PLEASE NOTE:
As an enhancement to the materials we have created, where possible, external web links to those cases and legislation that were available on the CanLII website. Please note, however, that not all links are reliable. The incorrect links appear to be especially problematic for the statutes, especially if the complete citation for the statute is not present at that exact spot in the materials. If you use the web links, please always double-check to ensure that you are being directed to the correct place.

The Nova Scotia Barristers' Society has prepared these Bar Review Materials for the sole purpose of assisting applicants to prepare for the Nova Scotia Bar Examination. These materials are reviewed and updated annually, and published May 1 each year as study materials for the upcoming July and January exams. These current materials are the study outlines for the July 2020 and January 2021 Bar Examinations and may be relied upon for that sole purpose. The materials are not intended to provide legal advice, and should not be relied upon by articled clerks, transfer applicants, lawyers or members of the public as a current statement of the law. Members of the public who access these materials are urged to seek legal advice and are specifically warned against reliance on them in any legal matter or for pursuit of any legal remedy. The Society will not be liable for any use you made of these materials, beyond their intended purpose.

NOVA SCOTIA
BARRISTERS' SOCIETY

COMMERCIAL TRANSACTIONS

April 2020

CONTENTS:

© Nova Scotia Barristers' Society

SALE OF GOODS

Introduction

The law of sale of goods is a specialized branch of contract and personal property law that has been largely codified through provincial statutes. The relevant statute in Nova Scotia is the *Sale of Goods Act*, RSNS 1989, c 408 ["SOGA"]. Despite this codification, the rules of the common law continue to apply, unless they are inconsistent with the express provisions of the SOGA (s. 60(1)). As well, the SOGA may be superseded in three ways under s. 56. First, the rules in the SOGA are enabling as opposed to mandatory and, thus, may be contracted out of expressly. Secondly, the course of dealing as between the parties may, in and of itself, be enough to vary or supersede the provisions of the SOGA. Third, established commercial usage in particular commercial contexts may negate or vary the provisions of the SOGA.

The sale of goods legislation is fairly consistent across the common law provinces, reflecting its shared source in the United Kingdom's *Imperial Sale of Goods Act, 1893*. This source statute reflects the character of commercial transactions of the late 19th century, where transactions were more often smaller scale, face-to-face, and without reliance upon security. At that time, there was little consideration of whether personal consumers ought to be subject to the same rules as commercial buyers. Provincial sale of goods legislation has not been substantially amended in response to changing commercial reality, despite consistent calls for change from law reform commissions. There has been some legislative response to consumer concerns, in the form of consumer protection legislation, which modifies, in certain circumstances, rules that would otherwise apply under the SOGA. There has also been statutory activity in the area of secured transactions, through personal property security legislation.

Scope of the SOGA

The SOGA applies only to transactions that are "contracts of sale", as defined by the SOGA. SOGA defines a contract for the sale of goods as being one where the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price (s. 4(1)).

1. Sale involving the transfer of property from a seller to a buyer

The contract must be a sale that involves the transfer of property from a seller to a buyer. As a consequence, bailments are excluded from the operation of the SOGA. Contracts to lease goods may, in some circumstances, also constitute sales. However, the test for characterizing transactions as either true leases or disguised conditional sales does not appear to be established. Traditionally, Canadian cases have followed the English obligation test, which asks whether, under the arrangement, there was an obligation to buy the goods in question; with the emphasis very much on the form of the transaction (*Helby* v. *Matthews*, [1895] AC 471). Thus, under the obligation test, transactions such as leases with an option to buy would

never be characterized as sales. However, when characterizing similar agreements in the context of personal property security legislation, Canadian courts are directed to consider the overall impact of the agreement, with the emphasis very much on the substance of the transaction. It is arguable that such an approach has replaced the obligation test in the sale of goods context but there appears to be no definitive judicial statement made to that effect. Similarly, agency agreements do not fall under the scope of SOGA as the agent in such an arrangement may not be classified as a buyer and no property passes to the agent (*B. & M. Readers' Service Ltd.* v. *Anglo Canadian Publishers Ltd.*, [1950] OR 159, [1950] OJ No 429 (Ont. CA)). However, contracts for sale or return will fall within the scope of the SOGA upon the buyer electing to keep or being no longer able to return the goods (*Atari Corpn (UK) Ltd v Electronics Boutique Stores (UK) Ltd*, [1998] 1 All ER 1010).

Note that a "contract of sale" includes an agreement to sell as well as a sale (s. 2(c)). A contract will be classified as an *agreement to sell* where property in the goods is to pass from the seller to the buyer at some future time or upon the fulfillment of any relevant conditions (s.4(2)(3)). A contract will be classified as a *sale* where property in the goods has already passed from the seller to the buyer (s. 4(1)).

2. Goods

The sale must be a sale of goods. "Goods" includes all chattels personal *other than* things in action and money (s. 2(h)). Therefore, contracts for the sale of land, or other chattels real such as leaseholds, are excluded. The express exclusion of "things in action" precludes the SOGA from applying to contracts for the assignment or transfer of debts owed to the transferor, shares, negotiable instruments and money.

"Goods" is further defined as including emblements (e.g., annual crops produced through agricultural labour such as wheat or potatoes), industrial growing crops, and things attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale (s. 2(h)). As a result, a contract for the sale of timber that is to be severed from the land could be subject to the SOGA, but a contract for a constructed item such as a garage, which is firmly attached to the land, would not.

Contracts for services are outside the SOGA and the conditions implied by the SOGA as to fitness and quality of goods will not apply, leaving the common law implied terms and consumer protection legislation. Difficulty arises where there is a hybrid contract, such as a contract to tailor a suit, where one party provides both goods and services. The question that arises is whether to characterize the agreement as being one of a sale of goods or one for work and materials.

Canadian jurisprudence is somewhat unsettled on how to properly distinguish between these two types of contracts and presents two separate tests. A "property" test asks whether the agreement involved the sale of a completed chattel (*Gee* v. *White Spot Ltd.*, [1986] BCJ No 896, 32 DLR (4th) 238). A "relative values" or "substantial character" test balances the value of the labour against the value of the materials: if the value of the materials outweighs the value of the labour, then the contract is subject to the SOGA (*Borek* v. *Hooper*, [1994] OJ No

916, 114 DLR (4th) 570 (Ont. Ct. (Gen Div)). The jurisprudential trend in Canada seems to favour the "property" test.

3. Money

The consideration for a contract for the sale of goods must be money. Contracts of barter or exchange are therefore outside the SOGA. Where the consideration for the goods is a combination of money and other goods, the contract will be within the SOGA as long as the substance of the transaction remains a sale as opposed to an exchange of assets (*Olympic Stone Construction Co.* v. *Momsen*, [1915] BCJ No 18, 21 DLR 271 (BCCA).

Formalities of contract formation

A contract for the sale of goods must comply with common law requirements. For example, the parties must intend to enter into a contract, and there must be offer and acceptance. The SOGA codifies part of the common law in s. 6, where it specifies that a contract for the sale of goods may be oral or in writing, or partially oral and partially written, or may be implied from the conduct of the parties (s. 6). However, if the value of the goods is $40 or more, the contract is not enforceable in court unless one of the following situations is present (s. 7(1)):

i) the contract is in writing and signed by the party to be charged,

ii) the buyer has accepted part of the goods and has received them,

iii) the buyer has given something in earnest to bind the contract, or

iv) the buyer provides part payment.

For the purposes of s. 7, acceptance is indicated when the buyer does any act in relation to the goods which recognizes a pre-existing contract of sale (s. 7(3)).

Types of goods

The SOGA distinguishes between "existing goods" and "future goods."

- *Existing goods* are goods that exist and are either owned or possessed by the seller when the contract is entered into (s. 8(1)).
- *Future goods* are goods to be manufactured or acquired by the seller after the making of the contract of sale (s. 2(g)).
- Existing goods can be the subject of either sales or agreements to sell, while future goods can only be the subject of agreements to sell (s. 8(3)).

The SOGA draws a further set of distinctions between "specific goods" and "unascertained goods", which are relevant for determining when the property in goods passes from the seller to the buyer.

- *Specific goods* are goods that are identified and agreed upon at the time the contract of sale is made (s. 2(n)), and so are the *only* goods that may be delivered in performance of the contract. They must be *identified* and not merely *identifiable* (*Kursell* v *Timber Operations & Contractors Ltd.*, [1927] 1 KB 298 (CA)).
- *Unascertained goods* are not defined by the SOGA. However, any goods that are not specific goods will be classified as unascertained goods. In other words, these are goods not identified and agreed upon at the time the contract of sale is made.
- Goods may be unascertained because they are defined with reference to a type; e.g., a contract with a wholesaler for 200 XBOX One game consoles. Any 200 XBOX One game consoles will be sufficient to perform the contract. Unascertained goods may also be generic goods; e.g., 100 tons of barley, or an unidentified part of a specified whole; e.g., 500 tons of goods out of 1,000 tons that are being carried on a specific ship (*Re Wait* (1918), 88 LJKB 585). Goods may also be unascertained because they do not yet exist (i.e., are future goods).
- Unascertained goods become "ascertained" when goods are specifically identified or individualized as the goods that are the subject of the contract (*Re Western Canada Pulpwood Company Limited*, [1930] 1 DLR 652 (Man. CA), aff'g [1929] 4 DLR 337).

Transfer of property

It is essential to identify when the property in goods is transferred from the seller to the buyer for several reasons. Firstly, it needs to be determined to assess which party will bear the loss in the event the goods suffer loss, deterioration, damage or destruction. Unless otherwise agreed, goods are at the seller's risk until the property is transferred to the buyer at which time the goods become at the risk of the buyer (s. 23). Secondly, as discussed below, whether or not the property has transferred affects the remedies available to the buyer and the seller. Thirdly, until property has passed, the buyer is merely in the position of an unsecured creditor in the event of the seller's insolvency. Once property has passed, the buyer may remove his or her goods from the pool of assets available to the seller's general creditors.

General rules

- Property in specific or ascertained goods passes at such time as the parties intend it to pass (s. 20(1)). In determining intention, regard must be given to the contract, the conduct of the parties, and the circumstances of the case (s. 20(2)).
- Property in unascertained goods cannot pass until goods are ascertained (s. 19).

- Unless a different intention may be inferred expressly or impliedly, the SOGA asserts rules for ascertaining the intentions of the parties regarding when the property is to pass to the buyer:

Provisions that apply to contracts for the sale of specific goods

Section 21 rule 1

Where the contract is unconditional and the specific goods are in a deliverable state, property passes when the contract is made regardless of whether payment or delivery is postponed.

- "Deliverable state" means the goods are in such a state that the buyer would, under the contract, be bound to take delivery of them (s. 3(3)).
- If, without the knowledge of the seller, the goods have perished at the time the contract is made, property does not pass and the contract is void (s. 9).

Section 21 rule 2

Where there is a contract for the sale of specific goods, and the seller is bound to do something to the goods to put them in a deliverable state, property does not pass until this is done and notice is given to the buyer that it has been done.

- The notice must be actual notice (*Jerome* v. *Clements Motor Sales Ltd.*, [1958] OR 738-758, 15 DLR (2d) 689 (Ont. CA)).
- Where there is an agreement to sell specific goods and the goods subsequently perish without any fault on the part of the seller or buyer before the risk passes to the buyer, the contract is avoided (s. 10).

Section 21 rule 3

Where the contract is for specific goods in a deliverable state, but the seller must weigh, measure or test the goods for the purpose of ascertaining the price, property does not pass until this is done and the buyer receives notice that it has been done.

- Note that s. 10 also applies to rule 3, as does the jurisprudence regarding notice.
- Note that the *de minimus* rule applies to contracts for the sale of goods (i.e., the law does not concern itself with trivial matters).

Provisions that apply to contracts for goods sold on sale or return (goods could be either specific or unascertained)

Section 21 rule 4

Where goods are delivered "on sale or return", the property passes when the buyer signifies approval or does some other act adopting the transaction, *or* retains the goods without giving notice of rejection beyond a fixed or reasonable time. What is a reasonable time is a question of fact.

- Provisions regarding when goods are accepted are discussed below.

Provisions that apply to contracts for the sale of unascertained or future goods

Section 21 rule 5

Where there is a contract for the sale of unascertained or future goods by description, the property in the goods passes when goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller.

- Assent can be express or implied.
- Goods must be ascertained and also unconditionally appropriated.
- Unconditional appropriation involves the irreversible attachment of the now ascertained goods to the contract.
- Delivering the goods to a third party carrier for delivery to the buyer will be deemed to constitute unconditional appropriation (s. 21 Rule 5(2)).
- Until the seller is in a position where he or she cannot change his or her mind about which particular goods will be used to perform the contract, the goods are not unconditionally appropriated. Merely packaging and setting aside goods that *could* be used to fulfil the seller's contractual obligations is not enough (*Carlos Federspiel* v. *Twigg*, [1957] 1 Lloyd's Rep 240 (QB)).

Obligations

The SOGA implies certain conditions and warranties into the contract of sale. Parties may contract out of these obligations. Courts generally require such exclusions to be express.

Obligations of the seller

1. Right to sell

Unless circumstances show a different intention, in the case of a *sale* there is an implied condition on the part of the seller that the seller has a right to sell the goods. In the case of an *agreement to sell*, there is similarly an implied condition that the seller will have a right to sell the goods at the time when the property is to pass (s. 15(a)).

- This provision does not require the seller to have title to the goods, but rather a right to sell it.
- If a seller can be lawfully stopped from selling the goods, then the implied condition of the right to sell is not met, even though good title could be passed from the seller. For example, there is no right to sell where the goods bear a label that infringes a third party's

trademark and so cannot be exported/imported. (*Niblett* v *Confectioners' Materials Co.,* [1921] 3 KB 387 (CA)).

- If goods are stolen, and the offender convicted of theft, title to the goods *always* reverts to the original owner (s. 27(1)).
- The SOGA expressly adopts the *nemo dat quod non habet* doctrine. The Latin maxim "nemo dat quod non habet"—translation: "no one can give what he does not have," or, stated alternatively, "one cannot give better title than he has"—carries considerable importance in property law. The maxim provides that a buyer can acquire no better title than that possessed by the seller (s. 24).
- The SOGA provides several express exceptions to the *nemo dat quod non habet* doctrine that allow a good faith purchaser for value without notice to take the goods free of any prior claims:

    a. The original owner by their conduct may be precluded from denying the seller's authority to sell (s. 24). For this exception to be made out, it must be determined that the original owner failed to take sufficient steps to prevent the wrongful transfer by the seller. However, the original owner's mere giving of possession of the goods or being careless with ownership documents is not sufficient to make out this exception. (*Canaplan Leasing Inc.* v. *Dominion of Canada General Insurance Co.*, [1990] BCJ No 914, 69 DLR (4th) 531).

    b. Where the sale is made by a mercantile agent who has possession of the goods in such a capacity with the permission of the original owner, the good faith purchaser receives good title. (s. 25(a)) of the SOGA and s. 3(1) of the *Factors Act*, RSNS 1989, c 13.).

    c. Where a seller has voidable title, a good faith purchaser takes good title unless the original owner (i) takes action to avoid the sale prior to the purchaser taking title, or (ii) causes the buyer to have notice of the seller's defective title (s. 26).

    d. Where a seller retains possession of the goods or documents of title after selling them, and the seller subsequently resells the goods to a second buyer, then the second buyer will have good title as long as he or she receives the goods in good faith and without notice of the previous sale (s. 28(2)). A more recent Canadian case has confirmed that possession of either the goods or documents of title is sufficient to meet this exception (*Bartin Pipe* v. *Epscan*, 2004 ABCA 52, [2004] AJ No 126.

    e. Where, with the consent of the seller, the buyer is in possession of the goods or documents of title prior to the transfer of title and the buyer sells the goods to a second buyer, the second buyer receives good title as long as he or she receives it in good faith (s. 28(3)). There is some debate as to the precise scope of this exception. Some cases have required the second sale to be in the buyer's ordinary course of business (*Newtons of Wembley Ltd* v *Williams*

[1964] 3 All ER 532) while others have not (*General Motors Acceptance Corp. of Canada Ltd.* v. *Hubbard*, [1978] NBJ No 58, 21 NBR (2d) 49).

2. Right to quiet possession

Unless circumstances show a different intention, there is an implied warranty that the buyer shall have and enjoy quiet possession of the goods (s. 15(b)).

- This warranty is more forward looking than the condition of the right to sell. This warranty may be breached if the buyer becomes precluded from enjoying the goods after the sale is concluded; e.g., if a third party obtains a patent for the goods after the completion of the sale such that the buyer cannot use the good without infringing the patent (*Microbeads AC* v *Vinhurst Road Markings Inc.*, [1975] 1 All ER 529 (CA)).

3. Right to freedom from encumbrances

Unless circumstances show a different intention, there is an implied warranty that the goods shall be free from any charge or encumbrance in favour of a third party, which is not declared or known to the buyer before or at the time the contract is made (s. 15(c)).

4. Goods must correspond with description

When goods are sold by description, there is an implied condition that the goods must correspond with their description. If the sale is both by sample and by description, the goods must correspond with both (s. 16).

- In this context, the "description" relates to the *identity* of the goods, not their *quality*. Thus, poisonous mink food is still mink food and will not breach this condition (*Ashington Piggeries Ltd.* v. *Christopher Hill Ltd.*, [1972] AC 441 (HL)).
- Whether or not the language used to describe the good is a term of the contract, or merely a pre-contractual representation, is determined pursuant to the common law. The meaning of the description is assessed objectively.

5. Terms of quality

The SOGA implies certain terms of quality and fitness into contracts for the sale of goods. No other warranty or condition to such effect may be implied into the contract (s. 17), unless it is annexed by usage of trade (s. 17(c)). Express contractual warranties or conditions do not negate the terms implied by the SOGA, unless they are mutually inconsistent (s. 17(d)).

a) Fitness for purpose

If a buyer makes known expressly or by implication to a seller

i) the particular purpose for which goods are required,

ii) so as to show that the buyer relies on the seller's skill and judgment, and

iii) the goods are sold in the ordinary course of the seller's business, then

iv) there is an implied condition that the goods shall be reasonably fit for such purpose (s. 17(a)).

- The requirement that the goods be sold in the ordinary course of the seller's business excludes private sales, and will probably exclude "one-off sales", such as a business selling off its used office furniture.
- If the buyer does not expressly state a purpose for the goods, the purpose will be implied if it is obvious from the character of the goods.
- Once the particular purpose is made known, there arises an inference that the buyer relied on the seller's skill and judgment. This presumption is rebuttable. (*Kendall & Sons* v *Lillico & Sons,* [1966] 1 All ER 309 (HL)).
- There is no implied condition as to fitness if the article is sold under its patent or trade name (s. 17(a)). This exception has been construed narrowly: merely asking for an item by its trade name does not remove protection of s. 17(a). Courts will consider whether the buyer specified the trade name so as to indicate that he or she is not relying on the seller's skill and judgment (*Baldry* v *Marshall,* [1925] 1 KB 260 (CA)).

b) Merchantable quality

Where goods are bought by description from a seller who deals in goods of that description, there is an implied condition that the goods are of merchantable quality (s. 17(b)).

- This condition applies regardless of whether the seller is or is not the manufacturer.
- The case law has developed two tests of merchantability: one based on *saleability* and the other on *usability*. The test based on usability seems to be favoured by Canadian courts.
- The test based on saleability asks whether a reasonable person would, after a full examination of the good, accept it under the same contractual terms (*International Business Machines Co Ltd.* v. *Scherban et al.*, [1925] SJ No 39, 1 DLR 864 (Sask. CA)).
- The test based on usability asks whether the good is reasonably fit for any one of its usual purposes. If the good is reasonably fit for any of its usual purposes, then it is merchantable (unless the price difference between the higher and lower quality is not so substantial as to be a throwaway price) (*Kendall v Lillico, Brown (BS) & Sons*, [1970] 1 All ER 823 (HL)).
- If the buyer has examined the goods, then there is no implied condition as regards defects that the examination ought to have revealed (s. 17(b)). Courts will objectively assess whether the defect ought to have been discovered pursuant to a proper inspection. However, if the buyer takes the opportunity to examine the

goods, he or she may be estopped from denying that a full examination was made; thereby being bound by defects that a full examination would have revealed (*Thornett and Fehr* v. *Beers & Son,* [1919] 1 KB 486)).

Delivery, time and quantity

Delivery

"Delivery" is the "voluntary transfer of possession from one person to another" (s. 2(1)(d)), and the seller has a "duty" to deliver the goods in accordance with the terms of the contract (s. 29). Delivery and payment of the price are deemed to be concurrent conditions, unless agreed otherwise (s. 30).

Place and expense of delivery

The place of delivery is to be determined first with reference to the contract (s. 31(1)). If the contract is silent, then the seller's place of business is deemed to be place of delivery. An exception arises where the goods are specific goods which to the knowledge of the parties are located somewhere else. In this case, that other place is the place of delivery (s. 31(1)). Delivery, or demand of delivery, is ineffective unless made at a reasonable hour (s. 31(4)). What is considered a "reasonable hour" is a question of fact (s. 31(4)).

Any expenses required to place the goods into a deliverable state are borne by the seller, unless otherwise agreed (s. 31(5)).

Contracts with carriers

If the contract requires the seller to effect delivery by sending the goods to the buyer, then the seller must make a reasonable contract with a carrier for delivery, having regard to the nature of the goods and other circumstances (s. 34(2)). If the seller does make a reasonable contract, then delivery of the goods to the carrier is deemed to be a delivery of the goods to the buyer (s. 34(1)). The risk of deterioration of the goods that is necessarily incidental to the course of transit is, unless otherwise agreed, borne by the buyer (s. 35). However, if the seller omits to make a reasonable contract, and the goods are lost or damaged in transit, the buyer may decline to take delivery or may pursue damages against the seller (s. 34(2)).

Time

In commercial sales, unless a different intention appears from the terms of the contract, the general rule has been that stipulations as to time of delivery are *prima facie* deemed to be of the essence (*Bunge Corpn.* v. *Tradax SA,* [1881] 2 All ER 516 (HC)). It should be noted that the Supreme Court of Canada, in a more recent case involving payments on a charter

party contract, suggested that time is not deemed to be of the essence in any commercial contract (*Sail Labrador Ltd.* v. *Challenge One (The)*, [1999] 1 SCR 265, [1999] 1 SCJ No 69).

However, it is fairly certain that any presumption of stipulations as to the time of delivery being of the essence does not apply as a matter of course to consumer sales (*Allen* v. *Danforth Motors*, 12 DLR (2d) 572, [1958] OJ No 29(Ont. CA)).

If the seller is bound to send the goods to another location, but the contract does not specify when the goods are to be sent, then the seller must send the goods within a reasonable time (s. 31(2)). The meaning of "reasonable time" is a question of fact (s. 57).

Quantity

The seller must deliver the proper quantity of goods. If too few goods are delivered, the buyer may reject the goods or accept them at a pro-rated price (s. 32(1)). If a surplus of goods is delivered, then the buyer may reject the whole, accept the goods included in the contract and reject the surplus, or accept the whole delivery. If the buyer accepts the whole delivery, the buyer must pay for the surplus at the contract rate (s. 32(2)).

Unless otherwise agreed, the buyer is not obliged to accept delivery of the goods by instalments (s. 33(1)). If the delivery is by instalments, and one instalment is defective, then one must look at the contract and the whole of the circumstances to determine whether the breach is severable and so gives rise to a claim for compensation, or if the breach supports a right to treat the entire contract as repudiated (s. 33(2), *Maple Flock Co. Ltd.* v. *Universal Furniture Products (Wembley) Ltd.*, [1934] 1 KB 148).

Remedies of the buyer

Rejection of the goods

Breach of an implied or express condition may give rise to a right to treat the contract as repudiated, and to reject the goods, while breach of a warranty may only give rise to a claim in damages (s. 14(2)). Whether a term is a condition, or merely a warranty, depends on the construction of the contract (s. 14(2)).

Losing the right to reject

Following a breach of a condition, the buyer may waive the right to reject, and choose instead to treat the breach of condition as a breach of warranty (s. 14(1)).

Section 14(3) sets out an important limitation on the right of a buyer to reject for breach of condition which ties in with the matters of property transfer and acceptance:

> Where a contract of sale is not severable and the buyer has accepted the goods, or part of the goods, *or*

> where the contract is for specific goods, the property in which has passed to the buyer, *then*
>
> the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as grounds for rejecting the goods and treating the contract as repudiated, *unless*
>
> there is a term of the contract, express or implied, to that effect.

This raises two issues:

- With respect to specific goods, the right to reject is lost as soon as property passes. Under s. 21 rule 1, where there is a sale of specific goods in a deliverable state, property passes as soon as the contract is made. Therefore, s. 14(3) would indicate that if the contract is also unconditional, then the right to reject is lost upon entering into the contract. Under s. 21 rule 2, property shall pass when the goods are placed in a deliverable state and notice of this has been provided to the buyer. Under s. 21 rule 3, where goods have to be weighed or measured in order to determine price, property passes as soon as this is done and notice has been provided to the buyer. In some cases, courts have been unwilling to prevent a buyer from rejecting specific goods on the basis of this aspect of s. 14(3) on the grounds that it renders the buyer's right to reject meaningless when it comes to specific goods (*Wojakowski* v. *Pembina Dodge Chrysler Ltd.*, [1976] MJ No 277, [1976] 5 WWR 97).
- With respect to unascertained goods, the buyer loses the right to reject where the agreement is not severable and there is acceptance of the goods or part thereof. Whether a contract is severable or not depends upon whether delivery is made in stated instalments. If a contract is severable, then accepting part of the goods does not amount to acceptance of the entire order. In other words, the buyer does not lose the right to reject subsequent deliveries. Only if the contract is not severable, will accepting part of the goods amount to acceptance of the entire order. Whether a contract is severable or not will depend on the agreement itself and the circumstances of the case (s. 33(2), *Maple Flock Co. Ltd.* v. *Universal Furniture Products (Wembley) Ltd.*, [1934] 1 KB 148).

Acceptance of the goods

- Where goods are delivered to the buyer and the buyer has not previously examined them, the buyer must be given a reasonable opportunity to examine them (s. 36(1) and (2)).
- The buyer is deemed to have accepted the goods where (s. 37):
  - the buyer intimates to the seller that the buyer has accepted them;
  - after lapse of a reasonable time, the buyer retains the goods without intimating to the seller that the buyer has rejected them; or

- after the goods have been delivered to the buyer, the buyer does any act in relation to the goods that is inconsistent with the ownership of the seller.

In a number of instances, it has been held that retaining and using the goods for some time, based on inducements that the goods would be satisfactorily repaired or otherwise put right by the seller, does not constitute acceptance (*Rafuse Motors Ltd.* v *Mardo Construction Ltd.*, [1963] NSJ No 21, 41 DLR (2d) 340 (NSCA)).

The relationship between s. 36 (opportunity to examine) and s. 37 (deemed acceptance) is not entirely clear. The English Court of Appeal found, in *Hardy & Co.* v *Hillerns*, [1923] 2 KB 490, that if a buyer does not examine the goods but instead *immediately* upon receipt thereof resells to a second buyer, this act is inconsistent with the ownership of the goods by the original seller. As a result, the buyer is deemed to have accepted the goods notwithstanding the fact that the buyer may not have had a reasonable opportunity to examine them. As a consequence, if the second buyer rejects the goods for breach of condition, the original buyer will only be able to sue the original seller for damages.

Although the substance of the decision in this case has since been reversed in England by statute, our SOGA has not been similarly amended. However, there is an Ontario Appeal Court decision (*A.J. Frank & Sons Ltd.* v. *Northern Peat Co. Ltd.*, [1963] 2 OR 415, 3 DLR (2d) 721) which suggests that the buyer may reject the goods as long as it has possession of them as at the time of rejection despite any resale. As a result, there may be some question as to where that leaves the law in Nova Scotia, i.e., does an act inconsistent with the seller's ownership necessarily oust the right to a reasonable opportunity to examine the goods, or must the opportunity for a reasonable examination always pass before the goods are deemed accepted?

Damages

The SOGA contemplates two different situations where the buyer may recover damages. First, for breach of warranty, the buyer may either bring an action for damages (s. 54(1)(b)), or bring a set-off in response to an action by the seller for the price of the goods (s. 54(1)(a)). Second, damages are available if the seller wrongfully neglects or refuses to deliver the goods to the buyer (s. 52(1)).

The measure of damages for a general breach of warranty is determined partially from the SOGA and partially from the common law. The SOGA appears to differentiate between the damages that are available for breaches of warranties of quality (e.g., merchantability, description, fitness for purpose, etc.) and breaches of any other warranty.

Sections 51 and 52 of the SOGA refer to damages for breach of warranty generally, and codify one branch of the *Hadley* v. *Baxendale* test for damages: all damages directly and naturally flowing from the breach of contract are claimable. However, as the rules of common law continue to apply (s. 60 and 55), the second branch of the *Hadley* test presumably also applies, permitting claims for special damages which were foreseeable at the time the contract was entered into.

For breaches of warranties of *quality*, the damages are "*prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty" (s. 54 (3)). This presumptive rule for measuring damages for breach of warranty relating to quality is displaced in most cases. Buyers often frame their action in terms of s. 52, despite the breached warranty being one of quality. Also, courts appear willing in most cases to assume that, if foreseeable and direct damages go beyond the difference in market value, that these damages are recoverable also (*Sunnyside Greenhouses and Golden West Seeds Ltd.*, [1972] AJ No 140, 27 DLR (3d) 434 (Alta CA)).

In an action for failure to deliver, the damages are *prima facie* the difference between the contract price and the market value when the failure to deliver occurred (s. 52 (3)). The *prima facie* presumption only operates where there is an available market. Where there is no such market, damages are awarded to reflect the estimated loss arising naturally and directly from the non-delivery (s. 52(2)).

Specific performance

In any action for the breach of contract to deliver specific or ascertained goods, the court may, if it thinks fit, direct that the contract be performed specifically (s. 53(1)).

As expressed, the remedy is only available for specific or ascertained goods. The remedy is discretionary and s. 53 does not change the general circumstances where specific performance is available (i.e., the goods should be of special interest or value and damages are not an appropriate remedy) (*George Eddy Co. Ltd. v. Corey et al*., [1951] 4 DLR 90, 28 MPR 140 (N.B.C.A.).

Remedies of the seller

Rights of unpaid seller

For the purposes of remedies, 'seller' is defined to include the seller's agent (s. 40(2)). An unpaid seller has both real and personal remedies.

Real remedies

The three real remedies are:

- a **lien** on the goods or right to retain them for the price while in possession of them;
- if the buyer is insolvent, a **right of stoppage** of the goods in transit; and
- a **right of resale** as limited by the SOGA (s. 41).

A contract of sale is not rescinded by the mere exercise of an unpaid seller of his or her right of lien or retention or stoppage *in transitu* (s. 49(1)). However, if the seller assented to

the buyer disposing of the goods to a third party, that third party's rights may defeat the seller's right to exercise the real remedies (s. 48).

1. Lien

Section 42(1) of the SOGA provides an unpaid seller, where the seller has delivered part of the goods, with a right of lien or retention over the remainder of the goods subject to exceptions. This remedy is only available if:

- the seller must be unpaid,
- the goods must not have been sold on credit ***unless*** the terms of credit have expired or the buyer becomes insolvent, and
- the seller must still be in possession of the goods.

Loss of the lien

The unpaid seller of goods loses his or her lien or right of retention in the following situations (s. 44(1)):

- when the seller delivers goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods,
- when the seller waives the lien, or
- when the buyer lawfully obtains possession of the goods.

Obviously, the seller also loses the lien if the seller is paid. However, the unpaid seller does not lose its lien or right of retention by reason only that it has obtained judgment for the price of the goods (s. 44(2)).

2. Stoppage in transitu

An unpaid seller has the right to stop the goods "in transit," resume possession, and retain them until payment of the purchase price. This remedy is only available if (s. 45):

- the seller is unpaid, and
- the buyer is insolvent.

"Goods in transit"

Goods in transit are goods delivered to a carrier or other bailee for the purpose of transmission to the buyer, until the buyer or its agent takes delivery of them (s. 46).

Manner of effecting stoppage *in transitu*

The seller must either take actual possession of the goods or give notice to the carrier who has possession of them. The carrier must then redeliver the goods to the seller at the seller's expense (s. 47).

3. Right of resale

Where an unpaid seller exercises a right of lien or stoppage in transit and resells the goods, the new buyer acquires good title against the original buyer (s. 49(2)).

An unpaid seller has a right of resale if (ss. 49(3) and (4)):

- the right of resale is expressly reserved in the contract;
- if the goods are perishable;
- if notice to the buyer of intention to resell is given and the buyer does not pay within a reasonable time; or
- if the seller expressly reserves the right of resale, and the conditions for this right to be exercised are present.

The seller may recover damages from the original buyer for breach of contract (s. 49(3)).

Personal remedies

Unless otherwise indicated by the contract, the seller has the right to bring an action for the price of the goods once property has passed or for damages if the buyer wrongfully refuses to accept the goods (ss. 50 and 51, respectively).

The seller has a duty to mitigate damages.

Privity of contract, Manufacturers' Liability and private secondary sales

The requirement of privity between contracting parties can create difficulties for purchasers of goods who may only be able to seek recourse against the immediate seller, and not the manufacturer or any other supplier of the goods. This is especially problematic for the buyer where the immediate seller is insolvent.

- The SOGA does not vary the common law on privity of contract.
- Common law options that may allow a buyer to hold a manufacturer liable include:
    - Bringing an action in tort for negligence in manufacture, design or failure to warn (i.e., product liability cases) using the *Donoghue* v. *Stevenson* "neighbour" principle. Damages are, generally speaking, only available for personal injury or property damage. Recovery of pure economic loss may be granted in cases where the goods pose a real and substantial danger. However, recovery would be limited to the cost of repair or replacement so that the goods no longer pose a real and substantial danger (*Winnipeg Condominium Corp. No 36* v *Bird Construction Co.*, [1995] 1 SCR 85). In addition, Canadian courts have determined that, at least in theory, relational economic losses may also be recoverable (i.e., loss suffered by a third party to the contract) on the grounds of proximity as between the parties (*Bow Valley Husky (Bermuda) Ltd.* v *Saint John Ship Building Ltd* (1977), 153 DLR (4th) 385 (SCC)).

- If there has been a negligent misstatement, the purchaser may sue in tort under *Hedley Byrne* [1964] AC 465 (HL) and recover for pure economic loss.
- An action may also be possible in contract pursuant to a collateral contract based upon a representation by the manufacturer upon which the buyer relied when making the purchase (*Carlill* v *Carbolic Smoke Ball*, [1892] 2 QB 484 (CA)). In addition, courts have enforced guarantees or independent warranties provided by manufacturers that accompany the goods (*Maughan* v. *International Harvester Co. of Canada Ltd*., (1980), 112 DLR (3d) 243 (NSCA)).

Limitation of Liability Clauses

Limitation of Liability clauses or disclaimer clauses are frequently inserted in contracts in an effort to either exclude the seller's liability or limit the extent of such liability. For an exclusion clause to be enforceable, it is important that:

- The purchaser be provided with sufficient notice of the clause.
- The act or event for which the seller is seeking protection under the clause be contemplated by the clause.
- The party claiming protection under the clause be able to invoke it.

The Supreme Court of Canada in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)* (2010 SCC 4, [2010] 1 SCR 69 set out the contemporary approach to the evaluation of the enforceability of limitation of liability clauses. *Tercon* requires that the court first examine whether the exclusion clause applies to the circumstances. If it does apply, the court must go on to determine if the clause is unconscionable at the time the contract was made, with the example being given as unequal bargaining power between the parties. Finally, the court must examine whether it should decline to enforce the otherwise valid exclusionary clause due to public policy considerations. In addition, the interpretation of exclusion clauses is subject to the doctrine of contra proferentem, under which any ambiguities in a contractual provision must be resolved against the party that benefits from the operation of the them. As well, the interpretation of limitation fo liability clauses seeking to exclude or limit liability for negligence are subject to a separate and stricter analysis.

In some cases, an exclusion clause can even exempt a party from liability for negligence, but a party's liability arising from fraud generally cannot be excluded. However, the ability to contractually limit liability in consumer contacts is limited by the *Nova Scotia Consumer Protection Act* (s. 28(1)), which disallows any contractual limitation or exclusion of the implied conditions and warranties set out in the CPA.

Consumer protection

The Nova Scotia *Consumer Protection Act*, RSNS 1989, c. 92 ["CPA"] primarily addresses the regulation of consumer credit. It also includes some provisions on consumer sales.

Scope of the CPA

A "consumer sale" includes both sales of goods and sales of services, including agreements of sale, as long as the sale is made in the seller's ordinary course of business. The goods must be purchased for the buyer's own personal consumption or use (s. 26(1)). The CPA does not include a sale:

- to a purchaser for resale (s. 26(1)(a));
- to a purchaser whose purchase is in the course of carrying on business (s. 26(1)(b));
- to a corporation, association or partnership (s. 26(1)(c)); or
- by a trustee in bankruptcy, a receiver, a liquidator or a person acting under the order of a court (s. 26(1)(d)).

Relationship between the CPA and the SOGA

Consumer sales contracts may be subject not only to the CPA, but also to the SOGA as long as the contract meets its statutory criteria. This is a somewhat moot point regarding implied terms, as the terms implied under the SOGA are replicated within the CPA (see below). However, the remedies available under the CPA and the SOGA vary.

Terms implied into consumer sales contracts

A number of terms that are implied pursuant to the SOGA are also implied pursuant to the CPA. There are some differences between how these terms are introduced in the two statutes, so care should be taken when comparing these implied terms. Unlike the terms implied by the SOGA, parties cannot contract out of the CPA (s. 21) or its implied terms (s. 26(3)). Any term which purports to negative or vary the implied terms, or states that the CPA does not apply, is void (s. 28(1)) and/or severable (s. 28(2)) and not considered evidence of an intention that the implied terms are not to apply (s. 28(3)).

Implied term	SOGA section	CPA section
Condition of a right to sell	15(a)	26(3)(a)
Warranty of quiet enjoyment	15(b)	26(3)(b)
Warranty of freedom from encumbrance	15(c)	26(3)(c)
Condition of correspondence with description	16	26(3)(d)

Implied term	SOGA section	CPA section
Condition of fitness for purpose	17(a)	26(3)(e)
Condition of merchantable quality	17(b)	26(3)(f)

The CPA implies other terms that are not mirrored in the SOGA. They include:

- A condition that the goods be of merchantable quality *except for such defects as are described* (s. 26(3)(h)). This provision is stronger than s. 26(3)(d), and may render it redundant.
- A condition that goods are new and unused unless otherwise described (s. 26(3)(i)).
- A condition that goods shall be durable for a reasonable period of time (s. 26(3)(j)). The meanings of "durable" and of "reasonable period of time" are both assessed objectively, based upon the nature of the goods and the character of the contract, having regard to the use to which they would normally be put and to all the surrounding circumstances.
- A condition that, when a sale is one of services, the services shall be performed in a skilful, efficient and competent manner (s. 26(5)). This section of the CPA was amended in 2018 to insert "efficient and competent" in place of "workmanship like". The reasoning given was the replacement of a gendered term. However, as the standard for "workmanship like manner" reflects the standards established through the law of negligence, the question becomes does the change in wording of the CPA alter the meaning of the provision?

Warranties regarding automobiles

The CPA overrides the common law with respect to privity of contract, and the characterization of pre-contractual representations, regarding automobiles. It deems statements made by a manufacturer or seller to be express warranties (s. 28A(1)), if the statement is made:

- By a seller to purchaser as part of a written contract (s. 28A(1)(a)) or
- to the public or any part of the public, including any advertisement (s. 28A(1)(b)).

Where a manufacturer or seller makes a statement which is captured by s. 28A(1)(b), the express warranty is deemed to be part of the contract of sale (s. 28A(2)). Every subsequent purchaser of the automobile has the same rights as if he or she were the original purchaser

(s. 28A(3)). No person may collect or charge a fee for the statutory transfer of the warranty (s. 28A(4)).

Remedies

Consumers can make use of common law remedies for violations of the implied terms, or may choose to pursue a remedy under the SOGA if the transaction and term are also addressed within that statute. Those who violate the CPA itself are guilty of an offence, and liable on summary conviction to a fine of not more than $25,000 or imprisonment for no more than a year, or both penalties (s. 29(1)). Corporations that are found guilty of violating the CPA will be liable to a fine of up to $300,000 (s. 29(2)).

Other consumer protection statutes

Competition Act, RSC 1985, c. C-34 (the "CA")

This federal statute provides criminal sanctions against those who make misleading or false advertising representations to the public (s. 52(1)). Representation is broadly defined to include wrappings, tags, displays or anything else that accompanies a good (s. 52(2)).

A conviction for violating the false advertising prohibition does not require evidence that a consumer was actually misled (s. 52(1.1)).

The CA also sets a standard of disclosure for telemarketers (s. 52.1), and prohibits certain types of selling techniques. The CA defines telemarketing as "the practice of communicating orally by any means of telecommunication" (s. 52.1(1)) and so such practices as faxes, or pre-recorded announcements may not be subject to these provisions.

The CA also regulates multi-level selling, prohibits the form of multi-level selling known as pyramid selling (ss. 55 and 55.1), and prohibits double-ticketing (s. 54). As well as providing for criminal sanctions of fines and imprisonment, there are also remedies for the victims of these offenses in the form of damages.

Direct Sellers' Regulation Act, RSNS 1989, c 129 (the "DSA")

The DSA regulates "direct selling," where the first contact with the consumer is made by a salesperson outside of a retail outlet. This includes selling, offering for sale or soliciting orders for future delivery of goods or services, and the sale of hearing aids regardless of the circumstances of the sale (ss. 2(a) and (d)).

The DSA does not apply to several types of direct sale contracts, including:

- contracts for goods or services that are regulated by a federal or provincial statute;
- contracts for sales of food or drink (for human or animal consumption);
- contracts for sales of newspapers;

- contracts between manufacturers or distributors and wholesalers (where the wholesaler intends to resell the goods); and
- contracts between manufacturers, wholesalers, or distributors and retailers (where the retailer intends to resell the goods in the course of their business) (s. 6).

All direct sellers must obtain a permit with the Province (s. 5). The DSA imposes a cooling-off period, where a consumer can cancel the sale within 10 days of receiving written notice of his or her cancellation rights (s. 21(1)(a)). The consumer has one year to cancel the contract if:

- the direct seller was not in compliance with the requirements for a permit;
- the goods or services to be supplied under the contract are not supplied to the consumer within 30 days after the supply date specified in the contract;
- a written contract does not contain the information required under the CPA or the regulations; or
- notice of cancellation rights does not conform to the requirements under the CPA or the regulations where a written contract is not required (s.21).

The DSA provides for summary convictions for those who offend the DSA, with a penalty of fines ranging from $500 to $25,000, imprisonment for a period of up to two years, or both (s. 36). The DSA is silent regarding commercial standards of behaviour, and does not address unconscionable transactions or misleading advertising. Any attempt to contract out of the DSA is void (s. 34).

International Sale of Goods Act, SNS 1988, c 13 (the "ISGA")

The ISGA came into force in Nova Scotia in 1992 and gave effect to the United Nations Convention on Contracts for the International Sale of Goods. This was a multi-nation agreement that was intended to improve and encourage the globalization of free market economies. Together with the *International Commercial Arbitration Act*, RSNS 1989, c 234, the ISGA helps facilitate international trade and governs all aspects of international trade (including disputes) between commercial parties from different countries. It has limited application in consumer transactions but does apply to consumer sales where the seller of consumer goods neither knew, nor could not have known, that the goods were actually bought for personal, family or household use (Article 2(a) of the Convention).

Trade practices legislation

Unlike many other provinces, Nova Scotia does not have a statutory instrument that regulates trade practices so as to protect consumers from unconscionable transactions. As a consequence, consumers are left with common law actions and remedies.

NEGOTIABLE INSTRUMENTS

Basic concepts

Negotiable instruments developed as an alternative to the risk of carrying gold or money from one market town to the next. Their major advantage is transferability. A negotiable instrument is a document of title that embodies rights to the payment of money, and is transferable, either through delivery or through endorsement and delivery. It is a chattel governed by property law as well as an obligation governed by contract law. The law of negotiable instruments is, for the most part, codified in the federal *Bills of Exchange Act*, RSC 1985, c B-4 (the "BEA"). Section 91(18) of the *Constitution Act* gives the federal government exclusive power to legislate in relation to bills of exchange and promissory notes.

With the exception of a new part of the BEA that addresses consumer bills and notes, the BEA has changed very little since it was first enacted in 1890. Although there are various kinds of negotiable instruments, the BEA only governs three types of negotiable papers: bills of exchange, cheques, and promissory notes. The common law continues to apply unless it is inconsistent with the BEA (s. 9).

Parties to a bill of exchange

Although the BEA uses the following terms, they are for the most part not defined in the statute.

- **Drawer:** the person who draws up (signs) the document or the order to pay.
- **Payee:** the person in whose favour the order is drawn.
  - If a payee endorses the bill to a third party, the payee becomes the *endorser* and the person to whom it is endorsed is the *endorsee*.
- **Drawee:** the person to whom the order to pay is addressed, before acceptance, is the *drawee*.
  - Once the drawee accepts the bill, the drawee becomes the **Acceptor.**
- **Holder:** the person to whom the bill is by its terms payable and who is in possession of it. The holder is therefore the payee or endorsee in possession of an instrument payable to order, or the bearer of an instrument payable to bearer.

Defining bills of exchange

"Bill of exchange" is defined in s. 16 as follows:

A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay, on demand

or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person or bearer.

Examples of bills of exchange are set out in Appendix I.

Cheque

A cheque is a bill of exchange drawn on a bank and payable on demand (s. 165(1)).

Promissory note

A promissory note is a signed promise to pay, on demand or at a fixed or determinable future time, a certain sum of money, either to the order of a payee or to bearer (s. 176(1)).

Examples of simple Promissory Notes are set out in Appendix II.

Relationship between bills of exchange, cheques and promissory notes

The BEA consists of 5 parts:

Part I: General (ss. 3-15);

Part II: Bills of Exchange (ss. 16-163);

Part III: Cheques on a Bank (ss. 164-175);

Part IV: Promissory Notes (ss. 176-187); and

Part V: Consumer Bills and Notes (ss. 188-192).

The provisions relating to bills apply to notes subject to the provisions in Part IV and with such modifications as the circumstances require (s. 186(1)). Except as otherwise provided in Part III, the provisions applicable to a bill that is payable on demand also apply to a cheque (s. 165(2)). **In other words, Part II applies to all negotiable instruments, with certain modifications, except as provided otherwise**.

A brief overview of cheques and other bills

The language of negotiable instruments is somewhat technical. However, most are quite familiar with the simple act of writing a cheque.

You may have had occasion to write a cheque drawn on your bank account at, say, The Big Bank of Canada. Since it is "drawn" on your account, you are the drawer and, because the Bank maintains your account, it is the drawee. The cheque may be payable to Jane Doe.

All cheques order the drawee (the Bank) to pay the payee, who, in this example, is Jane Doe.

As a matter of form, there is little to distinguish a cheque from other bills of exchange except that a cheque is drawn on a bank.

For example, a merchant in Halifax could effect payment to a supplier in Vancouver by way of a bill of exchange if the merchant has someone in Vancouver who would be willing to make the payment on the merchant's behalf. The merchant may have an investment account or credit facilities with a broker in Vancouver. The merchant (the drawer) could forward a bill of exchange to the supplier (the payee) drawn on the broker (the drawee). This method of payment is becoming relatively rare because of all of the other means that are available to transfer funds today.

However, this is where there is some divergence between cheques and other forms of bills of exchange. As noted above, a cheque is presented to the drawee bank and it is payable on demand.

A bill of exchange that is not drawn on a bank may have to be presented to the drawee for acceptance. The drawee may refuse to accept the bill. If the drawee or someone authorized on behalf of the drawee signs the bill to signify that it has been accepted, the drawee becomes the acceptor. The bill then has to be presented for payment in accordance with its terms.

Bills of exchange, including cheques, may be negotiated by the payee signing (endorsing) the document, usually on the back, and delivering the document to the person in whose favour the endorsement was specifically made, or, if no person is specified, to anyone. Colloquially, cheques that have been endorsed are sometimes referred to as third party cheques. An endorsee may negotiate the bill of exchange again by endorsing it.

Parties who have endorsed the cheque or other form of bill may be liable to subsequent endorsees if the drawee or acceptor ultimately dishonours it. See below for the rules with respect to preserving each endorser's liability.

Requirements

- A bill or cheque is an order to pay and must be expressed in imperative terms (e.g., "Pay") (ss. 16 and 165(2)).
- A promissory note must contain an unconditional promise to pay, and not merely acknowledge a debt (s. 176(1)). There must be some words that expressly or implicitly suggest a promise to pay; a mere acknowledgement of a debt is not sufficient.
- The drawee must be named with reasonable certainty (ss. 17(2), 19 and 25).
- A bill, cheque or promissory note must be in writing (s. 16(1)). "Writing" is broadly construed and includes printing, typing, painting and engraving. Some question remains as to whether the BEA precludes the electronic transmission of a bill or note.

- A bill or cheque must be unconditional, *i.e.*, not subject to any limitation on the order or promise to pay. An order to pay out of a particular *fund* is conditional, although an unqualified order to pay, coupled with either an indication of a particular fund out of which the drawee may reimburse him or herself, or a particular account that is to be debited, is unconditional (s. 16(3)). If the document contains an order to perform any act in addition to the payment of money, it is not a bill of exchange (s. 16(2)).
- The mere reference to the fact that a note is pledged as collateral security in a transaction does not disqualify it from protection under the BEA (s. 176(3)). However, if the note is stated to be security, then the promise to pay becomes conditional.
- A bill or promissory note may be payable on demand or at a fixed or determinable future time (ss. 16 and 176). When payable on demand, payment is immediate. When payable at sight, the bill is payable either on acceptance or within a specified number of days (s. 44). A cheque must be payable on demand (s. 165).
- A document is considered to be payable on demand if it is expressed to be payable on demand, or on presentation, or if no time of payment is expressed (s. 22).
- A document is considered payable at a determinable future time if it is payable at sight or at a fixed period after date of sight (s. 23(a)), or is payable at a fixed period after the occurrence of a specified event that is certain to happen (s. 23(b)).
- A bill, promissory note, or cheque must be for a sum certain in money (ss. 16(1), 176(1) and 27(1). The amount will still be considered a sum certain, even if the sum is to be paid by instalments with interest (s. 27). Courts have also accepted formulas and that amounts may be determined by reference to an appropriate objective standard: Royal Bank v. Stonehocker (1985), 61 B.C.L.R. (2d) 265 (C.A.).

Negotiation of the instrument

A negotiable bill, cheque or note may be payable **to order** or **to bearer** (s. 20(2)). Negotiation is the transfer of the instrument from one person to another in such a manner as to constitute the transferee the holder of the instrument (s. 59(1)).

Payable to order

- An instrument is payable **to order** (*i.e.*, to a specific person) if it is expressed to be so payable (s. 21(1)). Where a bill is payable to order, the payee must be named with reasonable certainty (s. 20(4)).
- An instrument payable to order is negotiated by endorsement (signature on the instrument) by the holder and completed by delivery (s. 59(1), (2) and (3)). A forged signature is inoperative, and does not convey any property (ss. 48). The person on whose behalf payment is made has the right to recover that amount from the person to whom it was fraudulently paid (s. 49(1)).

Payable to bearer

- An instrument is payable **to bearer** (*i.e.*, anyone who holds possession of the instrument) if it is expressed to be so payable, or if the last endorsement on the instrument is an "endorsement in blank" (*i.e.*, the holder writes her name on the back without naming an endorsee) (s. 20(3)). In this way, an instrument payable to order can become an instrument payable to bearer.
- If the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer (s. 20(5)). "Fictitiousness" is determined with reference to the intention of the party who drew up the bill (*Bank of England* v *Vagliano Bros.* [1891] AC 107 HL; *Royal Bank of Canada v Concrete Column Clamps* (1976), 74 DLR (3d) 26 (SCC)). This subsection is used frequently in cheque fraud cases where two innocent parties to cheque fraud try to shift liability for the stolen funds, usually a bank and the company subject to the fraud. The courts have determined the main test to be is the payee is either (1) a legitimate payee of the drawer (an employee or supplier); or (2) a payee who could reasonably be mistaken for a legitimate payee of the drawer (a name similar to a known payee). If neither of these is satisfied, then the payee does not exist, the cheque is payable to bearer, and the drawer is liable. If either is satisfied, then the payee exists and in such circumstances the bank is liable (*Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce* [1996] 3 SCR 727, and *Teva Canada Ltd. v. TD Canada Trust*, 2017 SCC 51)

- An instrument payable to bearer is negotiated by delivery (s. 59(2)).

Endorsement

- Endorsement may be "in blank" (specifying no endorsee, in which case it becomes a bearer instrument) or it may be "special" (specifying the name of the endorsee) (s. 66), e.g., "Pay to Jane Smith [signature]."
- An endorsement may also contain terms making it restrictive (s. 67(1)), e.g., "For deposit only to the account of Jane Smith [signature]."

Defective title

A person holds defective title to a bill if the bill was obtained, or accepted, by fraud or duress, or any unlawful means, or for an illegal consideration, or if the person negotiates the bill in breach of faith or under such circumstances as amount to fraud (s. 55(2)).

Consideration

There is a rebuttable presumption that every party whose signature appears on the bill received the bill for value (s. 57(1)).

Rights of holders

The BEA distinguishes between "holders" and "holders in due course", as described below. The Act creates a rebuttable presumption that every holder *is* a holder in due course (s. 57(2)).

Holder

- A "holder" may sue on the instrument in his or her own name (s. 73(a)).
- A "holder" who holds defective title may still pass good title to a "holder in due course" (s. 73(c)).

Holder in Due Course

- A "holder in due course" may enforce the instrument against *all* parties liable on the instrument, and holds the instrument free from any defects of title (s. 73(b)). The BEA thus creates an exception to the *nemo dat* rule. The holder in due course *may* acquire good title from or through a thief, and is not affected by the fact that any predecessor obtained the instrument by fraud or other illegal purpose, or that consideration given by a predecessor has wholly failed.
- However, the title of a holder in due course *does not* override a predecessor's title when there is a "real" defence because such defences are based on the nullity of the *res* (*i.e.*, the instrument). For example, a forged or unauthorized signature, an incapacity creating a nullity, or *non est factum* (*Foster* v *MacKinnon*, (1869), LR 4 CP 704) are real defences. Thus where a signature on an instrument is forged or of no legal effect, the holder in due course has no rights against those who were parties to the instrument prior to the ineffective signature.

Under the BEA the following conditions are required in order to acquire "holder in due course" status (s. 55(1)):

- The holder must be a holder of an instrument;
- The instrument must be complete and regular on its face (no irregularities or omissions);
- The holder must have become the holder before the instrument was overdue;
    - An instrument becomes overdue when it appears to have been in circulation for an unreasonable length of time (s. 69(2));
- If the bill was previously dishonoured, the holder must not have any notice of this fact;
- The holder must have taken the instrument in good faith (s. 3) and for value;

- The holder must have taken the instrument by negotiation; and
- If the prior holder had defective title, the holder must have taken the bill without notice of the defect in title.

A bank that cashes a cheque is ordinarily a holder in due course, unless it has notice of facts that negate the right to negotiate the cheque. (s. 165(3)).

Presentment and dishonour

Presentment for acceptance

Cheques and notes do not need to be presented for acceptance. A bill (other than a cheque) must be presented to the drawee for acceptance if:

- it is payable 'at sight' or a number of days 'after sight'(s. 74(1)), or
- where the bill expressly requires that it be presented for acceptance (s. 74(2)), or
- where the bill is payable at a place other than the place of business or residence of the drawee (s. 74(2)).

Upon being presented with a bill for acceptance, the drawee has two days to accept the bill. If the drawee refuses to accept or the acceptance cannot be obtained, the bill is dishonoured for non-acceptance. (s. 79).

Presentment of a sight bill that has been negotiated must be made within a reasonable time having regard to the nature of the bill, the usage of the trade and the facts of the particular case (s. 76).

A bill is duly presented for acceptance if made by the holder to the drawee or to someone authorized to accept or refuse acceptance on behalf of the drawee at a reasonable hour on a business day. If the drawee is dead, presentment may be made to his or her personal representative. If authorized by agreement or usage, presentment may be made by post. See s. 77.

Presentment is excused if the drawee is dead, is a fictitious person or lacks the capacity to contract or, after the exercise of due diligence, presentment cannot be effected (s. 78). A bill is dishonoured by non-acceptance when it is duly presented and acceptance is refused, acceptance cannot be obtained, or presentment is excused and the bill is not accepted (s. 80 and s. 82).

When a bill is dishonoured by non-acceptance, an immediate right of recourse against the drawer and endorsers accrues to the holder and presentment for payment is unnecessary (s. 81).

Presentment for payment

With a few exceptions, bills and cheques must be presented to the drawee for payment. If a bill is not presented for payment as required, the drawer and the endorsers are discharged (s. 84). The bill must be exhibited to the drawee (s. 84(3)). A bill is dishonoured by non-payment when it is duly presented for payment and payment is refused or cannot be obtained or presentment is excused and the bill is overdue and unpaid (s. 94).

A proper place for the presentment of a bill (s. 87) is:

- the place specified in the bill, if any;
- where no place is specified, at the address of the drawee specified in the bill, if any; or
- where no place or address is specified, at the drawee's or acceptor's place of business, if known, or their residence, if known, or wherever he or she can be found.

Delay in presenting a bill for payment is excused where the delay is beyond the control of the holder (s. 90). Section 91 of the BEA identifies certain cases where presentment is dispensed with including:

- where, after the exercise of reasonable diligence, presentment cannot be effected;
- where the drawee is a fictitious person;
- with respect to the drawer, where the drawee or acceptor is not bound to accept or pay the bill;
- with respect to an endorser, where the bill was accepted or made for the accommodation of that endorser; or
- by waiver.

A promissory note must be presented for payment in order to maintain the liability of an endorser (s. 184). Where the note is payable at a particular place, presentment must be made at that place (s. 183(1)). However, presentment of a promissory note that does not specify a place for payment is not required to maintain the liability of the maker of the note (s. 183(3)). It is unsettled whether, in Canada, presentment is necessary where the note is made payable at a particular place to render the maker liable. However, the preponderance of authority suggests that presentment is not required.

Notice of dishonour

In order to maintain the liability of the drawer and the endorsers of a bill, notice of the drawee's failure to accept the bill must be given to each of them unless notice is dispensed with as set out below. Similarly, if the drawee of a bill accepts it but subsequently the bill is dishonoured by non-payment, notice of that must also be given to the drawer and the endorsers to maintain their liability (s. 95). However, notice of dishonour does need to be given to the acceptor (s. 95(4)).

Consequently, it will usually be unnecessary to give notice of dishonour to the drawer of a cheque because, in most cases, a bank's failure to honour a cheque will be due to the fact that the drawer has insufficient funds in its account, and consequently, the bank has no obligation to the drawer to pay, or payment of the cheque was countermanded.

Notice of dishonour of a promissory note need not be given to the maker of the note. Under s. 186(2) the maker of a promissory note is deemed to correspond with the acceptor of a bill. Consequently, since notice of dishonour need not be given to the acceptor of a bill that is dishonoured by non-payment, (s. 95(4)), notice to the maker is unnecessary.

Time, place and form of notice

Notice of dishonour must be given not later than the judicial or business day next following the date of dishonour (s. 96).

Notice may be given personally to a party or its agent (s. 97(1)(b)).

If the bill is payable in Canada, notice may be given by post addressed to the party at its customary address, place of residence, place where the bill is dated, or at the place designated in the bill by the person who is to receive the notice (s. 102). If posted in time, the notice is duly given notwithstanding any miscarriage by the Post Office (s. 103).

A notice may be given in writing or personal communication in any terms that identify the bill and intimate that the bill has been dishonoured by non-acceptance or non-payment (s. 97(1)(d)). A written notice need not be signed and an insufficient written notice may be supplemented and validated by verbal communication (s. 98).

Delay in giving notice may be excused where the delay is caused by circumstances beyond the control of the party giving the notice (s. 104) or may be dispensed with by waiver or if, after the exercise of reasonable diligence, notice cannot be given or the notice does not reach the drawer or endorser (s. 105).

Notice of dishonour to the drawer is also dispensed with (s. 106) if:

- the drawer and drawee are the same person;
- if the drawee is a fictitious person or lacks the capacity to contract;

- if the drawee or acceptor is under no obligation to the drawer to accept or pay the bill; or
- if the drawer has countermanded payment.

Notice of dishonour to an endorser is dispensed with (s. 107) if:

- the drawee is a fictitious person or lacks the capacity to contract; and
- the endorser was aware of that fact when he or she endorsed the bill or if the bill was accepted or made for the endorser.

Protest

Protest is a formal declaration of the dishonour of a bill, cheque or promissory note. Protest is not required to maintain liability on an inland bill (s. 112 and 113).

An inland bill (s.24) is one that, on the face of it, is either:

a) drawn and payable in Canada; or

b) drawn within Canada on a person resident in Canada.

A bill that is not an inland bill is a foreign bill (s.24(2)). Protest is required to maintain liability of a drawer and endorser of a foreign bill (s. 111) and an endorser of a foreign promissory note (s. 187).

The procedure requires:

a) the due presentation of the instrument for acceptance or payment by a notary or the notary's clerk;

b) the declaration of the dishonour by the notary; and

c) notices of the protest being given to the parties who are entitled to notice of the dishonour.

Forms for notices of protest are set out in the schedule of the BEA. However, Form 3, a notice for non-acceptance or non-payment at a stated place is reproduced at Appendix III. See s. 121 for the required contents of a protest. The protest must be made or noted on the day of its dishonour (s. 118) However, protest may be excused or dispensed with for the same reasons which would allow a notice of dishonour to be excused or dispensed with (s. 109).

Liability on the instrument

- No person is liable on the instrument unless he or she has signed it (s. 130). Provisions regarding 'signature' are set out in ss. 48, 51, 57(1), 62(1), 63, 131, 132, 142, 192. Signature can be obtained in a representative capacity (s. 51).
- Any person who signs a bill without indicating his or her representative status will be personally liable on the note (s. 51(1)).
- The capacity to incur liability is coextensive with the capacity to contract (ss. 46 and 47) and, as noted above, there is a rebuttable presumption of consideration. Liability will not accrue unless the instrument is delivered (ss. 2, 38 and 178) to the drawer or endorser. The requirement of delivery draws a link between the chattel quality of the instrument and the validity of the contract. Notice of acceptance may substitute for delivery (s. 38).
- Secondary parties (i.e., the drawer and the endorser of a bill or note) engage to pay the instrument only if it is dishonoured (ss. 129(a) and 132(a)).

Defective and incomplete instruments

The BEA expressly addresses several situations where the validity of a bill could be brought into question.

- A bill is not invalidated by reason only that (s. 26) it:
    - is not dated,
    - does not specify the value given, or that any value has been given
    - does not specify the place where it is drawn or place where it is payable, or
    - is antedated, post-dated, or bears a date that is a Sunday or holiday.
- Where the sum payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the amount payable (s. 27(2)).
- Where the signer delivers a simple signature on blank paper for the purpose of it being converted into a bill, it operates as *prima facie* authority to fill it up as a complete bill for any amount using the signature for that of the drawer, acceptor or endorser (s. 30).
- Where, in a bill payable to order, the payee or endorsee is wrongly designated, or his or her name is misspelled, he or she may endorse the bill as therein described, adding his or her proper signature, or he or she may endorse by his or her own proper signature (s. 63).A material alteration in an instrument may discharge it (s. 144(1)). Therefore, if a mistake is made (including the date) it is preferable to prepare a new instrument, or at least have the change initialled by all persons involved.

Forgery

A forged signature of the drawer or endorser renders the instrument inoperative (s. 48). If a person whose name appears on an instrument can prove that his or her name was forged, he or she has a good defence even against a holder in due course.

If a bank pays out on a forged endorsement, the customer must give notice of the forgery within one year of acquiring knowledge of it in order to recover from the bank (s. 48(3)).

A bank is supposed to recognize the signature of its customers, so is bound by any payment made on a forged signature (*Price* v. *Neal* (1762), 3 Burr. 1354; 97 ER 871).

A material alteration can amount to a forgery and render the instrument void (e.g. changing the amount from $50 to $5000) (s. 144 and s. 145).

Defences to claims for payment

There are three defences that can be raised to a claim for payment of a bill of exchange[1]:

1. real defences;
2. defect of title defences; and
3. personal defences.

Real defences go to the root of the instrument and are good against all parties including a holder in due course[2]. Real defences include, but are not limited to, forgery, incapacity of a minor, lack of delivery of a complete instrument, material alteration of the instrument, fraud as to the nature of the instrument and cancellation of the instrument.

Defect of title defences are good against all parties except a holder in due course[3]. A defect of title defence may arise where a negotiable instrument is obtained by fraud, duress, inducement or undue influence, false representations by a payee, a promise not to negotiate or total failure of consideration (s. 55(2)).

Personal defences are good only against the immediate parties when the bill is presented[4]. A personal defence is one that is personal to the plaintiff[5]. Set-off is the most common defence

[1] See *Falconbridge on Banking and Bills of Exchange*, 7th ed. (1969), at pp. 665 – 668; see also *National Money Mart v. 1684075 Ontario Inc.*, [2009] OJ No 110.
[2] *Morguard Trust v. Bank of Nova Scotia*, [1982] OJ No 3601, 40 OR (2d) 211 at 217 where the Court cited *Falconbridge on Banking and Bills of Exchange*, *supra*, at pp. 666 – 668.
[3] Sections 73 and 55(2) of the *BEA*; see also: *360788 B.C. Ltd. (c.o.b. Money Mart) v. 304983 B.C. Ltd. (c.o.b. Niners Diner)*, [1998] BCJ No 3228, 90 ACWS (3d) 795at para 20.
[4] *Williams and Glyn's Bank Ltd. v. Belkin Packaging Ltd.*, [1983] 1 SCR 661, [1983] SCJ No 47 where the Court cited *Falconbridge on Banking and Bills of Exchange*, *supra*, at pp. 665 and 667.
[5] *360788 B.C. LTD. (c.o.b. Money Mart) v. 304983 British Columbia Ltd. (c.o.b. Niners Diner)*, supra, at paragraph 12 citing *Falconbridge*, *The Law of Negotiable Instruments in Canada*, 11th ed., 1958, Ryerson Press, Toronto, at page 117 to 118.

raised. This occurs where the party claiming the set-off is alleging that the plaintiff owes the defendant money as well.

Consumer bills

Consumer bills are addressed in Part V. A consumer bill or note is an instrument issued in respect of a consumer purchase (ss. 189(1) and (2)). A consumer purchase is a purchase or agreement to purchase, that is not a cash purchase, of goods or services for individual or commercial consumption (not resale) from a seller engaged in the business of selling such goods or services (s. 188). Every consumer bill or note must be marked prominently and legibly on its face with the words "Consumer Purchase," before or at the time it is signed by the purchaser (s. 190(1)). Although the bill may still be negotiated, the purchaser retains any defence that they would have had against the original seller, and may use such defences against any subsequent holder, or holder in due course (e.g., the original transaction is "attached" to the consumer bill or note) (s. 191).

If the bill is not marked as required, it is void in the hands of the original seller (s. 190(2)). However, such a bill will be valid in the hands of a holder in due course without notice that the instrument is a consumer bill, or in the hands of a drawee without this notice (s. 190(2)). It is a criminal offense to fail to mark the note or to knowingly transfer an unmarked note (s. 192).

APPENDIX I

EXAMPLES OF BILLS OF EXCHANGE

I
BILL PAYABLE ON DEMAND

1 First Street
Anytown, Nova Scotia
A1A 1A1
(Drawer's Address)

$10,000 July 1, 2018

ON DEMAND, for value received, pay to John Smith the sum of ten thousand dollars

TO: ABC Inc.
2 Second Street
Anytown, Nova Scotia
B2B 2B2

Tom Thumb
(Signature of Drawer)

II
BILL PAYABLE AFTER DATE

$10,000

(Drawer's Address)
(Date)

TEN DAYS after date, for value received, pay to (the Payee) the sum of ten thousand dollars.

(Signature of Drawer)

TO: (Name and Address of Drawee)

III
BILL PAYABLE AT SIGHT

$10,000

(Drawer's Address)
(Date)

AT SIGHT, for value received, pay to (the Payee) the sum of ten thousand dollars.

(Signature of Drawer)

TO: (Name and Address of Drawee)

APPENDIX II

EXAMPLE OF SIMPLE DEMAND PROMISSORY NOTE

$10,000 July 1, 2018

FOR VALUE RECEIVED, I hereby promise to pay to the order of John Smith, on demand, the sum of ten thousand dollars.

_____[signature of maker]_____

EXAMPLE OF AN INSTALMENT NOTE

$10,000 July 1, 2018

FOR VALUE RECEIVED, I hereby promise to pay to the order of John Smith the sum of $10,000 in ten equal, consecutive, monthly instalments of $1,000, each instalment to be payable on the first day of each and every month commencing August 1, 2018.

_(signature of maker)_____

NOTE: Add provisions for the payment of interest as may be applicable in the circumstances. It is common for installment notes to provide an acceleration clause whereby the entire unpaid balance of the note becomes immediately due and payable, or payable on demand, if there is default in payment of any one instalment.

APPENDIX III

EXAMPLES OF NOTICES OF DISHONOUR

I
TO DRAWER

3 Third Street
Anytown, Nova Scotia
C3C 3C3
(Date)

I HEREBY GIVE YOU NOTICE that a bill of exchange dated July 1, 2018 drawn by you on ABC Inc. of 2 Second Street, Anytown, Nova Scotia B2B 2B2, for ten thousand dollars payable to John Smith, on demand, has been dishonoured by non-acceptance (or non-payment) and you are held responsible therefor.

John Smith
(Signature of Payee)

TO: Tom Thumb
1 First Street
Anytown, Nova Scotia
A1A 1A1

II
TO AN ENDORSER BY ENDORSEE/HOLDER

(In this example, the Endorser is assumed to be the original payee who endorsed the bill in favour of Snow White)

4 Fourth Street
Anytown, Nova Scotia
D4D 4D4
(Date)

I HEREBY GIVE YOU NOTICE that a bill of exchange dated July 1, 2018 drawn by you on ABC Inc. of 2 Second Street, Anytown, Nova Scotia, B2B 2B2, for ten thousand dollars payable to John Smith, on demand, and bearing your endorsement has been dishonoured by non-acceptance (or non-payment) and you are held responsible therefor.

Snow White
(Signature of Endorser/Holder)

TO: John Smith
3 Third Street
Anytown, Nova Scotia
C3C 3C3

(It should be noted that, in order to keep Tom Thumb liable on the bill, Snow White must give him Notice of Dishonour as well).

APPENDIX IV

FORM 3
PROTEST FOR NON-ACCEPTANCE OR FOR NON-PAYMENT OF A BILL PAYABLE AT A STATED PLACE

(Copy of Bill and Endorsements)

ON THIS _____day of _____, in the year 20___, I, A.B., notary public for the Province of _____, dwelling at _____, in the Province of _____, at the request of _____, did exhibit the original bill of exchange whereof a true copy is above written, unto E.F., the (drawee or acceptor) thereof, at _____, being the stated place where the said bill is payable, and there speaking to _____ did demand (acceptance or payment) of the said bill; unto which demand he answered: "_____".

WHEREFORE I, the said notary, at the request aforesaid, have protested, and by these presents do protest against the acceptor, drawer and endorsers (or drawer and endorsers) of the said bill and all other parties thereto or therein concerned, for all exchange, re-exchange, costs, damages and interest, present and to come for want of (acceptance or payment) of the said bill.

All of which I attest by my signature.

A.B.
Notary Public

PERSONAL PROPERTY SECURITY ACT

The *Personal Property Security Act* ("PPSA") establishes a regime whereby a person, called the "secured party", may acquire a security interest in certain kinds of personal property (collateral) of another, called the "debtor", to secure some obligation, usually a debt, owed to the secured party. The PPSA further defines how that security interest may be enforced against the debtor, and against third parties who may also have a security interest in the same collateral.

In order to understand the PPSA, one must be familiar with the meaning of the terms it employs. As in all legislation, definitions are key.

PERSONAL PROPERTY

In the most general sense, any kind of property that is not real property is personal property, whether such property is tangible, such as a desk, or intangible, such as a right to receive a payment.

In s. 2(1), the PPSA defines personal property as being: goods, a document of title, chattel paper, investment property, an instrument, money or an intangible.

Goods are tangible personal property. However, fixtures attached to real property, crops, and the unborn young of animals are also included. Excluded are documents of title, chattel paper, investment properties, an instrument, money, trees (unless they are part of a crop) until they are severed (i.e., cut down), and un-extracted minerals. For certain purposes of the PPSA, goods are further divided into three categories: "consumer goods", "equipment" and "inventory".

A **document of title** is a document issued by a bailee of goods that states that the bailee will deliver the goods to a named person, or a transferee of that person, or to the bearer of the document. A warehouse's receipt would be a document of title if the person who is entitled to receive the goods is able to transfer its interest in the goods simply by transferring or assigning the document to a third party. In other words, the assignee of the document is, by virtue of the assignment, entitled to the goods.

Fixtures is not defined in the PPSA, which merely declares that "fixtures" does not include "building materials". Otherwise, the definition of "fixtures" is left to the common law meaning.

Chattel paper means a document that evidences both a monetary obligation and a security interest in, or a lease of, specific goods and any accessions to those goods. Consequently, a security agreement to which the PPSA applies could itself constitute chattel paper and be used in turn as collateral. For example, a document signed by a debtor in which the debtor promises to pay a certain sum of money to its creditor would be chattel paper if the document goes on to state that the debtor grants a security interest in a specific piece of machinery.

Investment property means a security, security entitlement, securities account, futures contract or futures account. Those terms have the meanings ascribed to them in the *Nova Scotia Securities Transfer Act*. Consequently, one must beware that the word "security" is used in the PPSA to mean something other than security on personal property. A security within the meaning of the *Securities Transfer Act* would include shares issued by a corporation that might also be governed by the *Nova Scotia Securities Act.*

Instrument means a bill of exchange, promissory note or cheque within the meaning of the *Bills of Exchange Act* (Canada), a similar document that evidences the right to receive payment that can be transferred by delivery, or a letter of credit, but excludes a document of title, chattel paper or investment property, and any writing that creates a mortgage against specific land.

Money means a government-authorized currency.

Intangible means personal property that is not goods, a document of title, chattel paper, investment property, an instrument, or money. The most common type of intangible in which a security interest is given in commercial matters is the right of the debtor to receive a payment from third parties, which the PPSA defines as an "account" but which is more commonly referred to as a "receivable".

SECURITY INTERESTS IN PERSONAL PROPERTY

Section 2(1) of the PPSA defines a **security interest** as an interest in personal property that secures payment or performance of an obligation. The section also defines more specific types of security interests, which will be discussed below.

Section 4(1) states the PPSA applies to every 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, and includes such things as: chattel mortgages, conditional sales, fixed and floating charges, pledges, trust indentures, assignments, consignments, leases, trusts, or transfers of chattel paper that secure a debt or performance of an obligation.

Older forms of security agreements—leases and conditional sales contracts in particular (such as those used to finance new automobiles)—are still in use, but it is important to understand that a security interest may be created or granted by using very simple words, such as: "as security for my debt to you, I grant you a security interest in all of my personal property."

Collateral is defined in s. 2(1) as personal property that is subject to a security interest.

Section 4(2) of the PPSA also provides that certain transactions that do not function to secure payment or the performance of an obligation are nevertheless governed by the PPSA, subject to exclusion as provided in sections 5 and 56. These transactions are often referred to as "deemed security interests" and are specified in s. 4(2) as:

a) commercial consignments;

b) a lease for a term of more than a year;
c) a transfer of an account or chattel paper; and
d) a sale of goods without a transfer of possession.

A **commercial consignment** means a consignment of goods between two parties who both ordinarily deal with goods of that description in their respective businesses. It is defined in s. 2(1) as: "a consignment under which goods are delivered for sale, lease or other disposition to a consignee who, in the ordinary course of the consignee's business, deals in goods of that description, by a consignor who also deals in goods of that description in the ordinary course of business who reserves an interest in the consigned goods after they are delivered to the consignee." However, a commercial consignment does not include a transfer to an auctioneer for sale or where the consignee is generally known to its creditors to be selling or leasing goods of others.

A **lease for a term of more than one year** is defined in s. 2(1) to mean:

a) a lease of goods with an indefinite term that is capable of being terminated by one or both parties after a year,
b) a lease of goods for a term of one year or less where the lessee, with the consent of the lessor, retains uninterrupted possession of the goods for more than a year, and
c) a lease of goods for a term of one year or less that, by its terms, is renewable for one or more terms, either automatically or at the option of the parties or by agreement, such that its term could extend beyond a year.

Many motor vehicles are leased today for terms longer than one year. Those leases are governed by the PPSA.

Some "equipment rental" contracts may be for a term as short as a month, week or even a day. If the contract contains renewal provisions that could conceivably extend the term beyond a year, however improbable that may be in reality, then the contract is governed by the PPSA.

There are exceptions to the definition, including: leases of goods by lessors who are not regularly engaged in the business of leasing goods, a lease of household furnishings or appliances as part of a lease of land (such as the lease of a furnished house), and other kinds of prescribed leases (as of yet, none have been prescribed).

The PPSA will govern a sale of goods where the seller retains possession. This has led to some interesting situations. For example: a landlord sells equipment to a person to whom it has agreed to lease the building in which the goods are located. The lease commences two months after the sale. In the lease, the tenant/buyer of the goods grants a security interest in the goods—which it just purchased from the landlord/seller—as security for the balance of the purchase price. The building and the goods are to remain in the possession of the landlord/seller until the lease term commences. The tenant/buyer has, in effect, a security interest in the goods it just purchased from the landlord/seller and the landlord/seller has a security interest in the same goods.

The types of transactions listed in s. 4(2), the so-called deemed security interests, are not subject to Part V of the PPSA, which deals with default rights and remedies (due to s. 56(a)). The default rights and remedies also do not apply to transactions between a pledgor and a pawnbroker (s. 56(b)).

EXCLUSIONS FROM THE ACT

Except as otherwise provided by the PPSA, section 5 states that the PPSA **does not apply to**:

(a) liens, charges or other interests **given by rule of law** or another statute unless the other statute provides otherwise,

(b) the creation or transfer of an interest **under an insurance policy** (except insurance for loss or damage to collateral, such as collision insurance on a car) and (ba) certain annuity contracts,

(c) the creation or transfer of an interest in **personal or future wages** and other remuneration where an assignment or transfer is prohibited by law,

(d) the transfer of an **unearned right to payment** under a contract to a transferee who is to perform the transferor's obligations under the contract,

(e) the creation or transfer of an **interest in land**, including a lease,

(f) the creation or transfer of an interest in a right to **payment arising in connection with an interest in land** or a lease of land (other than rights to payment evidenced by an investment property or instrument),

(g) a **sale of accounts**, chattel paper or goods as part of the sale of a business unless the vendor remains in apparent control of the business after the sale,

(h) a transfer of accounts to facilitate the **collection of accounts** for the transferor (for example, some department stores transfer all their credit card receivables to some financial institution in the business of collecting such types of accounts),

(i) the creation or transfer of a **right to damages in tort**,

(j) a mortgage or sale registered pursuant to the ***Canada Shipping Act***,

(k) a security agreement governed by an **Act of Parliament**, such as a security agreement governed by the *Bank Act* (Canada).

ATTACHMENT

In order for a security interest to be enforceable by a secured party against a debtor, it must first *attach*.

Section 13(1) provides that a security interest, including one in the nature of a floating charge, attaches when:

(a) value is given,

(b) the debtor has rights in the collateral or the power to transfer rights in the collateral to a third party, *and*

(c) except for the purpose of enforcing rights between the secured party and the debtor, the security agreement becomes enforceable under s. 11 (see below under "Security Agreements").

"Value" is defined in s. 2(1) as being any consideration sufficient to support a simple contract, which includes antecedent debts or liabilities. Consequently, a secured party need not actually advance funds or transfer property to a debtor in order to satisfy the condition. Any executory agreement will suffice. The debtor must have some right in the collateral but it need not be complete ownership.

For the purposes of s. 13(1)(b), a consignee under a commercial consignment, or a lessee under a lease for a term of more than a year, has rights in the goods when the lessee or consignee obtains possession of them. (s. 13(3)).

For the purposes of s. 13(1)(b), a debtor does not have rights in:

a) crops until they become growing crops,

b) the young of animals until they are conceived (they need not be born),

c) minerals, which by definition, include oil, gas and other hydrocarbons until they are extracted, and

d) trees that are not considered crops until they are severed (s. 13(4)).

The parties may agree to postpone the time of attachment (s. 13(2)).

See s. 13(5) and (6) for the particular rules applicable to attachment in securities accounts and futures accounts. See also s. 13A with respect to security interests in favour of securities intermediaries and persons who deliver certificated securities or other financial assets.

SECURITY AGREEMENTS

A "security agreement" is defined in s. 2(1) of the PPSA as an agreement that creates or provides for a security interest, and—where the context permits—includes both an agreement that creates or provides for a prior security interest and a writing that evidences a security agreement.

Section 11 stipulates that, subject to 13A (*i.e.*, security interests in favour of a securities intermediary) a security interest is enforceable against a third party only if:

(a) the collateral is

(i) not a certificated security but is in the possession of the secured party or on its behalf;

(ii) a certificated security in registered form and the security certificate has been delivered to the secured party under s. 68 of the *Securities Transfer Act* under the debtor's security agreement; or

(iii) investment property and the secured party has control under s. 2(2) of the PPSA in accordance with the debtor's security agreement;

or

(b) the debtor has signed a security agreement that contains

(i) a description of the collateral by item by reference to one or more of the following categories: goods, chattel paper, investment property, document of title, instrument, money or intangible;

(ii) a statement that a security interest is taken in all of the debtor's present and after-acquired personal property or all of the debtor's present and after-acquired personal property except specified items or kinds or any of the types of personal property referred to in (b)(i) above; or

(iii) A description of collateral that is a security entitlement, securities account or futures account if it describes the collateral by those terms or as an "investment property" or if it describes the underlying financial asset or futures contract.

Section 11(3) provides that a description of collateral simply as **consumer goods** or **equipment** is inadequate if it does not further describe the item or kind of collateral. "Consumer goods" is defined in s. 2(1) as goods that are used or acquired primarily for personal, family or household purposes.

Section 11(4) provides that a description of collateral as **inventory** is adequate only while the collateral is actually held as inventory by the debtor. "Inventory" is defined in s. 2(1) to include goods that are held for sale or lease, goods to be furnished or that have been furnished under a contract for service, goods that are raw materials or part of a "work in progress", and goods that are materials to be used or consumed in a business or profession.

Section 11(5) provides that a security interest in **proceeds** is enforceable against a third party whether or not the security agreement contains a description of the proceeds. By virtue of s. 29, when a security interest in collateral has been dealt with or has otherwise given rise to proceeds (for example, if the debtor sells the collateral without the secured party's authorization), then the security interest in the collateral continues (unless the secured party expressly or impliedly authorizes the dealing) and also extends to the proceeds. That is, the secured party will continue to have a security interest in both the collateral and the proceeds.

The debtor is entitled to receive a copy of the written security agreement within 10 days following its execution (s. 12).

Because there is no public registry for security agreements, the debtor, a creditor, a sheriff or a person with an interest in personal property of a debtor may make a written demand on the secured party to be provided with a copy of the security agreement and a statement of the amount secured by it. The secured party must respond within 10 days of the request or 25 days if the secured party is a trustee under a trust indenture. See s. 19 with respect to a secured party's obligation to provide information.

PERFECTION

Pursuant to s. 20, a security interest is **perfected** when (a) it has attached **and** (b) all steps required for perfection under the PPSA have been completed, regardless of the order of occurrence. Before any security interest can be perfected, it must attach. Generally, other than in the case of investment property, secured parties have two methods of perfection available to them: perfection by registration or perfection by possession.

In the vast majority of cases, a security interest that has attached to collateral other than investment property is perfected by the registration of a financing statement, pursuant to s. 26 of the PPSA. Registration of financing statements will be discussed below.

Section 20B provides that the following types of security interests are perfected when they attach:

- a security interest arising in the delivery of a financial asset under s. 13A;
- a security interest in investment property created by a broker or securities intermediary;
- a security interest in a futures contract or futures account created by a futures intermediary.

Section 25A provides that a security interest in **investment property** may be **perfected by control** under s. 2(2). Perfection by control will occur when the secured party has control in the manner provided under sections 23 to 26 of the *Securities Transfer Act*. It is recommended that the reader review those sections, since they are not reproduced in this document.

Pursuant to sections 25(1) and (2) of the PPSA, **possession of the collateral** by the secured party or someone on its behalf will perfect a security interest that has attached in goods, a negotiable document of title, chattel paper, an instrument, and money, so long as possession was not obtained as a result of seizure or repossession. A secured party is not in possession of the collateral if the collateral is in the actual or apparent possession or control of the debtor (s. 25(2)(a)). A secured party may perfect a security interest in a certificated security by taking delivery of it under s. 68 of the *Securities Transfer Act* if the interest has attached (s. 25(3) and (4)).

Pursuant to s. 28, a security interest in goods in the possession of a bailee may be perfected by:

(a) the bailee possessing the goods on behalf of the secured party;

(b) the bailee registering a financing statement relating to the goods, pursuant to s. 26;

(c) the bailee issuing a document of title to the goods in the name of the secured party;

(d) the secured party depositing a non-negotiable receipt for the goods issued by the bailee that was transferred to the secured party; *or*

(e) perfecting a security interest in a negotiable document of title to the goods if the bailee issued one.

THE GENERAL PRIORITY RULE

Section 36 sets out the priorities to be given to competing security interests in the same collateral where not otherwise provided under the PPSA.

Section 36(1)(a) provides that the priority between security interests that are all perfected by either the registration of a financing statement, or possession, are determined in the order in which the registration of the financing statement or the taking of possession occurred, without regard to the time of attachment of the security interest.

It is important to understand how this rule works. Consider the following example:

> ABC Bank may register a financing statement with respect to all of the present and after-acquired property of XYZ Ltd. At that time, ABC Bank's security interest may not have attached to any of the personal property of XYZ Ltd. Indeed, there may not even be an executed security agreement between the parties. After that, XYZ Ltd. signs a security agreement with DEF Bank for a loan that grants a security interest in a machine already owned by XYZ Ltd. A financing statement is registered. DEF Bank's security interest has attached and it is perfected. After that, XYZ Ltd. signs a security agreement with ABC Bank that provides for a security interest on all of its present and after-acquired property and ABC Bank advances its loan to XYZ Ltd. ABC Bank's security interest finally attaches. ABC Bank's financing statement was registered first and, therefore, its security interest in the machine has priority over DEF Bank's security interest.

Pursuant to s. 36(1)(b), a perfected security interest has priority over an unperfected security interest. Pursuant to s. 36(1)(c), the priority between unperfected security interests is governed by the order in which the security interests attached.

There are certain exceptions to the foregoing that include:

Exception 1: Serial numbered goods

Generally: if the secured good has a serial number, then the serial number should be recorded in the financing statement.

Section 36(4) provides that a security interest in goods that are equipment, and are of a kind that are prescribed by the regulations as *serial numbered goods*, is not perfected by the registration of a financing statement for certain purposes (including the priorities set out in s. 36(1) and the priority given to certain purchase money security interests pursuant to s. 35 (discussed below)), unless a financing statement relating to the security interest, which **includes a description of the goods by serial number,** is registered with the serial number entered in the appropriate field.

The regulations prescribe that serial numbered goods consist of motor vehicles, trailers, mobile homes, aircraft, boats and outboard motors for boats. Consequently, a secured party who registered a financing statement ten years ago against collateral described as all of the debtor's personal property will be deemed to have an unperfected security interest in a motor vehicle owned by the debtor as against a secured party who has registered a financing statement correctly describing the motor vehicle by serial number for the purposes of s. 36(1), (7) or (8), or 35(1).

The registration of a serial numbered good is included in the sample financing statement provided in the appendix below.

For serial numbered goods that are consumer goods, the registration of a financing statement will be invalid if there is a seriously misleading defect, irregularity, omission or error in the name of any of the debtors or the serial number(s) of the collateral. Importantly, section 20 of the *Personal Property Security Act General Regulations* provides that where the debtor is an individual, the registrant is required to enter the debtor's last name, followed by the first name, followed by the middle name, if any. Failure to register a debtor's middle name will render a registration invalid.[6]

To be clear, when a serial numbered good is also a consumer good, such as a mobile home, in order to perfect the security interest by registration, both the serial number and the debtor's name must be set out in the financing statement as stipulated by the PPSA and the regulations.

Exception 2: Ordinary course dispositions

Section 31(2) provides that persons who buy or lease goods in the ordinary course of business of the seller or lessor take them free of any security interest given by the seller

[6] See s. 44(8) (8A), and (8B) of the *PPSA*; see also *Robie Financial Inc. v PricewaterhouseCoopers Inc. (Trustee of)*, 2009 NSSC 397, [2009] NSJ No 624.

or lessor, even if they know of the security interest, unless they know that the sale or lease is a breach of the security agreement under which the security interest was created.

Subsections 3 and 4 of s. 31 provide that buyers or lessors of goods acquired as consumer goods, which are not fixtures and are worth less than $1,000, take them free of any security interest in those goods. This applies regardless of whether the goods are sold in the ordinary course of business.

Section 33 grants ordinary course repairer's liens priority over security interests. Section 33 operates only in respect of liens on goods that arise as a result of the provision, in the ordinary course of business, of materials or services in respect of those goods.

Exception 3: Purchase Money Security Interests

Section 35 accords a "superpriority" to purchase money security interests. The definition of Purchase Money Security Interests includes security interests taken to secure all or part of the purchase price of collateral, other than investment property, or to enable the debtor to acquire rights in collateral if the value is in fact used to acquire those rights. Case law in other jurisdictions has made it clear that a secured party can acquire a Purchase Money Security Interest even if the security agreement does not use the term.

Section 35(1) provides that Purchase Money Security Interests in collateral or its proceeds take priority over other security interests granted in the same collateral given by the same debtor. In order to gain this, the security interest must be perfected within fifteen days of the time the debtor obtains possession of the collateral (or, in the case of intangibles, fifteen days from the time the security interest attaches).

The above rule applies for all classes of collateral except inventory, which is subject to a special Purchase Money Security Interests rule in s. 35(2). In the case of inventory and its proceeds, the secured party can gain Purchase Money Security Interests priority only if

a) the security interest is perfected when the debtor obtains possession of the collateral (*i.e.*, no fifteen-day grace period), and
b) before that time the secured party has, by in-person delivery or registered mail, given written notice of the intended Purchase Money Security Interests to any other secured party who has registered a financing statement relating to that same item or kind of collateral.

Exception 4: Chattel paper

Section 32(6) provides that ordinary course purchases of chattel paper prevail over any security interest (*i.e.*, over first-in-time interests, even Purchase Money Security Interests) if:

1. the purchaser gives "new value" (defined in s. 2 as "value other than an antecedent debt or liability"),
2. the purchaser takes possession of the chattel paper in the ordinary course of business, and
3. where the chattel paper serves as original collateral, the ordinary course purchaser did not, at the time of taking possession, have knowledge that the chattel paper was subject to the earlier security interest (where the chattel paper collateral serves as proceeds of inventory, the knowledge of the ordinary course purchaser is irrelevant).

Exception 5: Judgment creditors

Section 36(6) limits the priority of perfected security interests against a judgment creditor who has registered a notice of judgment in the Registry pursuant to the *Creditors' Relief Act*, RSNS 1989, c 112. Advances made by the secured party before the registration of the notice of judgment have priority over the judgment, as do advances made by the secured party before it has knowledge of the registration of the notice of judgment. Consequently, it would be advantageous for judgment creditors to send the notice of judgment to each secured creditor who had previously registered a financing statement. For example, if a judgment creditor registers its interest and then a secured party makes an advance (e.g., advancing more funds to the debtor under a revolving line of credit), the judgment creditor will have priority to the advance, provided the secured party has knowledge of the registration of the judgment against the debtor.

Exception 6: Investment property

Section 36A sets out the priorities among conflicting security interests in investment properties. Those priorities are largely based on control and the order in which control was determined.

Exception 7: Money and other instruments

S. 32 of the PPSA provides that

(a) a holder of money has priority over a security interest perfected by registration if the holder had no knowledge of the security interest or the holder is a holder for value whether or not it knew of the security interest (s. 32(1));

(b) a creditor who receives an instrument (e.g., a bill of exchange), drawn or made by a debtor and delivered on payment of a debt due to the creditor, has priority over a security interest in the instrument whether or not the creditor knew of the security interest at the time of delivery (s. 32(2));

(c) a purchaser of an instrument has priority over a security interest in an instrument perfected by registration if the purchaser gave value and did not

know of the security interest, and took possession of the instrument (s. 32(3)) Note the definition of knowledge for the purposes of this subsection requires that the purchaser knew the transaction violates the terms of the security agreement (s.32(5)).

(d) a holder to whom a negotiable document of title was negotiated has priority over a security interest in it that was perfected by registration if the holder gave value and acquired the document without knowledge of the security interest (s. 32(4)).

Note: The definition of knowledge for the purposes of s. 32(3) and 32(4) requires that the purchaser know the transaction violates the terms of the security agreement (s. 32(5)).

As will be discussed further on, the registration of a security interest does not constitute notice of the registration or of any security agreement to which the registration applies (s. 48).

It should also be noted that a secured party might voluntarily subordinate its security interest to another security interest (s. 41).

FIXTURES AND CROPS

A security interest in fixtures or crops may be registered in the registry of deeds by submitting a notice in the form prescribed by the regulations. When the notice is registered, every person dealing with the land to which the notice relates is deemed to have knowledge of the security interest (s. 50).

Sections 37 and 38, respectively, set out the priorities of those holding a security interest in fixtures and crops as against those who have an existing interest in: the lands, existing or subsequent mortgages, and those who subsequently acquire an interest in the lands, whether before or after a notice (under s. 50 of the Act) is registered in the registry of deeds.

Basically, those having a security interest in goods that attaches before or when the goods become fixtures or crops will have priority over:

(a) someone with an existing interest in the lands,

(b) advances made by a mortgagee after a notice of the security interest is registered in the registry of deeds, and

(c) anyone who acquires an interest in the land after registration of the notice.

Section 37 provides specific rules about the rights of a secured creditor to sever and remove the crops or fixtures from the lands.

One may see notices of security interests in fixtures in the land registry where, for example, the secured party has financed the heating, ventilation or air conditioning (HVAC) systems in a commercial property or walk-in freezers in a food processing plant.

REGISTRATION

The most common way of perfecting a security interest is by registering a financing statement. These financing statements are entered into the Personal Property Registry electronically. The Registrar may allow (online) access to the Registry to any person on such times and conditions as the Registrar considers advisable (s. 44(2)).

A financing statement is effective from the time a registration number, date and time is assigned to it by the Registry (s. 44(4)) and, as alluded to earlier, it may be registered before or after a security agreement is made or a security interest attaches (s. 44(5)).

The registration is effective for the period of time specified in the financing statement. The registration may be renewed by registering a financing change statement (s. 45), through the same electronic process. Data may be entered to renew, discharge or otherwise amend a financing statement (s. 2(1)(q)). The PPSA provides no means of registering an actual security agreement.

An example of what is entered into the Registry system to effect the registration of a financing statement is appended at the end of this section dealing with the PPSA.

Registration of a financing statement does not, by itself, constitute notice or knowledge of the existence or contents of the financing statement or of the existence of the security interest or the contents of any security agreement to which the registration relates (s. 48).

The Registry may be searched electronically, and a printed search result may be obtained from the Registrar by a person who has entered into an agreement with the Registrar pursuant to s. 44(2). The search may be made against the name of a debtor, the serial numbers of serial numbered goods, or a registration number (s. 49).

When registering a financing statement one must ensure that the names of the parties and the description of the collateral (especially serial numbered goods) are properly set out as prescribed by the Regulations. For your reference, sections 19 to 25 of the Regulations, concerning the required registration information, are included in the appendix below.

Unsurprisingly, many individuals in this province have identical names. That being the case, it can be difficult—if not impossible—to determine who a secured party or debtor actually is. Under section 19 of the Regulations, a person may be further distinguished by entering his or her birth date.

Section 44(7) provides that the **validity of the registration** of a financing statement is **not affected by any defect**, irregularity, omission or error in the financing statement **that is not seriously misleading**. The test for determining whether an error is seriously misleading is an objective one. It is not necessary to prove anyone was actually misled (s. 44(9)). There has been much litigation over whether a one or two-digit error in a serial number is "seriously misleading." However, consider the possible consequences when one searches the registry by

entering a serial number and finds no results because the financing statement data—recorded to perfect a security interest—contains an error.

SECURED CREDITORS' REMEDIES AND THEIR ENFORCEMENT

The secured creditor's powers of enforcement are found in Part V of the PPSA (ss. 56-65). The PPSA defines "default" as: "(1) the failure to pay or otherwise perform the obligation secured when due, or (2) the occurrence of any event…whereupon, under the terms of the security agreement, the security interest becomes enforceable" (s. 2(1)(n)).

Keep in mind, as discussed above, that Part V remedies do not apply to the transactions enumerated in s. 4(2), i.e., commercial consignments, leases for a term of more than one year, transfer of an account or chattel paper, and sale of goods without transfer of possession (the so-called "deemed security interests").

Remedies **accrue automatically** to the secured creditor upon the debtor's default (s. 57(2)(b)). The secured creditor's remedies are **cumulative**. The secured party may enforce its statutory rights as well as the remedies reserved in the security agreement (s. 57 (2)(a)).

Remedies available

• Action on the debt and execution of judgment	section 59(2)
• Seizure of physical collateral	section 59
• Collection on intangible collateral	section 58(2)(a)
• Taking control of proceeds	section 58(2)(c)
• Retention of collateral in satisfaction of debt	section 62
• Resale of collateral after seizure	section 60
• Claim for deficiency after resale	section 61(b)

The secured creditor may take actual possession of the collateral or, if it is of a kind that cannot readily be moved or stored, then the secured creditor may take constructive possession, *i.e.*, seize it *in situ* in the way a sheriff would pursuant to an execution order (s. 59(2)(b)). Opening words of s. 59(2) codifies the common law obligation for a secured party to provide the debtor with reasonable notice of its intentions to enforce security on default and take hold of the collateral.

When the secured party proceeds to seize the collateral, he or she must do so peaceably, without force or violence and without trespassing. This is one of the supplementary provisions of the common law. If resistance by the debtor is anticipated or encountered, the appropriate course is to invoke the assistance of the court under its supervisory jurisdiction discussed previously. Once in possession of the collateral, the secured creditor must exercise reasonable care in the custody and preservation of the collateral (s. 18(2)).

Having taken control of the collateral, the secured creditor has to decide between two courses of action (with the exception of collecting debts owed to the debtor): whether the collateral should be **retained** or **sold**.

Option A: Collateral is retained

The secured party may choose to retain the collateral in satisfaction of the debt (s. 62), provided all requirements to give notice have been met, and the debtor and others with an interest in the collateral do not object.

If the debtor or another interested person considers itself adversely affected by the secured party's election, it may give notice of objection, and thus force the secured party to abandon its retention remedy and instead proceed to sell the collateral (s. 62(2)(3)).

Option B: Collateral is sold

The most common choice of the secured creditor is to sell the collateral after seizure or repossession (s. 60). If this course is followed, the proceeds of the sale may then be applied first to defray the reasonable expenses of seizing, storing, repairing and/or disposing of the collateral, and then against the debt secured by the security interest of the secured credictor selling the collateral (s. 60(3)). The PPSA is liberal about the methods of selling the collateral; it permits public or private sales, public auctions or closed tenders, sales of the collateral as a whole or in parts, and even leases where the security agreement so provides (s. 60(5)). The secured creditor is bound to choose a method of sale that is appropriate to the type of collateral and the market for it.

Not less than twenty days prior to sale, the debtor and any other person with an interest in the collateral must be given a notice (per s. 60(11)) containing a **prescribed list of details**, including (per s. 60(9)):

- a description of the collateral,
- a statement of the outstanding debt and associated expenses of enforcement,
- a statement of the sum actually in arrears, exclusive of the operation of any acceleration clause in the security agreement,
- a description of the debtor's default,
- a statement of the debtor's right to redeem the collateral or reinstate the security agreement,
- and information about the date, time, place and manner of intended disposal of the collateral, and
- a statement that the debtor may be liable for any deficiency.

These stringent requirements may be dispensed with in a few specific situations, such as when the collateral is perishable, or when every person entitled to a notice consents in writing to an immediate sale (s. 60(18)).

If the sale takes place, the secured party may buy the collateral in a public transaction in some circumstances (s. 60(14)), and any other purchaser for value and in good faith may acquire good title to it, whether the requirements before disposal have been fully complied with or not (s. 60(15)). Unless otherwise agreed, or unless otherwise provided for in the PPSA or any other Act, the debtor is liable to pay any deficiency to the secured party (s. 61(6)).

If the secured party effects a sale of the collateral without providing proper notice to the debtor, the debtor is deemed to have been detrimentally affected; as a result, a secured party may not be able to recover a deficiency, and may be liable to the debtor for damages (*Canada Permanent Trust Co* v *Thomas*, [1983] SJ No 620, 149 DLR (3d) 338 (SKQB); *Indian Head Credit Union Ltd* v *R & D Hardware Ltd*, [1988] SJ No 203, 10 ACWS (3d) 192 (SKCA)).

Once a debtor is in default under a security agreement, the secured party can immediately attempt to collect debts owed to the debtor on an intangible, chattel paper, or an obligor on an instrument or security (s. 58(2)).

Defaulting debtor's rights

The rights of a defaulting debtor include:

- Reasonable time to respond to demand for payment [common law right, not in PPSA]
- Retention of exempt possessions section 59
- Redemption of the collateral section 63(2)
- Reinstatement of the security agreement section 63(4)
- Recovery of surplus from resale of collateral section 61
- Damages for non-compliance of secured creditor section 67
- Additional consumer protections section 71(1)

When the secured party demands payment of the debt pursuant to default, the debtor generally has the right to a reasonable time in which to respond (*Lister* v. *Dunlop*, [1982] 1 SCR 726, [1982] SCJ No 38). Other statutes do require secured creditors to give notice of their intention to enforce their rights. For example:

> Section 244 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 applies when a secured creditor intends to enforce a security on all or substantially all of the inventory, accounts receivable or other property of an insolvent debtor, when that collateral was **acquired by the debtor for use in a business**. In these cases, the creditor must send the debtor notice of their intention to enforce the security. The creditor cannot enforce the security until ten days after sending notice, unless the debtor—after receiving notice—consents to an earlier enforcement of security. A few exceptions to this rule are provided at ss. 244(3) and (4).
>
> Section 21 of the *Farm Debt Mediation Act*, SC 1997, c 21 applies when a secured creditor intends to enforce a security against a **farmer**. Written notice of the creditor's intention must be given fifteen days in advance. Farmers must be advised of their right (under s. 5) to make an application to a government-appointed administrator for a stay of proceedings against their secured creditors, assistance in reviewing the farmer's financial affairs, or to provide mediation between the farmer and their secured creditors.

The exemption of personal possessions from seizure is granted by ss. 59(3) and (4), specifically: household furnishings and appliances (to a value of $5,000), medical and health aids, and a motor vehicle needed for employment up to a value of $6,500. The PPSA specifically states that those exemptions do not apply to goods that are subject to a purchase money security interest (s. 59(7)).

The debtor has the right to try either to redeem the collateral or to reinstate the security agreement (ss. 63(2) and (4)). In order to redeem the collateral the debtor must tender to the secured creditor full payment of the outstanding debt and all the reasonably incurred expenses associated with the enforcement to date.

The debtor may reinstate the security agreement by paying the sum in arrears, exclusive of any acceleration clause, plus reasonable expenses of the secured party (s. 63(4)). The security agreement may only be reinstated twice per year, unless otherwise agreed (s. 63(5)).

The PPSA establishes an order of priority of payment of the surplus: first to subordinate secured creditors, then to judgment creditors, then to any other person with an interest in the surplus, and finally to the debtor (s. 61(2)). Each claimant is entitled to be paid in full.

PPSA IN AN ABORIGINAL CONTEXT

Personal property of an Indian band or status Indian located on a reserve is exempt from charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour of any person other than an Indian or band (*Indian Act*, R.S.C. 1985, c. I-5, s. as amended, s. 89). As such, an attempt to take security over on-reserve personal property of an Indian or band on behalf of any person other than an Indian or a band is generally invalid, and the remedies available to a creditor under the PPSA are generally not available with respect to such personal property. An exception exists for conditional sales contracts where right of property or possession remains with the seller. The exemption also applies to certain personal property deemed to be on reserve under s. 90 of the *Indian Act*.

NOTE: This section of the Bar Review Materials (Commercial Transactions) is principally statute-based, so it is recommended that you read the statutes in their entirety.

APPENDIX V

Nova Scotia **PPRS Verification Statement (New)** **9866224**

Registration Number (New): 21108576
Registration Date/Time (Atlantic): 2019-04-23 10:31
Expiry Date: 2022-04-23
File Number: ABCDE

Registrant Name and Address

Registrant User ID: M112345
Law Firm

ADMINISTRATOR
1815 Upper Water StHALIFAX NS B3J1S7
Canada

All registration date/time values are stated in Atlantic Time.

Registration Details for Registration Number: 21108576

Province or Territory: Nova Scotia
Registration Type: PPSA Financing Statement

Registration History

Registration Activity	Registration Number	Date/Time (Atlantic)	Expiry Date	File Number
Original	21108576	2019-04-23 10:31	2022-04-23	ABCDE

This registration has **not** been the subject of an Amendment or Global Change. The following registration information was added by the original registration and has not been deleted.

Debtors

Type: Individual
Smith, John
1 First Street
Antigonish NS A9A 9A9
Canada

Secured Parties

Type: Enterprise
XYZ Finance Company Inc.
Doe, Jane
Account Manager
100 Second Street
Antigonish NS A9A 9A9
Canada

General Collateral

The serial numbered collateral described below and all proceeds as that term is defined in the Personal Property Security Act, Nova Scotia, arising therefrom of every nature and kind.

Report Version 2.20 **Page: 1**

Nova Scotia **PPRS Verification Statement (New)** **9866224**

Serial Numbered Collateral

Serial Number	Collateral Type	Description	Added By	Deleted By
12345	Motor Vehicle	2013 XYZ Tractor	21108576	

****** End of Report ******

Report Version 2.20 **Page: 2**

APPENDIX VI

[Sections 19-25 *Personal Property Security Act Regulations*]

Personal Property Security Act General Regulations
made under Section 72 of the
Personal Property Security Act
S.N.S. 1995-96, c. 13
O.I.C. 97-621 (October 1, 1997, effective November 3, 1997), N.S. Reg. 129/97
as amended to O.I.C. 2015-96 (March 31, 2015, effective April 1, 2015), N.S. Reg. 143/2015

(…)

Debtor information

19 (1) Where the debtor is an individual, the registrant shall enter, under the heading "Debtor (Individual)", the name, in the manner provided under Section 20, and address of the debtor.

(2) Where the debtor is an enterprise, the registrant shall enter, under the heading "Debtor (Enterprise)", the name, in the manner provided under Section 21, and address of the debtor.

(3) Where the debtor is an individual, the registrant may enter the birth date of the debtor with the number of the year entered first followed by the number of the month followed by the number of the day.

(4) Where the debtor is an enterprise, the registrant may enter the name and position of a contact person within the enterprise to whom inquiries relating to the registration may be addressed.

(5) Where a registration applies to more than 1 debtor, the registrant shall identify each debtor as a separate debtor in the registration.

Debtor (individual) name information

20 (1) Where the debtor is an individual, the registrant shall enter the last name followed by the first name followed by the middle name, if any, of the debtor.

(2) Where the debtor is an individual whose name includes more than 1 middle name, the registrant shall enter the first of the middle names.

(3) Where the debtor is an individual whose name consists of only 1 word, the registrant shall enter that word in the field for entering the last name of the debtor.

(4) Where the debtor is an individual who carries on business under a name and style other than the individual's own name, the registrant

(a) shall enter, in accordance with this Section, the individual's own name as a debtor (individual); and

(b) may enter, in accordance with Section 21, the individual's business name and style as a debtor (enterprise).

(5) Where the debtor is an individual, the name of the debtor shall be determined, for the purposes of this Section, by the following rules:

(a) where the debtor was born in Canada and the debtor's birth is registered in Canada with a government agency responsible for the registration of births, the name of the debtor is the name stated on the debtor's birth certificate or equivalent document issued by the government agency;

(b) where the debtor was born in Canada but the debtor's birth is not registered in Canada with a government agency responsible for the registration of births, the name of the debtor is

(i) the name stated in a current passport issued to the debtor by the Government of Canada,

(ii) if the debtor does not have a current Canadian passport, the name stated on a current social insurance card issued to the debtor by the Government of Canada, or

(iii) if the debtor does not have a current Canadian passport or social insurance card, the name stated in a current passport issued to the debtor by the government of a jurisdiction other than Canada where the debtor habitually resides;

(c) where the debtor was not born in Canada but is a Canadian citizen, the name of the debtor is the name stated on the debtor's certificate of Canadian citizenship;

(d) where the debtor was not born in Canada and is not a Canadian citizen, the name of the debtor is

(i) the name stated on a current visa issued to the debtor by the Government of Canada,

(ii) if the debtor does not have a current Canadian visa, the name stated on a current passport issued to the debtor by the government of the jurisdiction where the debtor habitually resides, or

(iii) if the debtor does not have a current Canadian visa or a current passport, the name stated on the birth certificate or equivalent document issued to the debtor by the government agency responsible for the registration of births at the place where the debtor was born;

(e) despite clauses (a) to (d) and subject to clause (f), if the debtor changes his or her name after marriage or in accordance with change of name legislation, the name of the debtor is the name adopted by the debtor after marriage, if that name is recognized under the law of the jurisdiction where the debtor habitually resides, or the name stated on the debtor's change of name certificate or equivalent document, as the case may be;

(f) where the law of the jurisdiction where the debtor habitually resides allows a person to use both the name adopted after marriage and the name that person had before marriage, and the debtor uses both names, clauses (a) to (d) continue to apply and both the name of the debtor determined in accordance with those clauses and the name adopted after marriage shall be registered as separate debtor (individual) names; and

(g) in a case not falling within clauses (a) to (f), the name of the debtor is the name stated on any 2 of the following documents issued to the debtor by the Government of Canada or of a province or territory of Canada:

(i) a current motor vehicle operator's licence,

(ii) a current vehicle registration,

(iii) a current medical insurance card.

(6) For the purposes of subsection (5), the name of the debtor shall be determined as of the date of the event or transaction to which the registration relates.

(7) In addition to entering the name of a debtor who is an individual determined in accordance with this Section, the registrant may enter any other name of the debtor of which the registrant has knowledge as a separate debtor (individual) name.

Debtor (enterprise) name information

Body corporate

21 (1) Where the debtor is an enterprise that is a body corporate, the registrant shall enter the name of the body corporate.

(2) The registrant shall enter, under separate "Debtor (Enterprise)" headings in the registration, all forms of the name of a debtor that is a body corporate if the name of the debtor is in more than one of the following forms:

(a) an English form;

(b) a French form;

(c) a combined English-French form.

(3) In entering the name of a debtor that is a body corporate, the registrant may enter, with or without a period, either the abbreviation "Ltd", "Ltee", "Ltée", "Inc", "Incorp", "Corp", "Co" or "Cie", as the case may be, or "Limited", "Limitee", "Limitée", "Incorporated", "Incorporee", "Incorporée", "Corporation", "Company" or "Compagnie", as the case may be.

Estate of deceased individual

(4) Where the debtor is an enterprise that is the estate of a deceased individual, the registrant shall enter the first name followed by the first of the middle names, if any, followed by the last name of the deceased, unless the name of the deceased consists of only 1 word in which case only that word shall be entered, followed by the word "estate".

Trade union

(5) Where the debtor is an enterprise that is a trade union, the registrant shall enter

(a) the name of the trade union; and

(b) in accordance with subsection (17), the name of each person representing the trade union in the transaction giving rise to the registration.

Named trust

(6) Where the debtor is a trustee acting for an enterprise that is in the form of a trust, and the document creating the trust designates the name of the trust, the registrant shall enter that name, followed by the word "trust" unless the name of the trust already contains the word "trust".

Unnamed trust

(7) Where the debtor is a trustee acting for an enterprise that is in the form of a trust, and the document creating the trust does not designate the name of the trust, the registrant shall enter the first name followed by the first of the middle names, if any, followed by the last name of at least 1 of the trustees, unless the name of the trustee consists of only 1 word in which case only that word shall be entered, followed by the word "trustee".

Bankrupt individual

(8) Where the debtor is a trustee acting for an enterprise that is in the form of the estate of a bankrupt individual, the registrant shall enter the first name followed by the first of

the middle names, if any, followed by the last name of the bankrupt, unless the name of the bankrupt consists of only 1 word in which case only that word shall be entered, followed by the word "bankrupt".

Bankrupt enterprise

(9) Where the debtor is a trustee acting for an enterprise that is in the form of the estate of a bankrupt enterprise, the registrant shall enter the name of the bankrupt enterprise followed by the word "bankrupt".

Registered or limited partnership

(10) Where the debtor is a debtor because of membership in an enterprise that is a partnership, the registrant shall enter

(a) in the case of a partnership that is registered under the *Partnerships and Business Names Registration Act*, the firm name of the partnership as stated in the certificate of registration issued under that Act; and

(b) in the case of a limited partnership, the firm name of the limited partnership as stated in the certificate filed and recorded under the *Limited Partnerships Act*.

Other partnership

(11) Where the debtor is a debtor because of membership in an enterprise that is a partnership, other than one referred to in subsection (10), the registrant shall enter

(a) the firm name of the partnership; and

(b) in accordance with subsection (17), the name of at least one of the partners, which, in the case of a limited partnership must include the name of a general partner.

(12) In a case within subsection (11), if the partnership does not have a name, the registrant shall enter, in accordance with subsection (17), the names of all of the partners.

Syndicate or joint venture

(13) Where the debtor is a debtor because of participation in an enterprise that is a syndicate or joint venture, the registrant shall enter

(a) the name, if any, of the syndicate or joint venture as stated in the document creating it; and

(b) in accordance with subsection (17), the name of each participant in it.

Other enterprise

(14) Where the debtor is a debtor because of membership or participation in an association, organization or enterprise other than one already referred to in this Section, the registrant shall enter

(a) the name of the association, organization or enterprise; and

(b) in accordance with subsection (17), the name of each person representing the association, organization or enterprise in the transaction giving rise to the registration.

(15) For the purposes of clause (14)(a), if the name of the association, organization or enterprise is stated in a constitution, charter or other document creating it, the registrant shall enter the name in the form stated therein.

Entering names of representatives or members of an enterprise

(16) For the purposes of this Section, a person representing an enterprise in a transaction giving rise to a registration is a person who has power to bind the enterprise or its officers or members and who has exercised that power in the formation of the contract or contracts involved in the transaction.

(17) Where, under clause (5)(b), (11)(b), subsection (12), clause (13)(b) or (14)(b),

(a) the name of an individual is to be entered, the name shall be entered in the manner provided under Sections 19 and 20; or

(b) the name of a body corporate is to be entered, the name shall be entered in the manner provided under Section 19 and subsections (1) to (3).

Secured party information

22 (1) The registrant shall indicate whether the secured party is an individual or an enterprise.

(2) Where the secured party is an individual, the registrant shall enter the name, in the manner provided under Section 20, and address of the secured party and Section 20 applies with the necessary changes in details.

(3) Except as provided in subsection (3A), where the secured party is an enterprise, the registrant shall enter the name, in the manner provided under Section 21, and address of the secured party and Section 21 applies with the necessary changes in details.

Subsection 22(3) amended: O.I.C. 2006-271, N.S. Reg. 87/2006.

(3A) Where the secured party is the Director of Maintenance Enforcement making a registration under the *Maintenance Enforcement Act*, the registrant shall indicate that the secured party is an enterprise and enter the title "Director of Maintenance Enforcement" as the name of the secured party.

Subsection 22(3A) added: O.I.C. 2006-271, N.S. Reg. 87/2006.

(4) The registrant may enter the secured party's phone number and fax number.

(5) Where the secured party is an enterprise, the registrant may enter the name and position of a contact person within the enterprise to whom inquiries relating to the registration may be addressed.

(6) Where a registration applies to more than 1 secured party, the registrant shall identify each secured party as a separate secured party in the registration.

Collateral (and proceeds) description

23 (1) Subject to subsection (2), where the collateral to which a registration relates is

(a) consumer goods that are serial numbered goods, the registrant shall enter a description of the collateral in accordance with Section 25;

(b) consumer goods that are not serial numbered goods, the registrant shall enter a description of the collateral in accordance with Section 24;

(c) equipment that is serial numbered goods, the registrant shall enter a description of the collateral in accordance with Section 24 or 25;

(d) equipment that is not serial numbered goods, the registrant shall enter a description of the collateral in accordance with Section 24; or

(e) items of inventory, whether or not serial numbered goods, the registrant shall enter a description of the collateral in accordance with Section 24.

(2) Where the collateral to which a registration relates is proceeds to be described for the purposes of subsection 29(3) or (4) of the Act, and the collateral is

(a) consumer goods that are serial numbered goods, the registrant shall enter a description of the collateral in accordance with Section 25;

(b) equipment that is serial numbered goods, the registrant shall

(i) enter a description of the collateral in accordance with Section 25, or

(ii) enter a description of the collateral in accordance with Section 24 and indicate that the description relates to proceeds; or

(c) collateral not referred to in clause (a) or (b), the registrant shall enter a description of the collateral in accordance with Section 24 and indicate that the description relates to proceeds.

General description of collateral

24 (1) Where collateral is to be described other than by serial number, the registrant shall enter

(a) a description of the collateral by item or kind or by reference to one or more of the following: "goods", "document of title", "chattel paper", "investment property", "instrument", "money" or "intangible";

Clause 24(1)(a) amended: O.I.C. 2010-342, N.S. Reg. 137/2010.

(b) a statement that a security interest is taken in all of the debtor's present and after-acquired personal property; or

(c) a statement that a security interest is taken in all of the debtor's present and after-acquired personal property except specified items or kinds of personal property or except one or more of the following: "goods", "document of title", "chattel paper", "investment property", "instrument", "money" or "intangible".

Clause 24(1)(c) amended: O.I.C. 2010-342, N.S. Reg. 137/2010.

(2) A description is inadequate for the purposes of clause (1)(a) if it describes the collateral as consumer goods or equipment without further describing the item or kind of collateral, but where the personal property to be excluded from a description of collateral under clause (1)(c) is the consumer goods of the debtor, the excluded property may be described simply as consumer goods.

(3) A description of collateral under subsection (1) that describes the collateral as inventory is adequate only while the collateral is held by the debtor as inventory.

Description of serial numbered goods

25 (1) Where collateral is to be described by serial number under the heading "Serial Numbered Collateral Information", the registrant

(a) shall indicate the type of serial numbered goods to which the registration relates after the heading "Serial Collateral Type";

Clause 25(1)(a) amended: O.I.C. 2004-95, N.S. Reg. 24/2004.

(b) shall enter the last 25 characters of the serial number or all the characters if the serial number contains less than 25 characters after the heading "Serial Number";

Clause 25(1)(b) amended: O.I.C. 2004-95, N.S. Reg. 24/2004.

(c) may verify the serial number entered by entering it a second time; and

(d) may describe the collateral by make, manufacturer, model, model year or any other particulars.

Subsection 25(1) amended: O.I.C. 2004-95, N.S. Reg. 24/2004.

(2) For the purposes of this Section, the serial number for

(a) a motor vehicle other than a combine or tractor is the vehicle identification number marked on, or attached to, the body frame by the manufacturer;

(b) a combine, tractor, mobile home or trailer is the serial number marked on, or attached to, the chassis by the manufacturer;

(c) a boat that can be registered, recorded or licensed under the *Canada Shipping Act* (Canada) is the registration, recording or licence number assigned to the boat under that Act;

(d) a boat not referred to in clause (c) is the serial number marked on, or attached to, the boat by the manufacturer;

(e) an outboard motor for a boat is the serial number marked on, or attached to, the outboard motor by the manufacturer;

(f) an aircraft that must be registered under the *Aeronautics Act* (Canada) or regulations made under that Act in order to be operated in Canada is the registration marks assigned to the airframe by the Department of Transport (Canada), omitting any hyphen;

(g) an aircraft that must be registered under the law of a state, other than Canada, that is a party to the Convention on International Civil Aviation 1944 (Chicago) is the registration marks assigned to the airframe by the relevant licensing authority, omitting any hyphen; and

(h) an aircraft not referred to in clause (f) or (g) is the serial number marked on, or attached to, the airframe by the manufacturer.

(3) Where collateral referred to in clause (2)(a), (b), (d), (e) or (h) does not have a serial number or vehicle identification number marked on, or attached to, it by the manufacturer, the serial number is any number of at least 6 characters that is marked on, or attached to, the collateral.