

BACKGROUND

Fixtures are goods (personal property), which are affixed to land (real property) in such a manner that their primary purpose becomes the better use of the land rather than the better use of the goods. Examples would be furnaces, air conditioning units and wall-to-wall carpeting.

The common law considered fixtures to be part of the land so that whoever owned or had an interest in the land also owned or had an interest in the fixtures. For many years however, Alberta statutes providing for registration of conditional sale contracts and chattel mortgages stipulated that where goods became affixed to land after registration in the Personal Property Registry, the goods remained personal property and did not become part of the land. As there was no provision for registration of any document against the title to the land, a search of the certificate of title would not reveal that a fixture continued to be personal property that was subject to a security interest.

Effective October 1, 1990, the Personal Property Security Act ("PPSA") instituted a new regime to regulate security interests in personal property. One aspect of this new regime is the requirement to register a notice against the title to land to which goods will be or are affixed in order to preserve the priority of the personal property security interest as against certain interests in land. Under the new regime, a person acquiring an interest in land is able to rely on existing fixtures being part of the real property unless there is a PPSA notice registered against the title. (1)

Essentially, the rules for establishment of priorities are generally as follows: (2)

1. Where a PPSA security interest is created before or at the time goods become affixed to land,
 - (i) it will have priority over an interest in the land that exists at the time the goods become fixtures (the holders of these interests would not have relied on the fixture being part of the land when they acquired their interests), but
 - (ii) it will not have priority over an interest in the land that is acquired after the goods become fixtures and before a notice is registered against the title to the land (the holders of these interests would assume that the fixture is part of the land when they acquire their interests unless notified otherwise).

2. Where a PPSA security interest is created after goods have been affixed to land, it will only have priority over an interest in the land that is acquired after registration of a notice against the title to the land.

The effect of these priority rules is that the order of registration against a title will not necessarily indicate who has the prior claim in respect of fixtures. A similar situation

exists in respect of judgment creditor claims where a subsequently registered interest in land may have priority over a previously registered writ if the interest was acquired before the writ was registered.

If a PPSA security interest holder fails to register a notice and loses priority to an interest in the land acquired after the goods became fixtures, then the protection of the PPSA is lost in this situation. The fixtures are considered to be part of the land, without regard to the PPSA security interest, and entitlement to them is determined according to the priority rules governing competing interests in land.

If a secured party has established priority over an interest in land, that secured party has the right to retake possession of the fixtures by requesting the civil enforcement agency to remove them from the land. (3) The holder of a subsequent interest in the land may retain the fixtures as part of the real property and obtain a discharge of the security interest by paying the secured party the lesser of the amount of the security interest or the market value of the goods.(4)

The Builders' Lien Act continues to apply to building materials as these are excluded from the definition of fixture in the PPSA. As in the case of builders' liens, a mortgage advance only gets priority over a PPSA security interest if there is no notice registered against the title when the advance is made. However, as in the case of builders' liens, there is a provision protecting advances made at any time on a particular day if a title search obtained on that day does not disclose the PPSA notice. (5)

Notice of a security interest in crops, naturally grown or planted but excluding certain trees, may also be registered against land in the same manner as for fixtures. Where a PPSA security interest is created in crops, it will have priority over interests in the land except an interest that is acquired after the crop is planted and before a notice is registered. (6)

REGISTRATION PROCEDURE

1. A Notice of Security Interest (**FORM 16**) has been prescribed for registration against the title to land. (7) (Use document type NOSI.) The notice must contain the following:

- a) the name and address of the debtor (can be a partnership),
- b) the legal description of the land to which the goods are affixed or on which the crops are growing (must be titled land),
- c) the name and address of the secured party,
- d) the amount secured (this is the lesser of the amount secured by the security interest or the value of the fixtures or crops),
- e) a description of the collateral (i.e., fixtures or crops) secured (pipeline is also acceptable). The collateral must be identifiable (e.g., furnaces, air conditioning units, etc.). Stating the entire debtor's present and after acquired personal property is not acceptable.
- f) the date on which the notice of the security interest is to expire ("Infinity" is acceptable)

2. **Execution and Affidavits for Notice** - The notice must be executed by the secured party or an agent for the secured party. (8) Under the PPSA, a secured party may be a partnership or an unincorporated organization; any authorizing signature may be accepted in respect of these entities. Attestation requirements (i.e., witnesses, seals, corporate signing affidavits) do not need to be complied with for the notice. If an agent for the secured party signs the notice, an Affidavit Verifying Notice (FORM 18) must be completed by the agent.

3. Subdivision approval is not required if the legal description relates to only part of the land described in a certificate of title. There is no possibility that these registrations may effect a subdivision, as the secured party does not have the right to force a sale of the land to realize on the security.

4. If the fixture is affixed to common property of a condominium, the notice is endorsed against the extra sheet for the condominium plan.

5. **Change Notice for Transactions Affecting a Security Interest** - A Change Notice (FORM 17) has been prescribed for giving notice of a renewal, transfer, postponement, amendment, partial discharge or full discharge of a security interest in fixtures or crops. (9) A change notice can only be registered if the original notice has not expired. As a change notice renewal must be registered within a specific time period, they should come to the registration area in a red folder.

a) **Renewal** - A new expiry date must be specified. The renewal period commences at the expiry of the original period. The notice is rejected if the original period was specified as "Infinity". (A.L.T.A. document type - RENN)

b) **Transfer** - The name and address of the transferee must be specified. The transferee becomes the new secured party and any future change notices must be executed by him or his agent. (A.L.T.A. document type - TFIN)

c) **Postponement** - Sufficient particulars to identify the instrument or caveat, which is to be given priority, are required. (A.L.T.A. document type - POST)

d) **Amendment** - This should generally relate to a change in the description of the collateral secured or a change of address for the secured party. It may also include a change to the amount secured. (A.L.T.A. document types - AMEN and CHAA)

e) **Partial discharge** - The legal descriptions of the parcels, which are no longer affected by the security interest, are required (A.L.T.A. document type - DISC).

f) **Full discharge** - The notice, as well as all change notices, are discharged against all affected titles.

6. **Execution and Affidavits for Change Notice** – Execution requirements for every change notice are the same as for Land Titles documents, with a witness and the usual affidavits or a corporate seal. Where the secured party is not an individual or corporation (such as a trade-name or partnership), the change notice must be signed by an agent since the authority to bind these entities will vary from one organization to another. (10)

Under the PPSA, a different agent can execute a change notice even though the original notice was executed by the secured party or another agent. It is therefore not necessary to know who signed the original notice. In this case, in addition to the normal attestation requirements for executing a change notice, the new agent must complete the Affidavit Verifying Notice in which they represent, under oath, that the secured party has authorized them to effect registration in the Land Titles office.

7. **Expiration of Notice** - If the original period plus any renewal period has elapsed, the notice and any subsequent change notice that relates to the security interest may be discharged from the title. (11) This would normally be done at the request of the debtor or any person who has an interest in the land.

8. **Demand to Secured Party** - The debtor named in the notice or a person shown on the certificate of title as having an interest in the land may give a written demand (FORM 19) to the secured party to either discharge or amend the notice of security interest. (12) The secured party has 40 days after the demand is given to submit for registration either a change notice or a certified copy of a court order confirming that the demand need not be complied with.

If the secured party does not comply, the person giving the demand is authorized to submit the appropriate change notice for registration. The change notice must be accompanied by the prescribed proof of demand (FORM 20) establishing that the demand was properly given to the secured party. Where the demand is given by an agent, the forms should be modified accordingly.

The demand may be given by sending it by registered mail to the address of the secured party as it appears on the notice, as amended if applicable. Various other methods of giving the demand are set out in section 72 of the PPSA. The demand is deemed to be given (i.e., the 40 day period starts running) when it is actually received by the secured party or, if registered mail is used, 10 days after the mail is registered.

9. **Fees**

- a) Notice of Security Interest - [Tariff item 4](#) is charged. The fee is based on the amount secured, as with mortgages and other encumbrances.
- b) Change Notice relating to a renewal, transfer, postponement or amendment - [Tariff item 11\(6\)](#) is charged. If the amendment is to change the address of the secured party, see item (c) below. If an amendment indicates that the amount secured has increased, [Tariff item 4\(5\)](#) applies.
- c) Change Notice relating to an amendment to change the address of the secured party - [Tariff item 11\(1\)](#) is charged.
- d) Change Notice relating to a partial or full discharge, or a request for expiration - [Tariff item 11\(5\)](#) is charged.

[Tariff item 13](#) is applicable for any extra endorsements after the first.

STATUTE AND CASE REFERENCES

Statute references are to the Personal Property Security Act, S.A. 2000, c. P-7, unless otherwise indicated.

1. s. 36
2. s. 36
3. s. 58
4. s.36(12)
5. s. 36(4)
6. s. 37
7. s. 49(2) and (3), Personal Property Security Forms Regulation, Alberta Regulation 295/90
8. s. 66(1), Personal Property Security Regulation, Alberta Regulation 231/2002
9. s. 49(4)
10. s. 66(1), Personal Property Security Regulation, Alberta Regulation 231/2002
11. s. 49(6)
12. s. 49(7) - (11)