Study Committee Report on Reform of Secured Transactions Law 2001

Background

[1] As part of the Commercial Law Strategy of the Uniform Law Conference of Canada ("ULC"), a study committee on the reform of secured transactions law at the provincial and territorial levels was created early in 2001. Professor Catherine Walsh of the Faculty of Law, University of New Brunswick, and Professor Ronald Cuming of the College of Law, University of Saskatchewan agreed to act as co-chairpersons of the committee.

Membership of the Committee

[2] The following agreed to serve as members of the Committee: Professor Tamara Buckwold (Sask), John Cameron (Ont.), Arthur Close (B.C.), Professor Ronald Cuming (Sask.), Michel Dechamps (Que.), Kenneth Morlock (Ont.), Professor Catherine Walsh (N.B.) and Professor Roderick Wood (Alta.). (Professor Jacob Ziegel (Ont.) is also a member, but due to other commitments was unable to participate in the Committee's deliberations).

Mandate of the Committee

[3] The mandate of the Committee was to explore approaches that might be used by the ULC to encourage greater harmonization of provincial and territorial laws dealing with security interests in personal (movable) property.

[4] As a working strategy, the Committee decided to select five or six issues on which it was thought broad support for reform could likely obtained quickly and without significant controversy. Ideally, the selected issues would have significance for Personal Property Security Act (PPSA) jurisdictions (all nine common law provinces and the three territories) as well as Quebec.

[5] It was recognized by the Committee that, under the sponsorship of the ULC, Professors Cuming and Walsh had previously undertaken a more general examination of possible reforms to the substantially uniform PPSAs in effect in all the common law provinces and territories except Ontario and the Yukon, and had presented the first part of their report to the 2000 ULC meeting. It was agreed that efforts would be made to coordinate that project with the present one.

Method of Proceeding

[6] Due to the short time between the date the Committee was formed and the date its report was to be completed, combined with the lack of sufficient funds, it was necessary for the Committee to hold all of its meetings in the form of telephone conference calls. Five such teleconferences were held at an approximate aggregate cost of $2,900.00.

Selection of Issues to be Examined

[7] The initial step in the process of selecting issues to be examined by the Committee was the preparation by Professors Cuming and Walsh of a list of matters they had encountered in the context of their previous work which might be appropriate for consideration by the Committee. The list which emerged included the following items:

Effective date for perfection of security interests for the purposes of determining effectiveness against the debtor's

trustee in bankruptcy (taking into account intervening changes in the "relation-back" provisions of the federal Bankruptcy and Insolvency Act)

- Creation and Enforcement of security interests in "licenses"
- Conflict of laws issues (expansion, clarification, and rationalization of statutory choice of law rules and connecting factors) Statutory presumptions for distinguishing security leases from "true" leases
- Characterization of security trusts
- Cross-collateralization of purchase money security interests/obligations
- Priority between judgment creditors and secured creditors: priority effect of advance registration of financing statement
- Priority between purchase money financers claiming security rights in accounts as proceeds of inventory and prior secured parties claiming a security right in accounts as original collateral
- Priority issues arising from corporate amalgamations Taking security in insurance interests
- Interface between Bank Act and provincial/territorial secured financing regimes Security interests in software imbedded in goods
- Expansion in default remedies of secured creditors to include taking collateral in partial satisfaction of obligation Standard for testing the validity of a registration
- Security in rights associated with intellectual property Security interests in future crops

[8] The list was circulated and Committee members were invited to comment and to add other potential issues. A poll of the Committee members resulted in the selection of the following issues: security in software imbedded in goods; priority issues arising from corporate amalgamations; expansion in default remedies of secured creditors to include taking collateral in partial satisfaction of obligation; and security interests in future crops. Later, the Committee decided to add to its agenda the issue of exempting certain consumer goods from seizure by secured creditors.

Committee Procedures

[9] The Committee deliberated on the policy considerations associated with the areas selected for examination. Draft legislative provisions were prepared by and circulated among members.

[10] A formal voting procedure was not employed, and it proved not to be possible to obtain complete consensus on the approaches to be recommended with respect to all of the issues examined. No formal consultation system was adopted. However, a few practitioners who were known to Committee members as persons with expertise in secured financing law, and who had indicated an interest in participating, were asked to react on an ad hoc basis to various of the proposals being examined by the Committee. In addition, the Ontario members of the Committee brought certain of the draft proposals before the Personal Property Security Law Sub-Committee of the Business Law Section of the Canadian Bar Association-Ontario. Although a number of other individuals had expressed interest in the work of the Committee, time constraints did not permit broader consultation.

Results of the Committee's Deliberations

[11] Set out below is a description of each of the issues examined by the Committee and the outcome of its deliberations with respect to these issues.

Software Embedded in Goods

[12] The Committee noted that many computer programs are designed specifically for particular goods. It concluded that secured financing law should make it clear that a security interest or hypothèque in goods includes any software embedded in the goods or integral to their use. In the context of the PPSAs, this could be implemented by expanding the current definition of "goods" along the lines of the following formulation:

"goods" means tangible personal property, fixtures, crops, and the unborn young of animals, and includes a computer program embodied in or accompanying the goods that is ordinarily considered part of the goods or that is an aspect of [essential to] making the goods functional, but does not include. . .

Priority Issues arising from Corporate Amalgamations

[13] Existing secured financing law does not directly address the issue of priority that arises when two or more corporations which have given security interests in their existing and after-acquired property amalgamate and the amalgamated corporation acquires property that falls within the collateral description of the security agreements previously executed by the amalgamating corporations. Under most Canadian business corporations legislation, the amalgamated corporation is not treated as a new entity but merely a continuation of the corporations involved in the amalgamation. Consequently, there is no solution in corporate law to the conflict that arises when the secured creditors of the amalgamating corporations claim priority to collateral acquired by the amalgamated corporation.

[14] The Committee examined two possible statutory solutions to this issue.(1) No consensus was reached as to which should be recommended. These alternative approaches are embodied in the draft provisions set out in paragraphs [17] and [18] further below.

[15] Both alternatives provide that security interests in property existing as of the date of amalgamation will be determined as if the amalgamation had not occurred. The difference between the two approaches arises in the case of property acquired after amalgamation. Under the first alternative, secured creditors holding security over after-acquired property would share ratably based on the obligations outstanding at the date of amalgamation. Under the second alternative, those secured creditors would share rateably based on the obligations outstanding at the time of enforcement.

[16] The following simple hypothetical displays the different results which would be reached under the two alternatives. Assume a secured party (SP1) holds a security interest in all the present and after-acquired property of A Inc. A second secured party (SP2) holds a security interest in all the present and after-acquired property of B Inc. On July 1, when the companies amalgamate, A Inc. owes SP1 $300,000, and B Inc. owes SP2 $100,000. After July 1, AB Amalgamated Inc. acquires new property worth $200,000. SP1advances no additional credit after July 1, but SP2 advances a further $200,000. Under the first alternative, SP1 would be entitled to $150,000 of the after- acquired property, while SP2 gets $50,000. Under the second alternative, assuming one of the creditors seizes, each creditor would recover $100,000 out of the after- acquired property.

[17] First Alternative:

[ ] ( ) When two or more incorporated debtors that have given security interests to separate secured parties amalgamate as provided in [the Business Corporations Act or other relevant provincial or territorial legislation],

(i) subject to section [e.g. OPPSA s. 51], the priority of the security interests with respect to property of each separate corporation existing at the date of the amalgamation is to be determined as if the amalgamation had not

occurred;

(ii) the security interests in after-acquired property of the amalgamated corporation provided for in security agreements with the separate debtors have equal priority to the value of the obligation owing to each secured party at the date of the amalgamation.

[18] Second Alternative:

( ) If two or more incorporated debtors create security interests attaching to after-acquired property and afterwards amalgamate under applicable legislation, then subject to [e.g. OPPSA s. 51], the priority of those security interests will be determined as follows:

- in the case of property in which a debtor had an interest as of the amalgamation, the priority will be determined as if the amalgamation had not occurred; and in the case of property acquired after the amalgamation:
- to the extent that those security interests attach to the same property, those security interests will rank equally and rateably according to the obligations secured, after applying the rule in (A), if any one of those debtors created two or more of those security interests attaching to the same property, the priority between those security interests created by that same debtor will be determined as if the amalgamation had not occurred.

[19] Any rule implemented to resolve a dispute between pre-amalgamation creditors with respect to their competing interests in property acquired by the amalgamated company should be evaluated according to the extent to which it satisfies three general objectives. It should (1) provide a simple, workable rule, (2) be congruent with the conceptual and structural foundation of the relevant secured transactions regime as a whole, and (3) achieve the fairest possible result in the circumstances.

[20] The proponents of the first alternative believe that it is superior to the second on all three criteria. As to the first objective, the amount of debt owed to each of the competing creditors at the date of amalgamation is easily determined. This ratio then establishes the proportionate share of the after-acquired property to which each creditor is entitled. The second alternative would, it seems, operate on the basis of the amount of debt owed to each creditor at such time as the interests come into conflict. In the absence of seizure of the collateral or some other triggering event, such as the bankruptcy of the amalgamated corporation, the second alternative would offer no other reference point for determination of the creditors' proportionate shares. This would mean that the creditors' proportionate claims to whatever after-acquired property might be subject to their interest would be unknowable by any one of them at any given point of time prior to such a triggering event, since those proportions could vary according to the subsequent lending decisions of other creditors.

[21] As to the second objective, the first alternative is consistent with the fundamental idea that the legislative framework for secured transactions law should, as much as possible, facilitate deliberate risk assessment and management. In the amalgamation of A Inc. and B Inc., the creditors of A Inc. have no knowledge, and no means of acquiring knowledge, of the existence of those security interests registered against B Inc. with whom they will be in competition with respect to after acquired-property if and when an amalgamation occurs. A search of the registry using the name of A Inc. will, of course, reveal only those competing creditors claiming against A Inc.'s assets. Unless amalgamation with B Inc. as an identified company is anticipated, the risk presented by the competing creditors of B Inc. is, before amalgamation, unknowable. However, proponents of the first alternative take the view that it is at least possible to acquire knowledge of an amalgamation if and when it occurs, and that although risk management in anticipation of amalgamation is an uncertain enterprise, that alternative at least presents the possibility of risk management after amalgamation. Under the second alternative, there is nothing a

secured creditor of A Inc. can do to prevent an increasing reduction in its proportionate share in after-acquired property due to the lending choices of the creditors of B Inc., short of taking immediate steps to realize -- a step that may for other reasons be unattractive. In other words, the choice is between the possibility of risk management (the reality of which increases with the degree of monitoring of the debtor company) and no possibility of risk management.

The motives of the respective creditors, in terms of any deliberate intention to exploit the others' ignorance of the amalgamation short of fraud, are irrelevant.

[22] The proponents of the second alternative seek to provide a simple and fair means of determining the priority of competing security interests in after-acquired property. In practice (apart from purchase money security interests and other special priority situations), neither secured creditor reasonably expects to be faced with a competing security interest in after-acquired property. Equal and ratable sharing is a sensible rule in that situation; and in practice equal and ratable sharing means sharing based on the obligations outstanding from time to time.

[23] The proponents of the second alternative believe that it offers a fairer result than the first, in that it offers some protection to creditors who have continued to lend in ignorance of an amalgamation. They suggest that, as a practical matter, it is the reality that some amalgamations take place without the knowledge of the secured creditors of the amalgamating corporations, and that this reality is the main reason for needing a statutory "rule" to address the problem in the first place.

[24] Although the second alternative may therefore appear "fair" to those creditors, it would undoubtedly appear "unfair" to creditors who have not advanced additional credit after amalgamation, or have advanced proportionately less credit, or who have refrained from enforcement in reliance on the new collateral, whether or not in the knowledge that the amalgamation has occurred. From their perspective, their collateral has effectively been pulled out from under them by the post-amalgamation lending of other creditors, with whom they may not have known they were in competition. In other words, either alternative may lead to results that would be viewed as unfair by some creditors. Given that reality, the proponents of the first alternative believe that the better choice is to adopt a rule that at least offers creditors the possibility of meaningful risk management in the context of amalgamation, rather than one that puts the matter entirely outside anyone's control. The proponents of the second alternative, on the other hand, worry that such risk management may not be practically or economically feasible.

[25] In conclusion, proponents of the first alternative believe that a rule which determined the obligations as of the date of amalgamation would encourage secured creditors to monitor whether an amalgamation has occurred, or at least reward those who are somehow able to do so; and that the PPSA rules should, in the absence of other considerations, encourage such behaviour. Proponents of the second alternative believe that there is no easy way for secured creditors to monitor whether an amalgamation has occurred; and that, in practice, in most cases secured creditors will extend further credit after amalgamation without any knowledge that the amalgamation has occurred. While a rule based on the knowledge of the secured creditor might be the most equitable, such a rule would be unduly complex. Therefore, proponents of the second alternative prefer a simple rule which fairly addresses the most common situation.

Taking Collateral in Partial Satisfaction of the Obligation Secured

[26] The Committee concluded that the current provisions in the PPSAs which empower a secured party to take collateral in satisfaction of an obligation are unnecessarily restrictive. They only enable a secured party to accept collateral in satisfaction of all of the obligation secured. As a result, there are instances at present where a secured party would prefer to accept the collateral but would not be willing to do so where the value of the collateral is less than the obligation secured because such acceptance would be in satisfaction of all of the obligation secured, with the consequence that the secured party would have no right to claim any deficiency from the debtor. Instead,

the secured party disposes of the collateral and necessarily incurs costs of disposition which typically are added to the amount of the debtor's obligation. Such costs of disposition result in an increase in the amount of the deficiency claim against the debtor.

[27] The proposed provisions, which have the support of the Committee, recognize that there are circumstances where incurring disposition costs is unnecessary and could be avoided. Specifically, the proposed provisions contemplate the possibility of acceptance of collateral by the secured party in satisfaction of part of the obligation secured where the debtor consents in writing to such partial satisfaction.

[28] The proposed provisions require the secured party to specifically state the part of the obligation secured which would be satisfied if the debtor's accepts the secured creditor's proposal to take collateral in partial satisfaction. The debtor's consent must be in writing. His or her mere failure to object to the secured party's proposal is not enough.

[29] The PPSAs do not currently prevent a debtor from agreeing after default to the acceptance by the secured party of the collateral in satisfaction of part of the obligation secured. However, the provisions proposed by the Committee go beyond the rights of the secured party and the debtor between themselves, and also address the rights of third parties including subordinate secured parties. The effect of an accepted proposal under the proposed provisions is to cut off the subordinate interests. A mere agreement between the secured party and the debtor would not have such effect. Of course, as in the case of the existing procedure for taking the collateral in "full" satisfaction, the proposed provisions ensure that third parties are given notice of the proposal, and an opportunity to object.

[30] The proposed provisions are premised on the belief that the availability of partial "foreclosure" will often produce fairer results than a disposition for all concerned. However, because of the perceived potential for abuse, and the complexity of providing statutory safeguards against it, the Committee concluded that provisions should not apply to transactions involving consumer goods.

[31] A draft of the proposed provisions is set out below. The draft was developed in the context of the Ontario PPSA, but could be readily adapted for incorporation into the counterpart provisions of the other PPSAs.

[OPPSA s. 65]

(1) [Provision dealing with consumer goods not found in Acts other than the OPPSA]

(2) In any case other than that mentioned in subsection (1), a secured party may, after default, propose to accept the collateral in satisfaction of all or part of the obligation secured and shall serve a notice of the proposal on the persons mentioned in clauses [OPPSA 63(4)(a) to (d)]

(3) If the secured party proposes to accept the collateral in satisfaction of part of the obligation secured, the notice under subsection (2) shall state the part of the obligation secured which would be satisfied by the acceptance of the collateral by the secured party.

(4) The secured party may not accept the collateral in satisfaction of part of the obligation secured if the debtor does not consent in writing to the acceptance by the secured party of the collateral in satisfaction of that part of the obligation secured which is stated in the notice under subsection (2).

(5) Subject to subsection (6) and (7), if any person entitled to notice under subsection (2), whose interest in the collateral would be adversely affected by the secured party's proposal, delivers to the secured party a written

objection within fifteen days after service of the notice,

- (a) the secured party may not accept the collateral in satisfaction of all of the obligation secured if the secured party had proposed to accept the collateral in satisfaction of all of the obligation secured, and the secured party shall dispose of the collateral in accordance with section [ ];
- (b) the secured party may not accept the collateral in satisfaction of that part of the obligation secured which is stated in the notice under subsection (2) if the secured party had proposed to accept the collateral in satisfaction of part of the obligation secured.

(6) The secured party may require any person who has made an objection to the proposal to furnish proof of that person's interest in the collateral and, unless the person furnishes the proof within ten days after demand by the secured party, the secured party may proceed as if no objection had been made.

(7) Upon application to the [in Ontario, the Superior Court of Justice] Court by the secured party, and after notice to every other person who has made an objection to the proposal, the court may order that an objection to the proposal of the secured party is ineffective because,

- (a) the person made the objection for a purpose other than the protection of the person's interest in the collateral or in the proceeds of a disposition of the collateral;
- (b) in the case of a proposal to accept the collateral in satisfaction of all of the obligation secured, the fair market value of the collateral is less than the total amount owing to the secured party and the estimated expenses recoverable under clause [OPPSA s. 63(1)(a)]; or
- (c) in the case of a proposal to accept the collateral in satisfaction of part of the obligation secured, the fair market value of the collateral is less than the part of the obligation secured which would be satisfied by the acceptance of the collateral by the secured party and the estimated expenses recoverable under clause [OPPSA s. 63(1)(a)].

(8) If the debtor has consented in writing to the acceptance by the secured party of the collateral in satisfaction of that part of the obligation secured which is stated in the notice under subsection (2) and if no effective objection is made to the proposal to accept the collateral in satisfaction of that part of the obligation secured, the secured party shall be deemed to have irrevocably elected to accept the collateral in satisfaction of that part of the obligation secured at the earlier of,

- (a) the expiration of the 15-day period mentioned in subsection (5); and
- (b) the time when the secured party received from each person entitled to notice under subsection (2) written consent to having the secured party retain the collateral in satisfaction of that part of the obligation secured which is stated in the notice under subsection (2).

(9) If no effective objection is made to the proposal to accept the collateral in satisfaction of the all of the obligation secured, the secured party shall be deemed to have irrevocably elected to accept the collateral in satisfaction of all of the obligation secured at the earlier of,

- (a) the expiration of the 15-day period mentioned in subsection (5); and
- (b) the time when the secured party received form each person entitled to notice under subsection (2) written consent to having the secured party retain the collateral in satisfaction of all of the obligation secured.

(10) After the time of the deemed election in subsection (8) or subsection (9), as the case may be, the secured party is entitled to the collateral free from all rights and interests in it of any person entitled to notice under

subsection (2) whose interest is subordinate to that of the secured party and who was served with the notice.

(11) When a secured party disposes of the collateral after the time of the deemed election in subsection (8) or subsection (9), as the case may be, to a purchaser who purchases in good faith for value and who takes possession of it or, in the case of an intangible, receives an assignment of it, the purchaser acquires the collateral free from any interest in it of the secured party and the debtor and free from every interest subordinate to that of the secured party, whether or not the requirements of this section have been complied with by the secured party.

Security Interests in Future Crops

[32] The Committee unanimously agreed to propose deletion of those provisions of the PPSAs which prevent a security interest in crops grown more than one year after the security agreement has been executed. See e.g. section 12(2)(a) of the Ont PPSA, and section 13(2)(a) of the NB PPSA. No similar limitation is found in Quebec law. The experience to date indicates that the increased transaction costs and risks resulting from the rule contributes to the general non-availability of crop financing under the PPSAs. Since security taken under the federal Bank Act is not subject to any equivalent restriction, agricultural producers may be effectively limited to bank financing. Minimally, the limitation restricts their access to the wider credit market available to debtors in other businesses.

Exemptions from Seizure under Security Interests

[33] The judgment enforcement laws of the Canadian provinces exempt certain basic assets of a judgment debtor from seizure. Without explicit legislative provision to the contrary, the courts in the common law provinces have held that a secured party is not caught by these exemptions unless it elects to forego its enforcement rights against the collateral and sue only on the debt.

[34] Exemption policy is designed to protect a debtor and his or her family from loss of assets required for their maintenance. Logically, this policy extends to the enforcement of secured debt. Indeed, there is an additional rationale in the secured credit context. Consumer goods with a value below the realizable values typically found in exemption statutes have little or no utility as collateral in the usual sense. The value of taking a security interest instead lies in the in terrorem effect of the secured creditor's power to threaten instant seizure. The power to seize consumer goods that are necessaries gives rise to the risk of abuse, not just of the debtor but also of the debtor's unsecured creditors, and leads only to economic waste when the threat is carried through. Persuaded by these considerations, the provinces of Saskatchewan, New Brunswick, Prince Edward Island, Nova Scotia, and Newfoundland now apply the same seizure exemptions to secured lenders and judgment creditors alike.

[35] The Committee decided unanimously to recommend that this approach be adopted as uniform national policy among all the common law provinces. No similar recommendation is needed in the Quebec context. Under the Quebec Code, hypothecary security is not permitted against consumer goods in the first instance, thereby dispensing with the need to legislate exemptions in the consumer secured credit context. Consumer goods "secured" financing is instead essentially restricted to purchase money financing, effected by way of retention of title (sale or lease) security (not considered to constitute hypothecary security in the strict sense in Quebec law).

[35] The Committee's recommendation is in line with a recommendation from Working Group 2 to the Superintendent's Personal Insolvency Task Force to add a provision to the Bankruptcy and Insolvency Act invalidating a non-purchase money security interest in consumer goods if the goods would be exempt from execution under the relevant provincial or territorial law. A very similar approach was recently recommended by the Personal Property Security Law Sub-Committee of the Business Law Section of the Canadian Bar

Association-Ontario.

[36] Although the basic policy is the same, the scope and quantum of the exemptions available to debtors in the judgment enforcement context vary somewhat from province to province. Since the exemptions applicable to secured creditors should be consistent with the exemptions applicable to judgment creditors, the Committee concluded that the details should be left to the individual provinces to determine; so should the decision as to whether our policy recommendation should be implemented through the incorporation of a parallel set of exemptions in the PPSA directly, or through an expansion in the relevant provisions of judgment enforcement legislation. However, recognizing that the existing law on exemptions in the judgment enforcement context may be out of date in at least some provinces, the Committee decided to also recommend a general review and updating of the law on exemptions in both contexts.

[37] Implementation of the Committee's recommendation does not carry any risk that consumer debtors will be forced into bankruptcy by secured creditors intent on avoiding the seizure exemption. This is an unlikely scenario on any cost/benefit analysis given the low values involved. But, in any event, the Bankruptcy and Insolvency Act ensures that the operation of the federal Act does not deprive a bankrupt of his or her pre-bankruptcy exemption entitlements. Section 136 of the Bankruptcy and Insolvency Act sets out a priority scheme for the division of the property of the bankrupt under which the interests of the various creditors are all "[s]ubject to the rights of secured creditors". However, s. 67(1)(b) excludes exempt property from the property of the bankrupt for the purposes of the Act, including the distribution scheme in section 136: "the property of a bankrupt divisible among his creditors shall not comprise . . . property that, as against the bankrupt, is exempt from seizure or execution" under provincial or territorial law.

[38] It is the Committee's view that implementation of its recommendation would not reduce access to credit for consumer borrowers. First, only very limited categories of assets fall within the scope of the exemption (e.g., as illustrated by paragraph (1) of the statutory prototype below, essential consumer goods and automobiles if necessary for the debtor to maintain his or her employment or means of livelihood). Second, even within these categories, purchase money financing, the most common and credible form of secured consumer credit, is fully preserved (as illustrated by subsection (5) of the statutory prototype below). Finally, the exemption regime we have in mind, and which is presently in force in those jurisdictions that have already implemented the recommended policy, would allow a secured creditor to enforce its security where the realizable value of the otherwise exempt property exceeds the value of the exemption, on condition that an amount equal to the value of the exemption be returned to the debtor (as illustrated by subsections (3) and (4) of the statutory prototype above). It follows that so long as the value of the secured credit that is extended by a creditor falls below the surplus realizable value of the relevant asset, the enforcement rights of secured creditors are fully preserved.

[39] Under the statutory prototype set out below, the onus is on the debtor, as being in the best position to know whether the facts to support the exemption are present, to claim and establish entitlement to the exemption: see the suggested wording in subsection (1) of the statutory prototype above (". . . the debtor may claim . . ."). This aspect of the proposal may need to be modified slightly in Alberta. Under current Alberta personal property security law, self-help seizure by secured creditors is precluded in favour of seizure by a civil enforcement bailiff. Under the current Alberta Civil Enforcement Act, where personal property is seized by a civil enforcement bailiff pursuant to a writ or a landlord's right of distress, the seizure documents that are served on a debtor must include a list of exemptions. If these exemptions are extended to seizure on behalf of secured creditors, as proposed here, consideration should be given, in the interests of preserving procedural consistency, to requiring a similar list to be provided to the debtor. A notice of objection procedure is provided in the current Alberta Civil Enforcement Act which permits the debtor to raise an objection to a seizure pursuant to a writ or a landlord's right of distress. Serious consideration will also need to be given to extending this procedure to cover a seizure of consumer goods pursuant to a security agreement.

[40] In order to communicate the intent and scope of the Committee's recommendation, it was decided to provide in this report a draft illustrative provision (the example is drawn from the relevant provisions of the PPSAs in effect in the Atlantic provinces which in turn reflect a recommendation of the Saskatchewan Law Reform Commission made in the context of modernizing judgment enforcement exemption policy):

[ ] (1) Subject to subsection (5), a debtor may claim the following items of collateral to be exempt from seizure by a secured party:

(a) furniture, household furnishings and appliances used by the debtor or a dependent to a realizable value of [insert relevant $ amount] or to any greater amount that may be prescribed;

(b) one motor vehicle having a realizable value of not more than [insert relevant $ amount] at the time the claim for exemption is made, or not more than any greater amount that may be prescribed, if the motor vehicle is required by the debtor in the course of or to retain employment or in the course of and necessary to the debtor's trade, profession or occupation or for transportation to a place of employment where public transportation facilities are not reasonably available;

(c) medical or health aids necessary to enable the debtor or a dependent to work or to sustain health; and

(d) consumer goods in the possession and use of the debtor or a dependent if, on application, the Court determines that

- (i) the loss of the consumer goods would cause serious hardship to the debtor or dependent, or
- (ii) the costs of seizing and selling the goods would be disproportionate to the value that would be realized.

(2) A dependent may claim an item of collateral within paragraph (1)(a), (c) or (d) to be exempt from seizure but a claim may not be made by both a debtor and a dependent with respect to an item of the same kind.

(3) If a claim for exemption is made under paragraph (1)(a) or (b) and the realizable value of the collateral for which the claim is made exceeds the maximum amount of the exemption specified in those paragraphs, the secured party may seize the collateral.

(4) A secured party who seizes collateral in the circumstances referred to in subsection (3) shall dispose of it in accordance with [OPPSA s. 63] and shall pay to the debtor an amount equivalent to the maximum amount of the exemption, whether or not the proceeds of the disposition exceed that maximum amount.

(5) Paragraphs (1)(a) to (c) and subsections (2), (3) and (4) do not apply in relation to goods that are subject to a purchase money security interest held by the secured party against whom the claim to exemption is made.

[42] As illustrated by subsection (5) of the draft provision, the enforcement rights of purchase money secured creditors would be excepted from the exemption regime. This exception would extend to all forms of purchase money financing, regardless of whether the purchase money security interest supports a purchase money loan or purchase money sale or lease credit.

[43] The Committee also discussed whether the provisions of the PPSAs which restrict non-purchase money security in after-acquired consumer goods should be repealed as being redundant in light of the above proposal on

exemptions. It was decided that these provisions should be retained, as arguably serving other policy objectives in addition to shielding the debtor's necessary assets from appropriation by secured creditors.

Assessment and Recommendation for Future Activities of the Committee

[44] At its final meeting, the Committee assessed the efficacy of the somewhat ad hoc issue-oriented approach employed by it since its formation. While some progress had been made, the Committee members concluded that in the longer run this approach would not likely result in a significant increase in uniformity between the PPSAs in effect in Ontario and the other provinces, or between the secured financing laws of Quebec and the PPSA jurisdictions. The experience of the Committee to date suggests that there are few discrete issues which are sufficiently noncontroversial to permit consensus to be reached on the appropriate resolution in the absence of a structure for deeper research and broader consultation. It was also agreed that an issue-by-issue approach does not adequately accommodate the heavily integrated structure of secured financing law, nor does it permit adequate assessment of the policy implications of a specific reform on related issues. It was also noted that the approach did not facilitate coordination with the ULC-sponsored work of Professors Cuming and Walsh referred to in paragraph [5] above.

[45] The Committee decided to recommend instead that it be authorized by the ULC to prepare a Uniform Personal Property Security Act. This approach would permit full coordination between this project and the Cuming/Walsh project. It would involve a systematic consideration of all aspects of personal property security law, including the feasibility of achieving broad agreement at least at the policy level between the Quebec and PPSA secured transactions regimes.

[46] It was agreed that a very important aspect of the new approach would be extensive and broadly-based consultation with individuals and groups interested in or affected by the development of this area of the law. Organized groups of credit grantors and credit consumers must be brought into the picture in order to ensure ultimate support for the recommendations the Committee develops. For the same reason, it was also agreed that efforts would need to be made to develop strong ties to the various government ministries responsible for secured financing legislation. Several avenues were discussed, including (high-level) government representation on the Committee from the outset.

[48] It is clear to the Committee that there are many practitioners who would be interested in being actively involved in a comprehensive reform project of this kind. This would provide a reservoir of volunteer expertise that could be drawn upon free of charge. Nonetheless, based on its experience with this project, it is the Committee's view that any future substantial progress depends on the availability of sufficient funds to cover:

- Regular in-person meetings of the Committee supplemented by teleconferences and other virtual exchanges; Research assistance in the preparation of background materials;
- The writing and circulation of issue and position papers;
- Consultation with stakeholders and interested constituencies including the holding of consultation meetings in different Canadian cities and regions; Tabulation and organization of responses from consultation initiatives;
- Ongoing services of an organizing secretariat to provide administrative, logistical, and secretarial, communication and clerical support.

[49] The Committee's limited mandate and the short amount of time available did not permit preparation of a

detailed timetable of "deliverables" or a detailed budget. However, the Committee is prepared to produce this if support in principle is obtained, and considers early agreement on a firm schedule of objectives and responsibilities to be an essential ingredient of success.

1. A third possible approach recommended by some experts who were consulted is to leave the matter for the courts to resolve.