that the power of sale cannot be exercised if there are prior registered mortgagees unless their consent to the sale is obtained. Other than this, it is silent on the question of enforcement remedies.[89]

2. The Definition and Relevance of Canadian Maritime Law

The CSA provides only a skeletal framework for the regulation of statutory ship mortgages. On many issues, it will be necessary to fill in the gaps in the federal statute. Here we discover that a fundamentally different approach will be taken. In other areas, the presumption is that provincial law will govern. This does not hold true in the case of statutory ship mortgages. There is a body of non-statutory federal law that will provide the suppletive law. It is called Canadian maritime law.

The Supreme Court of Canada has embarked on a fundamental reorientation in its maritime law jurisprudence through its acceptance of the notion of Canadian maritime law as a comprehensive body of federal law principles.[90] Its recent decision in *Ordon Estate v. Grail*[91] provides the clearest statement to date on the nature of

87. CSA, s. 40.

88. There were approximately 1,500 registrations of Bank Act security assignments covering fishing boats in the CSA as of August 1999.

89. CSA, s. 41.

90. See W. Tetley, "A Definition of Canadian Maritime Law" (1996), 30 U.B.C. L.Rev. 137, for a description of this change in direction.

91. [1998] 3 S.C.R. 437, at pp. 488-91, 166 D.L.R. (4th) 193. The judgment is a synthesis of the Court's previous decisions beginning with *ITO-International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752, 28 D.L.R. (4th) 641 and followed by *Q.N.S. Paper Co. v. Chartwell Shipping Ltd.*, [1989] 2 S.C.R. 683, 62 D.L.R. (4th) 36; *Whitbread v. Whalley*, [1990] 3 S.C.R. 1273, 77 D.L.R. (4th) 25; *Monk Corp. v. Island Fertilizers Ltd.*, [1991] 1 S.C.R. 779, 80 D.L.R. (4th) 58; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210, 153 D.L.R. (4th) 385; and *Porto Seguro Companhia De Seguros Gerais v. Belcan S.A.*, [1997] 3 S.C.R. 1278, 153 D.L.R. (4th) 577.

Canadian maritime law. Its salient characteristic is that it is a comprehensive body of federal law dealing with all claims in respect of maritime and admiralty matters. It is uniform throughout Canada and it is not the law of any province. Its substantive content includes the body of law administered in England by the High Court on its Admiralty side in 1934 as amended by the Canadian Parliament or developed by judicial precedent. The characteristic of this body of English admiralty law is that it was an amalgam of principles deriving in large part from both the common law and the civilian tradition. However, on matters dealing with issues of tort, contract, agency and bailment it is primarily founded on the English common law. Where a maritime matter is not dealt with in a federal statute, courts are expected to have resort to these principles before considering whether to apply provincial law to resolve an issue in a maritime action.

The definition of Canadian maritime law is relevant because it identifies the body of law that will be used to fill in any gaps in the legislation. The CSA ship mortgage provisions create a registry and provide a priority rule for competitions between registered mortgages. It is silent on many issues concerning the validity and enforcement of statutory ship mortgages. For example, the legislation does not indicate if the priority obtained by virtue of a prior registration extends to further advances made after the mortgagee knows of an intervening mortgage. Under mortgage law, a legal mortgagee making a further advance without notice that the mortgagor had granted a second mortgage was entitled to take the advance, thereby giving it the same priority as the original loan. However, if the mortgagee had notice of the intervening mortgagee, the first mortgagee did not obtain priority in respect of the further advance.[92] The fact that the first mortgagee may have been contractually obliged to make the advance did not alter the outcome, but only had the effect of releasing the mortgagee from the obligation to make the further advance.[93] Although the PPSA has altered this rule and has provided that the first to register rule of priority extends to future advances,[94] the CSA draws upon traditional mortgage law and not PPSA principles to fill in the interstices in the legislation.

92. *Hopkinson v. Rolt*, *supra*, footnote 23.
93. *West v. Williams*, [1899] 1 Ch. 132 (C.A.).
94. British Columbia PPSA ss.14 and 35; Ontario PPSA, ss.13 and 30. References hereafter will be made to the PPSA of British Columbia, R.S.B.C. 1996, c. 359 ("BCPPSA") and of Ontario. R.S.O. 1990, c. P.10 ("OPPSA").

Because these traditional property law concepts are a component of Canadian maritime law principles, they will apply equally to a statutory ship mortgage executed in Quebec.

The same approach would apply in respect of the mortgagee's enforcement remedies. Traditional mortgage law rather than the provincial PPSA would govern. Under mortgage law, the mortgagee has a right to take possession of the collateral on a default. Even in the absence of an event of default, the mortgagee of a ship may take possession of the vessel if the mortgagor's conduct has impaired the security.[95] A mortgagee exercising a power of sale is liable for loss caused by a negligent realization.[96] The mortgagee also has the option of foreclosure, although it appears that this remedy is seldom exercised.[97]

3. The Jurisdiction of the Federal Court and the *in rem* Action

Section 22(1) of the Federal Court Act[98] provides that the Trial Division has concurrent original jurisdiction in respect of a claim or remedy under "Canadian maritime law or any other law of Canada relating to any matter coming within the class of subject of navigation and shipping". Section 22(2) goes on to declare that the jurisdiction extends to a number of specific matters, including:

> (*a*) any claim with respect to title, possession or ownership of a ship or any part interest therein or with respect to the proceeds of sale of a ship or any part interest therein;
>
> . . . . .
>
> (*c*) any claim in respect of a mortgage or hypothecation of, or charge on, a ship or any part interest therein or any charge in the nature of bottomry or respondentia for which a ship or part interest therein or cargo was made security;

Section 22(3)(*d*) declares that the jurisdiction is applicable "in relation to all mortgages or hypothecations of, or charges by way of security on, a ship, whether registered or not, or whether legal or equitable, and whether created under foreign law or not".

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95. See Buchan, *supra*, footnote 78, at pp. 71-79; W. Tetley, *supra*, footnote 71, at pp. 483-87 for a discussion of the common law rights of a ship mortgagee.
96. *H.F. Russel Sea Foods Ltd. v. Mason* (1979) 36 N.S.R. (2d) 322 (S.C.); *Gulf & Fraser Fisherman's Credit Union v. Calm C. Fish Ltd.*, [1975] 3 W.W.R. 474 (B.C.S.C.).
97. Buchan, *supra*, footnote 78, at pp. 85-86.
98. R.S.C. 1985, c. F-7.

In a line of decisions culminating in *ITO-International Terminal Operators Ltd. v. Miida Electronics Inc.*,[99] the Supreme Court of Canada set out three pre-conditions that must exist for the Federal Court to have jurisdiction:

1. There must be a statutory grant of jurisdiction by the federal Parliament.
2. There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction.
3. The law on which the case is based must be "a law of Canada" as the phrase is used in s. 101 of the *Constitution Act, 1867*.

Section 22 undoubtedly provides the statutory grant of jurisdiction in relation to ship mortgages. The existing federal body of law is Canadian maritime law as it relates to ship mortgages as modified by the CSA ship mortgage provisions. The Federal Court will therefore have concurrent jurisdiction with provincial superior courts to deal with matters involving the validity, priorities or enforcement of a statutory ship mortgage or a Bank Act security in a fishing vessel in an *in personam* action. The jurisdiction will be limited where the matter involves the validity, priorities or enforcement of a PPSA security agreement, since most of the matters will involve the application of provincial legislation.

Canadian maritime law permits the enforcement of maritime claims through an action *in rem* against the ship. This action may be brought concurrently with an *in personam* action (which is the usual process for the enforcement of a civil claim) in the Federal Court, Trial Division. Canadian maritime law defines the various categories of claimants who are eligible to bring such actions. Creditors who have taken a security interest in a ship are among the classes of claimants who are entitled to bring an *in rem* action. The arrest of the ship is an essential component of the *in rem* action. The Federal Court rules set out the framework for the exercise of the right of arrest.[100] The secured party may seek an order for sale of the ship. This sale will have the effect of providing the purchaser with title free of maritime liens and other claims in respect of the ship. The proceeds of sale are then distributed in accordance with a priority system that ranks the maritime liens and other *in rem* claims.

99. *Supra*, footnote 91, at p. 766.
100. SOR/98-106, Rules 475 to 495.

This priority system is unique to maritime law. The order of ranking which is discussed in a number of Canadian decisions, is as follows:[101]

(1) disbursements of the admiralty Marshal;
(2) costs of the sale, including the costs of the plaintiff in an action for arrest, appraisal and sale;
(3) possessory liens in which the possession predated other liens;
(4) maritime liens including the lien traditionally granted to a seaman for wages;
(5) possessory liens arising subsequent to a maritime lien;
(6) the claim of a mortgage holder; and
(7) statutory rights *in rem*, including claims for necessaries (the supply of goods, materials and services) and those with claims arising out of a contract relating to the construction, or equipping of a ship, which rank *pari passu* among themselves and with the claims of ordinary non-marine unsecured creditors, the status of which does not change so as to allow the claimant to become a secured creditor upon institution of an action.

There are a number of different types of maritime liens, and there is in turn an internal ranking among them.[102] The ranking can be altered by the court on equitable grounds, and the court may in appropriate circumstances apply the equitable doctrines of marshaling, laches and estoppel.[103]

The *in rem* action is the only method through which maritime liens can be enforced. Maritime liens travel with the res into the hands of a new owner even though the owner takes legal title for value and without notice of the lien. Although a secured party may dispose of the collateral through the exercise of its enforcement remedies rather than through an *in rem* action, the existence of maritime liens will inhibit the exercise of these remedies since the buyer will not take the collateral free of the maritime lien. The res will therefore remain subject to arrest to satisfy the maritime lien, at least until the action is barred by a time limitation.

The priorities in the *in rem* action may sometimes differ from those in an *in personam* action. For example, some provinces

101. *Scott Steel Ltd. v. "Alarissa" (The)*, [1996] 2 F.C. 883 at p. 893, 11 F.T.R. 81 (T.D.), affd 125 F.T.R. 284 (T.D.).
102. See Tetley, *supra*, footnote 71, at pp. 890-91.
103. *Ibid.*, at pp. 857-58.

provide for the creation of a non-possessory lien which must be registered in the provincial personal property registry. If properly registered the lien is afforded priority over a security interest in the goods. This claim is not recognized in an *in rem* action because the lien is not a possessory lien.[104] Similarly, liens or other charges created by statute in favour of the Crown or other bodies would not be recognized in an *in rem* action since the maritime lien creates an interest in the res that detracts from the proprietary interest of the owner.[105] Therefore, it may be sometimes expedient for a secured party to enforce the claim through an *in rem* action in order to gain a priority that would not be available if the secured party simply exercised its other enforcement remedies against the vessel.

4. Interaction with the PPSA

If a secured party takes security in the form of a statutory ship mortgage, the PPSA will not apply to the transaction. Most of the provinces include in the PPSA an express exclusion of statutory ship mortgages. Even in the absence of such a provision, the PPSA cannot apply to statutory ship mortgages on constitutional grounds.[106] The CSA looks to Canadian maritime law and not to provincial law to fill gaps in the statute. The issue that arises is whether a CSA statutory ship mortgage and a Bank Act security in a fishing boat are the only means by which it is possible to create a security interest in a ship. Is it possible to create a PPSA security interest in a ship that is registered under the CSA?

There is nothing in the CSA to invalidate a ship mortgage that does not take the form of a statutory ship mortgage. Nor is there anything in the PPSA that would prevent it from applying to a security interest in a ship that is not in the form of a statutory ship mortgage. Indeed, the PPSA registration systems in most provinces expressly provide for the registration of security interests in ships that are registered under the CSA.[107] Therefore, if it is not possible to create

104. *Finning Ltd. v. Federal Business Development Bank* (1989), 34 B.C.L.R. (2d) 237, 56 D.L.R. (4th) 379 (B.C.S.C.).

105. *Federal Business Development Bank v. "Winder 4135" (The)* (1984), 11 D.L.R. (4th) 308, [1986] 2 F.C. 154 (T.D.). A provincial statutory lien in favour of the Workers' Compensation Board was ruled subordinate to a statutory ship mortgage.

106. *Doucet (Re)* (1983), 42 O.R. (2d) 638 at p. 644, 150 D.L.R. (3d) 53 (S.C.).

107. Personal Property Security Regulation, B.C. Reg. 279/90, s. 12(3)(e). There were over 14,400 registrations in respect of vessels under the PPSA in British Columbia in 1999. Most of these were in respect of smaller vessels, but there were a significant number in respect of ships that had been registered under the CSA.

a PPSA security interest in a registered ship, it can only be on constitutional grounds. Although there is at least one case that has applied the PPSA to security interests in registered ships that were not in the form of a statutory ship mortgage, the constitutionality of the provincial legislation was not in issue.[108]

The acceptance of Canadian maritime law as a body of federal law has resulted in many provincial statutes of general application being held not to apply to maritime matters.[109] The provincial statutes are not invalidated, but are instead read down through the constitutional doctrine of interjurisdictional immunity.[110] The critical issue is whether this approach might also be applied in respect of security interests in ships that do not take the form of statutory ship mortgages. As Canadian maritime law encompasses the area of ship mortgage law, it must be decided whether this constitutes an area of exclusive federal jurisdiction as a core element of Parliament's jurisdiction over maritime law. If so, the provincial legislation would have no application by virtue of being read down.

There are two powerful reasons why this argument should not be accepted. The first is that it would produce commercially unacceptable outcomes that would be very surprising to the parties who entered into security agreements covering ships. This is illustrated in the following scenario:

> SP1 is granted a general security interest that covers all present and after-acquired personal property of D, but fails to register it or otherwise perfect it under the PPSA. D subsequently grants SP2 a security interest in all of its present and after-acquired personal property, and SP2 registers properly a financing statement in respect of it. D acquires a tug boat which it registers under the Canada Shipping Act. D then makes an assignment in bankruptcy.

If the PPSA does not apply, then the validity and priority of the security interest in the ship will be determined by traditional property law principles. The security agreements of both SP1 and SP2

108. In *Ford v. Petford* (1996), 11 P.P.S.A.C. (2d) 227 (B.C.S.C.), the debtor was the owner of a motor yacht that was registered under the CSA. The debtor granted a security agreement that did not take the form of a statutory ship mortgage. The court held that the transaction was within the scope of the PPSA, and held that the enforcement of the security interest was governed by Part 5 of the PPSA. In *Re Doucet*, *supra*, footnote 106, the court raised the issue of the applicability of the PPSA to a chattel mortgage in a registered ship, but did not need to determine the question on the facts of the case.

109. *Supra*, footnote 91.

110. *Ordon Estate v. Grail*, *supra*, footnote 91, at p. 496.

evidence an intention to create a security interest in the ship. The interest would be characterized as an equitable mortgage or charge. As a result, SP1's security interest in the ship would be valid against D's trustee in bankruptcy.[111] The PPSA would not apply to the transaction and there is no applicable federal statutory provision that would invalidate the security interest. Furthermore, in a priority competition between SP1 and SP2, priority would typically be given to SP1 because it was the first of the two equitable interests to come into existence: *qui prior est tempore potior est jure.*

The second reason is even more compelling. If it is the case that the concept of Canadian maritime law insulates the entire area of security interests on ships from the intrusion of provincial legislation, then it would seem that it is not possible to create a PPSA security interest in any ship or vessel.[112] The application of Canadian maritime law is not limited to ships that are registered under the CSA. Smaller vessels that are not required to be registered under the CSA would be governed by traditional mortgage law principles. As the PPSA would not apply, no registration would be required. As a result, it would be impossible for subsequent purchasers and mortgagees to learn of the existence of the mortgage. There is no need to arrive at this chaotic state of affairs. The reason that Canadian maritime law is immunized from the intrusion of provincial legislation is to produce a uniform body of law that is consistent throughout Canada. While this may be an important value in many areas of maritime law such as maritime accidents, the financing of vessels has never been one of the core elements of maritime law.

Although a Bank Act security interest in a fishing boat can be registered in the CSA ship registry, there is no ability to do so in respect of a PPSA security interest in a registered ship. A PPSA security interest will therefore be subordinate to a statutory ship mortgage. There is one possible exception to this rule. A priority competition may arise in connection with a smaller vessel that does not require registration under the CSA. A PPSA or Bank Act security agreement may be taken at a time when the vessel is not registered under the CSA. The owner of the vessel may then cause the vessel to be registered under the CSA, and then grant a statutory ship mortgage

111. See *Doucet, supra*, footnote 106.

112. Tetley, *supra*, footnote 71, at p. 528, raises the possibility that the concept of Canadian maritime law may result in the non-application of Quebec Civil Code provisions to security interests in ships that are not subject to registration under the CSA.

to another creditor. Although the CSA is said to provide a first-to-register rule of priority, the statute only purports to cover competitions between registered ship mortgages. It is silent as to the outcome between a statutory ship mortgage and a prior security interest that was in existence before the ship was registered under the CSA. The case law suggests that a Bank Act or provincial security interest that is created before the ship is registered will have priority over a subsequent statutory ship mortgage,[113] although these cases are complicated by intimations that the result depended on knowledge or bad faith on the part of the subsequent statutory mortgage holder.

If the PPSA security interest is taken in personal property which is later incorporated in a registered ship, the items may be repossessed by the secured party if they are easily removable. However, if they are incorporated as an integral part of the ship, the security interest in them may be lost by virtue of the doctrine of accession.[114] Although the PPSA contains a set of rules which alters the common law rules of accession, it is doubtful whether these can have any application where the accessory goods are attached to a registered ship. In a priority competition between a PPSA security interest and Bank Act security interest in a fishing boat that is not registered under the CSA, the outcome will be plagued by the same problems that arise whenever there is a clash between these two security systems.

Once we accept the possibility of a PPSA security interest in a ship registered under the CSA, we encounter two other issues which we have previously examined in connection with the Bank Act security interest. The first concerns the possibility that a secured party will take both a statutory ship mortgage and a PPSA security interest in the same ship to secure the same obligation. To the extent that the secured party may be attempting to assert inconsistent rights, this would likely be resolved through the concept of election of remedies.[115] In Ontario, there is an additional problem. Because the Ontario PPSA does not restrict its application to federal security interests, it can be argued that the statutory ship mortgage document creates both a statutory ship mortgage and a PPSA security interest

113. *Royal Bank of Canada v. Queen Charlotte Fisheries Ltd.* (1981), 13 B.L.R. 306 (B.C.S.C.), affd 50 B.C.L.R. 128, 50 C.B.R. (N.S.) 157 (C.A.); *H.F. Russel Sea Foods v. Mason, supra*, footnote 96.

114. *Charles R. Bell Ltd. v. "Stephanie Colleen" (The)* (1994), 94 F.T.R. 1 (T.D.).

115. See the discussion associated with footnote 62.

and that the secured party may pick and choose the regime that is more favourable to it in any given situation.[116]

IV. SECURITY INTERESTS IN RAILWAY ASSETS AND ROLLING STOCK

Federal legislation governing security interests in rolling stock or in the assets of a railway company are found in ss. 104 and 105 of the Canada Transportation Act.[117] Section 104 provides:

> 104. (1) A mortgage or hypothec issued by a railway company, or an assignment or other document affecting the mortgage or hypothec, may be deposited in the office of the Registrar General of Canada, and notice of the deposit must be published in the *Canada Gazette* without delay.
>
> (2) The mortgage or hypothec, assignment or other document need not be deposited, registered or filed under any other law or statute respecting real or personal property if it has been deposited and a notice has been published in accordance with subsection (1).

Section 105 permits the deposit of a lease, sale, conditional sale, mortgage, hypothec, bailment or security agreement relating to rolling stock in the office of the Registrar General of Canada. Unlike s. 104, it is not restricted to security interests that are granted by a railway company. Section 105(3) provides that once the deposit is made, "the document need not be deposited, registered or filed under any other law or statute respecting real or personal property, and the document is valid against all persons".

When these provisions were first enacted, the provincial registry systems were highly decentralized. Each county or judicial district had its own registry.[118] Compliance with the provincial registration requirements would require multiple registrations within each province. The federal statute therefore created a centralized registration system for security interests in railway company assets and in rolling stock. The Act does not, however, set out any rules concerning the validity, priority or enforcement of security interests that are federally registered. The first step is to identify the body of suppletive law that will answer these kinds of questions. The statute uses the older chattel security terminology in referring to a "mortgage" and

116. See the discussion associated with footnote 51.

117. S.C. 1996, c.10. These provisions were formerly contained in the Railway Act, R.S.C. 1985, c. R-3, ss. 81 to 83 and 90, and were repealed upon the coming into force of s. 185 of the Canada Transportation Act.

118. See, *supra*, footnote 19.

"conditional sale", and it might be argued that this demonstrates an intention to adhere to traditional concepts in deciding these issues. This argument should be rejected. Section 104 covers both mortgages and hypothecs, while s. 105 includes a security agreement. It is therefore difficult to make the argument that the statute implicitly incorporates traditional mortgage law as a form of federal common law, since the use of the these terms suggests that provincial law is to be applied.

If it is provincial law that governs, it must next be determined whether there is anything in the PPSA which might limit its application to security interests that are covered by ss. 104 and 105. Most provide that the PPSA does not apply to "a security agreement governed by an Act of the Parliament of Canada that deals with rights of parties to the agreement or the rights of third parties affected by a security interest created by the agreement".[119] This would not appear to exclude security interests in railway assets and rolling stock that have been registered under s. 104 or 105. The Canada Transportation Act merely provides an alternative place for registration. It does not purport to define the rights of the parties to the agreement or the rights of third parties affected by it.

The final question deals with the interaction between the federal and provincial laws. On questions of validity and enforcement it will be relatively easy to apply the provisions of the PPSA. For example, a security interest in rolling stock that is registered under the Canada Transportation Act must nevertheless meet the formality rules of the PPSA in order to be enforceable against third parties. In enforcing the security interest, the system of rights and remedies set out in Part 5 of the PPSA will apply.

The resolution of priority competitions is more complicated. Under pre-PPSA chattel security law, registration was not directly linked to the priority system. A failure to register had a negative effect in that it rendered the transaction void as against certain third parties. Priorities were determined by the application of property law principles. The only consequence of registration in the federal registry was that it eliminated the need to register provincially.

A priority competition may arise between a prior mortgage covering after-acquired property registered under s. 104 and a conditional sale covering rolling stock registered under s. 105. Under pre-PPSA law, the holder of the conditional sales agreement

119. *Supra* at footnote 8.

would prevail because of the retention of legal title. Under the PPSA, the resolution of the competition depends on the application of the internal priority rules of the PPSA. As a conditional sales agreement constitutes a purchase-money security interest, the conditional seller would obtain priority if it were perfected within 15 days after the debtor obtained possession of the collateral.[120] In order to apply this section it is necessary to determine when the security interest was perfected. Normally, this would occur on registration of it in the PPSA registry. However, the federal provisions provide that provincial registration is not required. Presumably, the only method of giving any meaning to this is to treat the security interest as perfected for the purposes of the PPSA when it is registered in the federal registry. According to this approach, the conditional sales contract would obtain priority if it were registered under s. 105 not later than 15 days after the debtor obtained possession of the collateral.

A priority competition may arise between a security interest that is federally registered and a security interest that is registered under the PPSA. Sections 104 and 105 do not specify that registration in the federal registry is the proper place of registration of a security interest in the assets of a railway company or in rolling stock. They merely provide that federal registration is an alternative to provincial registration. Again, the solution would be to treat the federally registered security interest as perfected for the purposes of the PPSA as of the date that it was registered in the federal registry. It is not at all clear what position should be taken in respect of proceeds of a federally registered security interest. The PPSA provides that a security interest extends to proceeds, but perfection of the proceeds security interest is dependent on registration under the PPSA.[121] Will the federal registration be sufficient to satisfy this requirement as well?

V. SECURITY INTERESTS IN INTELLECTUAL PROPERTY

Patents, copyrights, trade marks, industrial designs, plant breeder's rights and integrated circuit topographies are forms of personal property whose creation is governed by federal statute. In this sense, they can be regarded as a examples of federal property interests, *i.e.*, property interests whose attributes are given definition by statutes of the Parliament of Canada. However, it is neither

120. BCPPSA, s. 34(1); OPPSA, s. 33(2).
121. BCPPSA, s. 28; OPPSA, s. 25.

correct nor meaningful to claim that a security interest in such property is a federal security interest.

For the most part, the federal statutes do not concern themselves with the regulation of security interests in intellectual property. Although the Bank Act security provisions and the Canada Shipping Act mortgage are not complete statutory codes, they do provide a legal framework for the regulation of these federal security interests. The intellectual property statutes are different in their structure. Their presence, where there is a presence at all, is limited to a provision which permits assignments to be registered, and another which provides a single priority rule for competitions between competing assignees.

Section 57(3) of the Copyright Act[122] provides:

> Any assignment of copyright, or any licence granting an interest in a copyright, shall be adjudged void against any subsequent assignee or licensee for valuable consideration without actual notice, unless the prior assignment or licence is registered in the manner prescribed by this Act before the registering of the instrument under which the subsequent assignee or licensee claims.

Section 50 of the Patent Act[123] provides that a patent is assignable and sets out the formalities that are required before the assignment can be registered. Section 51 goes on the provide:

> 51. Every assignment affecting a patent for invention, whether it is one referred to in section 49 or 50, is void against any subsequent assignee, unless the assignment is registered as prescribed by those sections, before registration of the instrument under which the subsequent assignee claims.

Section 31(3) of the Plant Breeders' Rights Act[124] similarly provides that an assignment of a plant breeder's right is void against a subsequent assignee for value and without notice. As with the other provisions, the subsequent assignee must be the first to register the assignment in order to obtain this priority. The Industrial Design Act,[125] the Trade-marks Act[126] and the Integrated Circuit Topography Act[127] permit the registration of transfers, but do not provide a priority rule for competitions between assignees.

122. R.S.C. 1985, c. C-42.
123. R.S.C. 1985, c. P-4.
124. S.C. 1990, c. 20.
125. R.S.C. 1985, c. I-9, s. 19.
126. R.S.C. 1985, c. T-13.
127. S.C. 1990, c. 37, s. 21.

There are four distinct questions that concern the interaction between provincial and federal law in this context:

(1) Do the federal provisions have any application at all to security assignments (*i.e.*, assignments that are not absolute, but are only intended by way of security)?

(2) If yes, does the form of the transaction have an effect on the applicability of the federal provisions? In other words, will the provisions apply to all secured transactions that create a security interest in the intellectual property right? Or will it apply only where the secured transaction is in the form of an assignment?

(3) Is there anything in the PPSA which limits its scope such that it does not apply to security assignments of intellectual property?

(4) If both the federal registration provisions and the PPSA apply to a security interest in intellectual property, to what extent, if any, does the federal provision pre-empt the application of the PPSA?

The starting point is to determine if the federal provisions apply to assignments that are not absolute, but are by way of security. There is very little authority on this point. A decision of the Alberta Court of Appeal in *Colpitts v. Sherwood*[128] dealt with a competition between two assignments, both of which were of a patent given as security for a debt owed to a creditor. The Court read into s. 51 of the Patent Act the requirement that the subsequent registered assignee must take the interest without knowledge of the prior registered assignment in order to take the advantage of the statutory priority. The case lends support for the view that security assignments are governed by the federal provision. However, this question was not directly addressed in the decision. Other textual arguments provide some additional support for the view that security assignments are covered.[129] Many, though not all, commentators believe that security assignments are covered.[130] In any event, given the fact that there is uncertainty on this issue, prudent lawyers will typically

128. [1927] 3 D.L.R. 7 (Alta. C.A.).

129. For a thorough review of this issue, see R.H. El Sissi, "Security Interests in Copyrights" (1995), I.P.J. 34 at pp. 37-49.

130. El Sissi, *ibid.*; M. Erdle, "Security Interests in Personal Property: Part Two" (1985), 5 Can. Computer L. Reporter 61 at pp. 61-62.

operate on the assumption that security assignments of intellectual property are caught by the section.[131]

The second question looks to the form of the secured transaction. Under pre-PPSA law, the form of the transaction was of fundamental importance. The characterization of a security interest as a mortgage, charge, conditional sale, floating charge or assignment determined which body of rules were to be applied to the transaction. Under the PPSA, these categories are no longer significant. The Act looks to the substance of the transaction. The Act will apply to any transaction that in substance creates a security interest without regard to its form and without regard to the person who has title to the collateral. The PPSA therefore does not distinguish between a mortgage, charge or assignment.

The federal statutory provisions were drafted in a different era, and have not been amended to reflect the changes in secured transaction law. They adopt the older language and categories of Anglo-Canadian chattel security law. This may not pose a problem if the security agreement deploys the traditional property conveying terminology in the security agreement. However, a controversy will arise if one or both of the competing interests are drawn up in a form that does not involve a conveyance of title to the intellectual property right. Does this bring the transaction outside of the operation of the federal provision? A security agreement that does not convey title to the secured party is typically characterized as a charge under traditional common law property principles. If the PPSA security agreement is characterized in this manner, it would fall outside the definition of an assignment.

The significance of this point can be illustrated in the following example:

> A debtor (D) gives SP1 a security interest in a patent. The security agreement merely grants the secured party a security interest in the collateral and does not purport to assign or convey title to it. The security interest is registered under the PPSA. D later gives SP2 a security interest in the same patent. The security agreement provides for an assignment of the collateral. SP2 registers the assignment in the Patent Office, and also registers under the PPSA.

131. C. Spring Zimmerman, L. Bertrand and L. Dunlop, "Intellectual Property in Secured Transactions" (1980), 8 Intell. Prop. Rev. 72 at p. 88.

Section 51 of the Patent Act creates a first-to-register rule of priority. But if that section does not apply because SP1's security agreement was not in the form of an assignment, priorities will presumably fall to be determined by the PPSA. SP1 will therefore obtain priority because SP1 was the first to register under the PPSA. This result would seriously undermine the utility of federal registration of assignments. Nevertheless, this conclusion may be difficult to escape given the clearly understood definition of an assignment, and the distinction that has always been drawn between an assignment and a charge under traditional property law concepts.

The third question asks if there is anything in the PPSA itself which might limit its application where a security interest is taken in intellectual property. The scope provisions of the PPSA are clearly broad enough to cover such a security interest. The Act covers any transaction that creates a security interest in personal property. An intellectual property right falls within the definition of an "intangible", which is one of the seven categories of personal property defined by the Act. The issue arises because many of the statutes provide a limitation on the application of the Act where federal security interests are involved. The PPSA does not apply to a security agreement governed by an Act of Parliament if that statute "deals with rights of parties to the agreement or the rights of third parties affected by a security interest created by the agreement".[132]

The section was designed to ensure that the PPSA would not apply to Bank Act security and Canada Shipping Act mortgages. However, it might be interpreted to extend as well to the federal statutes that provide a priority rule to resolve priorities between competing assignees. This interpretation would produce peculiar results. Some of the federal statutes permit the registration of transfers or assignments, but do not provide a priority rule to resolve competitions between assignees. Here, the PPSA would govern a security interest taken in these kinds of assets. Federal statutes that contain a priority rule for such competitions would be excluded from the Act, and issues dealing with validity, priorities and enforcement of the security interest would be determined by traditional common law chattel security principles. A more reasonable approach is to hold that the federal statute must be one that purports to create a statutory regime governing the enforcement or priorities of security interests. The fact that the federal provision governing

132. *Supra*, footnote 8.

competing assignments may also cover a security assignment as well should not result in the complete non-application of the PPSA.

Assuming that federal registration provisions and the PPSA apply to a security interest in intellectual property, it becomes necessary to determine the extent to which the PPSA is pre-empted or otherwise affected by the federal provision. It is interesting to note that a very similar controversy arose in the United States in *Peregrine Entertainment Ltd. (Re)*[133] The United States Copyright Act provided for the recordation of a transfer or mortgage of a copyright. The court decided that the Copyright Act pre-empts any state recordation system pertaining to copyrights. Registration of a security assignment in the United States Copyright Office was held to be the exclusive means by which a security interest in a copyright could be perfected. The failure to register the security interest pursuant to Article 9 therefore did not result in the invalidation of the security interest as against the trustee in bankruptcy. This did not result in the complete pre-emption of state law. Article 9 continued to govern the secured transactions on matters that did not involve the registration system.

In reaching its decision, the court expressed concern over the problems of duplication and overlap of state and federal registration systems:[134]

> A recording system works by virtue of the fact that the interested parties have a specific place to look in order to discover with certainty whether a particular interest has been transferred or encumbered. To the extent there are competing recordation schemes, this lessens the utility of each; when records are scattered in several filing units, potential creditors must conduct several searches before they can be sure that the property is not encumbered.

The fundamental problem with this approach is that it becomes necessary to register the security interest against each separate copyright. The secured financing of businesses that owned a large inventory of copyrights has become cumbersome and more expensive since a single filing covering all the inventory could no longer be used to perfect the security interest.[135]

It is doubtful that the *Peregrine* approach would be followed in Canada. The practical problems that came to light in the aftermath

133. 11 U.C.C. Rep. Serv. 2d 1025 (D.C. Cal. 1990).
134. *Ibid.*, at p. 1032.
135. See D. Brinson and M. Radcliffe, "Security Interests in Copyrights: The New Learning" (1991), 2 Ent. L. Rev. 14. See also El Sissi, *supra*, footnote 129, at pp. 56-58 for a summary of the problems produced by this approach.

of the decision undermine its policy justification. More significantly, the approach to federal pre-emption differs. In the United States, state law will be pre-empted if the federal enactment is so pervasive so as to indicate that "Congress left no room for supplementary state regulation" or that "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject".[136] In Canada, the concept of federal paramountcy utilizes a test of operational conflict rather than negative implication. Mere duplication or overlap does not constitute a conflict.[137]

Further support for the concurrent operation of federal and provincial law is found in *Poolman v. Eiffel Productions S.A.*[138] The dispute was between a prior assignment and a subsequent unregistered assignment which was entered into before the prior assignment was registered. Section 57(3) of the Copyright Act invalidates a prior unregistered assignment against a subsequent registered assignment. It covers only this scenario and does not create a general first-to-register rule of priority. Pinard J. held that the federal provision does not immunize the transaction from the general laws applicable to property and civil rights in the province. It therefore appears to support the position that provincial law will govern all matters that do not strictly fall within the priority rule of the federal statute.

It seems likely, therefore, that in Canada the federal statutes governing intellectual property and the provincial PPSAs operate concurrently. Registration of a financing statement in the PPSA registry is required to protect the security interest against a trustee in bankruptcy. With a single registration, a secured party will also be able to perfect its security interest in a large inventory of intellectual property rights, including after-acquired rights. Registration under the PPSA alone will carry a somewhat greater level of risk. The security interest will be defeated by a competing transferee or secured party who registers in the federal registry. To be able to take advantage of this federal priority rule, the competing party must be without notice. However, registration under the PPSA does not constitute constructive notice. Therefore, registration in both the federal and provincial registries will be necessary if a secured party wants to obtain the maximum level of protection.

136. *Supra*, footnote 133, at p. 1031, quoting *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985).
137. *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, 138 D.L.R. (3d) 1.
138. (1991), 35 C.P.R. (3d) 384, 42 F.T.R. 201 (T.D).

VI. THE FRAMEWORK FOR REFORM

It is difficult to escape the conclusion that the federal law governing security interests is in a wretched state of disrepair. Judges and academics alike have critically commented on the obscure language of the Bank Act. Although the progressive development of the case law has made it somewhat easier to predict the outcome of priority competitions between a Bank Act security interest and a PPSA security interest, these outcomes cannot be regarded as commercially acceptable. They violate a central norm of modern personal property security law — that third parties should have some means to discover the existence of a security interest. In Ontario, the situation is even more troubled. The Ontario Court of Appeal, with the very best of intentions, has opened Pandora's Box and let loose a plague of uncertainties. In other areas, we are confronted with a series of questions that we are unable to answer. We are unsure about the extent to which Canadian maritime law has limited the application of the PPSA. We do not know if security assignments of copyrights and patents are required to be registered in the federal registries. Registration of a security interest in rolling stock or in the assets of a railway company eliminates the need to register it under a provincial registry system, but this ignores the fact that priorities are now inextricably linked to registration. How are we supposed to determine the priority of a federally registered security interest in such property? These are important questions and we need to be able to answer to them.

If we stand back and look at the federal systems from afar, it is immediately apparent that a unitary concept of a federal security interest is absent. There is absolutely no consistency in approach. The Bank Act security system sets out a basic framework, but it must borrow from provincial law on several key matters. The Canada Shipping Act creates an autonomous federal security system premised on traditional mortgage law that is imported via the concept of Canadian maritime law. The Canada Transportation Act adopts the strategy of a conditional[139] pre-emption of the provincial registry system, while leaving all other matters to be determined by provincial law. In the case of some, but not all, of the intellectual property rights, an additional federal registration requirement is

139. It is conditional because federal registration is optional. The provisions are activated only if the secured party registers it federally.

imposed in order to protect the security interest against certain third parties.[140]

Reform of the law is required. Is the solution to these problems to be found in the adoption of a unified concept of a security interest that can be utilized across these statutes? I believe that one should not even bother to ask this particular question until a more fundamental issue is addressed. Is it useful or desirable even to have a federal presence in these areas? Instead of working towards a unified federal personal property security system, perhaps the preferred approach is simply to vacate the field. In my view, we should seriously consider the possibilty of dismantling the federal provisions in three of the four areas. My comments are subject to a major caveat. I examine the need for a federal presence from the perspective of a province that has enacted a PPSA. It may be that these conclusions do not hold true in Quebec and that the federal presence fulfils some useful purpose in that province which might thereby justify its existence.

The suggestion that the Bank Act security system should be replaced is certainly not a novel one. On April 7, 1997, the Personal Property Security Law Sub-Committee of the Canadian Bar Association — Ontario made a submission proposing the suspension or repeal of s. 427 in respect of those provinces that have adopted PPSA legislation and which do not discriminate against banks.[141] The Submission considered the merits of a modest band-aid solution that attempted to integrate the priority rules of the federal and provincial systems. It concluded that a better approach to the problem was the outright abolition of the Bank Act security system. It is useful to examine the reasons for their conclusion, as well as those of other commentators who have proposed reform.[142]

A major problem with the Bank Act security system is that it introduces an additional layer of complexity to the law and creates additional costs that must be borne by the parties. These problems arise because the Bank Act security system overlaps the provincial

140. This assumes: (a) that the federal statutes do apply to security assignments; (b) that the form of security agreement used is construed to be an assignment; (c) that the PPSA does not exclude the transaction from its scope; and (d) that the federal and provincial statutes create concurrent registration requirements. Each and every one of these assumptions is open to challenge.

141. *Harmonization of Section 427 of the Bank Act and the Provincial Personal Property Security Acts*, Submission to the National Business Section of the Canadian Business Law Section of the Canadian Bar Association (April 7, 1997).

142. Ziegel, *supra*, footnote 33, at pp. 91-95.

system. This imposes additional costs on third parties since it is necessary to undertake a search of both the provincial and the federal registries in order to determine if property is encumbered. If we expand the scope of the federal system, we magnify this problem. Banks typically take and register both provincial PPSA security agreements and Bank Act security interests, thus inflating the costs to the banks and to their customers. We should expect there to be some beneficial feature of the federal presence in this field that would offset these costs. However, it is very difficult to see what these benefits might be. The traditional justification was that the inadequacies of provincial chattel security law did not provide an adequate form of financing device. This justification no longer holds true. Banks are permitted to take provincial security interests. The PPSA permits the creation of a general security agreement that gives a secured party a security interest in all the present and after-acquired property of a debtor. Because of this, banks tend to regard this all encompassing form of security interest as their primary security and look to the Bank Act security as a back-up security device that will be invoked only if there is some special advantage.

There are two types of benefits that can be obtained by a bank by virtue of its taking Bank Act security. The first is that it is insulated from provincial limitations that restrict the enforcement remedies of secured creditors. The other advantage is that the registration requirements under the Bank Act system are less stringent so that there is less likelihood that the security interest will be subordinated due to a registration error. However, in conferring these advantages, the federal system provides one class of financial institution with an advantage that is not provided to other financial institutions and has thereby put them on an uneven footing. A province may choose to restrict the enforcement remedies of secured creditors. However, these limitations apply to all financial institutions that operate within the province and it is difficult to see why banks should be treated differently. Professor Cuming has noted that these restrictions are imposed by democratically elected provincial legislatures in an attempt to strike a realistic balance between the rights of lenders and the rights of borrowers.[143] If these restrictions are too onerous, the lenders can always choose not to

143. See R.C.C. Cuming, "The Position Paper on Revised Bank Act Security: Rehabilitation of Canadian Personal Property Security Law or Curing the Illness by Killing the Patient" (1992), 20 C.B.L.J. 336 at p. 338.

lend. It is true that Bank Act security may prove useful to a bank if its PPSA security interest is compromised due to a registration error. But this does not seem to provide the basis for a separate federal security system.

The Canada Transportation Act railway asset registry provisions are another example of a federal presence which at one time fulfilled a useful commercial purpose, but which has since been eclipsed by changes in the provincial law. These provisions hark back to an age when the provincial chattel security registries were decentralized and every county or judicial district had its own registry. The federal provisions were introduced to eliminate that multiplicity of registrations that would otherwise be required. Much has changed since that time. The provinces have adopted centralized personal property security systems which eliminate the need for multiple registrations within a province. The PPSA registry system provides a variable registration life which greatly reduces the risk of lapse in the case of long-term equipment financing. Rolling stock is not required to be registered by serial number, so the simplest of collateral descriptions is all that is needed to perfect the security interest. Furthermore, it would not be necessary to register a security interest in rolling stock in more than one province. Under the PPSA, the validity and perfection and priorities of a security interest in mobile goods held as equipment is determined in accordance with the law of the jurisdiction where the debtor is located at the time the security interest attaches.[144]

In the case of the intellectual property statutes, we should consider amending the statutes so that they will only require registration of an absolute assignment. A security assignment or other form of security interest in an intellectual property right would be governed by the PPSA. This would mean that a person wishing to obtain an assignment of a copyright or patent would be required to search the personal property registry in order to determine if the intellectual property right was subject to a security interest.[145] From the standpoint of economic efficiency, we would likely conclude that it is less costly for a searching party to conduct a search of the personal property registry than it is for a secured party to prepare,

144. BCPPSA, s. 7; OPPSA, s. 7.

145. The federal priority rule would still operate in competitions between competing absolute assignments, and this could have an indirect effect on the priorities of secured creditors. See R.C.C. Cuming and R.J. Wood, *Alberta Personal Property Security Act Handbook*, 4th ed. (Scarborough, Carswell, 1998) at p. 83.

execute and register security assignments in respect of each intellectual property right.[146] Because the governing law is determined by the location of debtor, a single search of a provincial personal property security registry is all that will be needed to determine if the property is subject to a security interest.

The existence of a federal security system is easier to justify in the case of security interests in registered ships. The federal registry may enjoy a comparative advantage over a provincial registry system in that a search of it produces fuller and more complete information than can be provided by a provincial PPSA registry. Given that ships carry a particularly high value, it does not seem overly burdensome to require the individual registration of security interests against each ship. However, the federal system's reliance on traditional mortgage law is anomalous. Under the PPSA, the rule in *Hopkinson v. Rolt*[147] has been abolished in favour of a rule that permits a secured party to make further advances in priority to an intervening interest. A similar position is adopted by the Civil Code of Quebec.[148] Given this, it would seem sensible to reformulate the substantive law by eliminating its dependence on mortgage law and by introducing features that are more in line with the secured transactions law in operation in both the provinces.

It may be that I am mistaken in my assessment about the value of the federal presence of the feasability of amending or repealing the federal statute. This can only be conclusively determined if the process of law reform provides an opportunity to consult with those who have expertise in these specialized fields of law. It may turn out that there are other benefits which might justify the federal presence in the field. If it is determined that a federal presence is desirable, it is then necessary to determine the nature and extent of the federal presence. Several design questions concerning the attributes of the federal security interest arise. What follows are some of the special considerations that need to be given in defining a federal security system.[149] A failure to properly address these

146. It is also more costly for searching parties to conduct searches in the intellectual property registries, as they are not designed in a manner that facilitates the disclosure of security interests. See C. Spring Zimmerman, L. Bertrand and L. Dunlop, *supra*, footnote 131, at pp. 89-91.

147. *Supra*, footnote 23.

148. See Tetley, *supra*, footnote 71, at pp. 528-29 citing art. 2688 of the Civil Code.

149. These questions are in addition to the usual sorts of issues that arise in the reform of personal property system (*e.g.*, notice filling system or document filing system, relevance of knowledge, extent of purchase-money priority).

issues will likely lead to a recreation of many of the problems that have marred the operation of our present system.

(1) *Completeness and Interstitality*: Will the federal security system provide a comprehensive code that will answer every question that might arise? If it is not complete, what suppletive law will be used to fill in the gaps in the statute?

(2) *Exclusivity or Overlap*: Is the federal security system to be the exclusive means by which a security interest in the property can be taken? Or will it be possible to take a provincial security interest in the property?

(3) *Duality*: If the federal security system is not exclusive, will it be possible for a secured party to hold a federal security interest and a provincial security interest in the same collateral to secure the same obligation? If so, under what conditions will the secured party be required to elect between them? Will the two systems operate simultaneously so that a single security document will give rise to both a federal and a provincial security interest?

(4) *Registration Strategy*: Should a centralized registry system be adopted or should a decentralized system with separate registries for each province be created? Is it possible to utilize the provincial PPSA registry as the proper place for registration of the federal security interest?[150]

(5) *Interaction:* If the federal security system is not exclusive, how are priorities to be determined when a federal security interest comes into competition with a provincial security interest? Will there be a hierarchy in which the federal registration provides the highest priority? Or will the provincial and federal security interests be co-ordinated through the adoption of some form of "race to the registry" principle?

(6) *Congruency*: To what extent is it possible to design the system so that the concepts and terminology are commensurate with those employed in the provincial system? Is it possible to attain this desirable objective for both civil law and common law jurisdictions?

A final step in the reform project would be to examine the decisions that have been made in respect of each of these areas. It

150. The registration of federally created interests in provincial registries is not a novel concept. The Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 86 to 87 utilizes this registration strategy in relation to non-consensual security interests in favour of the Crown.

may be that the strategies that have been proposed share something akin to a common approach. If they do, it should be determined if the provisions can be cut from whole cloth and included in a single federal statute — in effect, a federal personal property security statute. To my mind, this is the least important question.[151] In each area we must be assured that there is a proper commercial purpose that is achieved by the federal presence. We must work out what we want the federal security interest to do and how it is to interact with the provincial law. A unified federal personal property security system is not an end in itself. What is crucial is that the federal and provincial systems be properly coordinated so as to produce predictable and commercially sensible outcomes.

151. Similar design questions arise when PPSA jurisdictions reform contiguous areas of commercial law, such as the law of liens and judgment enforcement law. In reforming the law, the concepts and terminology and registry system of the PPSA are utilized. The issue is whether the provisions should be integrated directly into the PPSA (by widening the definition of a security interest) or whether a parallel approach should be adopted in a separate statute. See *Report on Liens*, Report for Discussion No. 13, Alberta Law Reform Institute (September 1992) at pp. 63-65.