THE ROLE OF PUBLIC REGISTRY SYSTEMS IN RISK ASSESSMENT: A COMPARATIVE ANALYSIS OF THE PERSONAL PROPERTY SECURITY ACT AND UNIFORM COMMERCIAL CODE ARTICLE 9

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ABSTRACT

The focus of this thesis is on the central role that registration plays in modern systems regulating secured and related transactions involving personal property and the extent to which an effective registry system reduces legal risk and associated transactional costs to persons taking interests in personal property. The thesis focuses on two types of systems, the registry system associated with *The Saskatchewan Personal Property Security Act* and the filing system associated with the Texas version of Article 9 of the United States of America *Uniform Commercial Code*.

The outcome of this comparison is the conclusion that the approach contained in the Saskatchewan system is more effective at facilitating risk assessment associated with transactions involving security interests in personal property. The major considerations in reaching this conclusion are the Saskatchewan Personal Property Registry's centralized structure, low transactional cost, and user-friendly configuration. By comparison, the UCC Article 9 'filing' or 'open drawer' system is bifurcated and its structure imposes high transactional costs on its users. Further, unlike the SPPR, the Article 9 system is designed primarily to facilitate commercial lending and does not address some important registry concerns that arise in the context of secured transactions involving consumer goods.

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DEDICATION

To my Parents, Greg and Patty.

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I. INTRODUCTION

Registry systems play a central role in statutory regimes applicable to secured transactions involving interests in personal property.[1] A central issue in the design of a registry system is the extent to which it produces the desired outcome in the most efficient manner.

The focus of this thesis is on the central role that registration plays in modern systems regulating secured and related transactions involving personal property and the extent to which an effective registry system reduces legal risk and associated transactional costs to persons taking interests in personal property.[2] The thesis focuses on two types of systems, the registry system associated with *The Saskatchewan Personal Property Security Act*[3] [hereafter "SPPSA"] and the filing system associated with the Texas version of Article 9 of the United States of America *Uniform Commercial Code* [hereafter "UCC Article 9"].[4]

The outcome of this comparison is the conclusion that the approach contained in the Saskatchewan system is more effective at facilitating risk assessment associated with transactions involving security interests in personal property. The major considerations in reaching this conclusion are the Saskatchewan Personal Property Registry's [hereafter the "SPPR" or "Registry"] centralized structure, low transactional cost, and user-friendly configuration. By comparison, the UCC Article 9 'filing' or 'open drawer' system [hereafter "UCC Article 9 system"] is bifurcated and its structure imposes high transactional costs on its users. Further, unlike the SPPR, the Article 9 system is designed primarily to facilitate commercial lending and

[1] Within Canada, the generic term "registry system" refers to a government operated or controlled system for recording data relating to property interests and making that data available to members of the public who request them. The equivalent term used within the United States of America is "filing system".

[2] The thesis addresses only issue involving competing interests in tangible personal property and not intangible property such as accounts, etc.

[3] *The Personal Property Security Act,* 1993, SS 1993, c. P-6.1 [SPPSA].

[4] Texas Uniform Commercial Code – Chapter 9 - Secured Transactions. Amended by Acts 1999, 76th Leg. ch. 414, Sec. 1.01, eff. July 1, 2001 [UCC Article 9].

does not address some important registry concerns that arise in the context of secured transactions involving consumer goods.

Texas law is superior to Saskatchewan law in one respect; it addresses through its certificate of title system [hereafter "COT system"] ownership interests in specified types of personal property. A COT system is designed to reflect both ownership of and interests in items of personal property that can be specifically identified in a statutorily prescribed manner [hereafter, "specific property" or "specific collateral"][5]. A COT system provides consumers and lenders with a simple and reliable means of assessing risk in dealing with specific property. However, technological advancements, along with other factors, have forced state and federal governments to implement additional protections to help prevent theft and fraud. Overall, these protections are beneficial for risk assessment purposes. However, they indicate that a COT cannot be relied upon as a complete guarantee of ownership of and interests in specific property.

The SPPR is not an ownership registry. The author examines how the SPPSA and related Saskatchewan law and public facilities deal with the ownership issue in specifically identifiable types of personal property outside the SPPR and compares this with the COT system.

II. METHODOLOGY

When addressing the subject-matter of this thesis, the author employs the following analytical method. An assumption of the thesis is that legal risk assessment is a central feature of secured financing. The analysis employed in the thesis is based on the well-recognized principle that the volume and kind of secured financing facilities available to both consumer and business borrowers is affected by the degree of risk of non-payment on the part of potential borrowers. While other factors go into a risk assessment, risk of the loss or ineffectiveness of the right to

[5] "Specific property" and "specific collateral" can be defined as property that is identifiable by serial number or other alphanumeric identifier.

invoke the law to enforce a debt obligation is central to the willingness of a credit grantor to grant credit to a potential borrower.

Legal risk assessment is also an important factor to anyone planning to acquire an interest in personal property. The decision to proceed with an acquisition will be affected by the determination as to nature and quantum of interest held by the person offering the property. The tradition of the common law, represented by the principle *nemo dat quod non habe*t, is to protect property interests from unauthorized disposition or encumbrance of the property. There is no universally recognized principle that good faith buyers are protected.

The central issue addressed in the thesis is the extent to which modern personal property registries of North American common law jurisdictions facilitate legal risk assessments by persons intending to engage in personal property security transactions falling within a Canadian *Personal Property Security Act* or UCC Article 9 as credit grantors or as buyers of property. While both the registry systems of Canadian jurisdictions and their counterparts in states of the United States were designed to address legal risk assessment, they differ in many respects. These differences affect risk assessment in important ways.

All provinces of Canada and states of the United States have personal property registry systems. However, there is a high degree of commonality among the Canadian systems, on the one hand, and among the United States systems, on the other. This feature has facilitated the analytical approach used in the thesis by permitting the author to focus on a single representative from each county: the SPPSA and the version of UCC Article 9 enacted in Texas.

The thesis compares the features of the SPPSA and UCC Article 9 (and related legislation) as they relate to legal risk assessment by credit grantors and potential buyers of personal property. Each feature is examined in the context in which it functions, and its relative effectiveness is

assessed. This approach facilitated the author in reaching a conclusion as to which approach meets the needs of registry system users who rely on information in the registries to make financing decisions.

However, the analytical approach employed does not involve examination of data relating to volume and kind of secured credit granted in each jurisdiction. The author concluded that this date would be of little value in assessing the effectiveness of each of the systems because a wide range of other factors affect the volume of secured credit available in a jurisdiction. As such, the conclusions of the author are based on the assessment as to the extent to which registry system users are exposed to risk of loss when relying on registry information. From this information, the author has extrapolated that an efficient system will facilitate secured credit granting, while an inefficient system will have the opposite effect.

III. RISK ASSESSMENT

(a) Risk in Secured Transactions

Generally, registration systems are designed to reduce legal risk to persons who deal with personal property. The "best practices" approach employed when buying or taking a security interest in personal property is to conduct in various offices of public record searches in order to ensure, to the extent possible, that there are no recorded security interests, liens, claims or other encumbrances that affect the property.[6] The purpose of performing these searches is to allow an interested person to assess the legal risk associated with acquiring an interest in personal property and mitigate that risk.

[6] Wilfred M. Estey, *Legal Opinions in Commercial Transactions*, 3rd Edition (Toronto: LexisNexis Canada, 2013) at 349 [Legal Opinions in Commercial Transactions].

(b) The Relationship between Risk and Transactional Cost

A comparison of the relative transactional costs associated with transactions is a useful method through which the effectiveness of the registry systems examined in this thesis can be assessed. The term 'transactional cost' refers to the administrative and monetary costs incurred by users of a system in achieving a high level of predictability when assessing the risk associated with acquiring interests in property. A registry system providing only limited information will require a searching party[7] to inquire beyond the results disclosed by the registry in assessing the legal risk involved in a potential transaction. This inquiry can significantly increase transactional costs. On the other hand, a registry system providing a searching party with the necessary information to assess legal risk without need for further inquiry significantly reduces transactional costs for the searching party.

IV. REGISTRATION OF SECURITY INTERESTS: A BRIEF HISTORY FROM THE *STATUTE OF FRAUDULENT CONVEYANCES 1571* TO *THE PERSONAL PROPERTY SECURITY ACT 1993*

The origin of modern registry systems can be traced back to 1571, when English Parliament enacted 15 Eliz.1, c. 5, *the Statute of Fraudulent Conveyances* to address problems associated with the commercial revolution. The Statute applied to all conveyances of land and goods "devised and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent to delay, hinder or defraud creditors and others of their just and lawful actions, suits, debts".[8] It declared "such conveyances . . . to be clearly and utterly void, frustrate and of no effect; any pretence, colour, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding."[9]

[7] The term "searching party" refers to a person who is seeking to determine the legal risk of acquiring an interest in personal property
[8] 15 Eliz.1, c. 5
[9] *Ibid.*

However, the statute also provided "this act, or anything therein contained, shall not extend to any estate or interest in lands, . . . goods or chattels, had, made, conveyed or assured . . . which estate or interest is or shall be upon good consideration and bona fide lawfully conveyed or assured to any person or persons, or bodies politic or corporate, not having at the time of such conveyance or assurance to them made, any manner of notice or knowledge of such covin, fraud or collusion as is aforesaid."[10]

The effect of the statute was to make vulnerable to attack any conveyance by a debtor to a transferee that was made with the intention (or presumed intention) of delaying, hindering or defrauding existing or prospective unsecured creditors of the transferor. In the result, a creditor, whether he or she was a creditor at the date of the conveyance or became one after the conveyance, could bring action to have the conveyance declared "void".[11] However, the resulting state of the law was not satisfactory since it caused "a great quantity of perjury, of fighting and expense" in the process of characterizing transactions as shams or "real honest transactions".[12] For these reasons it was thought necessary to put a stop to this.[13]

The English *Bills of Sale Registration Act of 1854* was one of several Acts passed "to give greater protection to creditors against secret bills of sale and to enable them to ascertain whether the person in apparent possession of personal property was or was not the real owner, and, as such entitled to credit on account of that property".[14]

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[10] *Ibid*.
[11] Ronald C.C. Cuming, "Priority Competition Between Secured and Unsecured Creditors: The Evolution of Policy", Banking & Finance Law Review (2015) Vol. 30 at 458-459 [Priority Competitions between Secured and Unsecured Creditors].
[12] *Ibid*, 458.
[13] *Ibid*, 459-460.
[14] S.W. Worthington, *May on Fraudulent and Voluntary Dispositions of Property*, 2d ed. (Philadelphia: The Blackstone Publishing Co. 1887) 138.

The problems that induced the English *Bills of Sale Registration Act of 1854* were apparently of sufficient significance in Upper Canada as to induce legislature to enact the Act requiring *Mortgages of Personal Property in Upper-Canada to be filed.*[15] In 1857, a consolidated and expanded *Act respecting Mortgages and Sales of Personal Property in Upper Canada* was passed.[16] The historic evidence suggests that this version of the Act was patterned on prior chattel mortgage legislation of some of the United States.[17] For example, New York Statute of 1833, c. 279, s. 3 contained terms almost identical to those in the 1857 Act.[18] This structure set the pattern for the development of chattel mortgage registration requirements in several Canadian jurisdictions over the next 150 years.[19] The Act stated:

> Every mortgage, or conveyance intended to operate as a mortgage, of goods and chattels, made in Upper Canada, which is not accompanied by an immediate delivery, and an actual and continued change of possession of the things mortgaged, or a true copy thereof, shall, within five days from the execution thereof, be registered as hereinafter provided, together with the affidavit of a witness thereto, of the due execution of such mortgage or conveyance, or of the due execution of the mortgage or conveyance of which the copy filed purports to be a copy, and also with the affidavit of the Mortgagee or his agent be aware of all the circumstances connected therewith and properly authorized in writing to take such mortgage (in which case a copy of such authority shall be registered therewith).[20]

The Act provided that unless properly registered, the mortgage or conveyance "shall be absolutely null and void as against creditors of the Mortgagor, and against subsequent Purchasers or Mortgagees in good faith for valuable consideration".[21]

To effect registration in accordance with the Act, the relevant instrument was registered in the office of the Clerk of the Country Court or Union of Counties where the Mortgagor or

[15] 12, Vict. c. 74 (1849). The 1849 Act was amended in 1850, 13 & 14 Vict. c. 47 and re-enacted as a statute of the Province of Canada.
[16] 20 Vict. c. 3.
[17] Priority Competitions between Secured and Unsecured Creditors, *supra* note 13, 460-461.
[18] *Ibid*, 461, footnote 11.
[19] *Ibid*, 461.
[20] 20 Vict. c. 3.
[21] *Ibid*, s.3.

Bargainor resides at the time of execution.[22] The Clerks would endorse and file all instruments presented to them, so that they could be inspected by interested parties.[23] A filing remained valid against creditors and subsequent purchasers or mortgagees in good faith for valuable consideration for a period of one year, unless the filing was renewed within thirty days preceding the expiration of the one year term.[24]

The Act also included a fee schedule for filing and searching documents. The cost of filing each instrument and affidavit, and for entering same in a book, was twenty-five cents.[25] Conducting a search for each paper was ten cents.[26] Copies of any document filed under the Act cost ten cents for every hundred words.[27]

In the wake of the Confederation of Canada, there was a strong desire for westward expansion. The building of the Canadian Pacific Railway and promises of the 'Last Best West' resulted in significant immigration to the Northwest Territories and beyond.[28] As a result, new legislation, including chattel mortgage legislation, was required and spread quickly within the newly emerging provinces.[29] The first such legislation was introduced in the Northwest Territories in 1895.[30] The formation of Saskatchewan and Alberta in 1905 made further chattel mortgage legislation necessary. In Saskatchewan, this legislation took the form of *The Chattel Mortgage Act* RSS 1909, c. 144. The Act remained in force until 1920, when it was repealed and replaced by *The Chattel Mortgage Act* RSS 1920, c. 200.

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[22] *Ibid*, s.7.
[23] *Ibid*, s.7.
[24] *Ibid*, s.10.
[25] *Ibid*, s.14(1).
[26] *Ibid*, s.14(2).
[27] *Ibid*, s.14(3).
[28] Eli Yarhi and T.D. Regher, "Dominion Lands Act", The Canadian Encyclopedia. (Retrieved from: https://www.thecanadianencyclopedia.ca/en/article/dominion-lands-policy).
[29] Ziegel, Jacob*, The Legal Problems of Wholesale Financing of Durable Goods in Canada*, (The Canadian Bar Review (1963) Vol. XLI, 54-122) 62.
[30] *The Bills of Sale Ordinance*, Ordinances of the North-West Territories, 1895, No. 8, s. 8.

As its predecessors, the 1920 version of the Act required registration of every mortgage or conveyance intended to operate as a mortgage of goods and chattels which was not accompanied by an immediate delivery and an actual and continued change of possession of the things mortgaged.[31] The Act provided that registration was to be effected within thirty days of execution of the mortgage or conveyance, along with an affidavit of a witness and the mortgagee or the agent of the mortgagee.[32]

The 1920 Act also provided that each judicial district in Saskatchewan constituted a registration district.[33] As a result, a mortgage or conveyance or bill of sale registered pursuant to the Act was only effective in the district where registration occurred.[34] Pursuant to s. 18 of the Act, the proper district for registration was the district in which the property was located at the time of execution of the instrument or in case of a sale, assignment or transfer of book debts or accounts the district in which the vendor, assignor or transferor carried on business.

As Professor Roderick Wood notes, this type of registry system could be described as unified but decentralized. It was unified in the sense that for each registration district there was a single registry system that an interested party could search. However, it was decentralized in that the search would only reveal registrations pertaining to that registration district.[35] As a result, it was necessary to conduct multiple registrations and searches, particularly where mobile goods were involved. The decentralized system necessitated a set of rules governing situations where chattels were moved from one registration district to another.[36]

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[31] *The Chattel Mortgage Act* RSS 1920, c. 200, s. 9.
[32] *Ibid*, s. 9(1).
[33] *Ibid*, s. 3.
[34] *Ibid*, s. 15.
[35] Roderick J. Wood, "The Evolution of the Personal Property Registry: Centralization, Computerization, Privatization and Beyond" (Alberta Law Review, Vol. XXXV, No. 1 1996, 45-58) 47.
[36] *Ibid.*

The Uniform Bills of Sale Chattel Mortgage Act promulgated by the Conference of Commissioners on Uniform Legislation in Canada represented the next phase in the evolution of chattel mortgage legislation in Saskatchewan. The Uniform Act was adopted in Saskatchewan in 1928.[37] Subsection 6(1) of the Act provided that:

> Registration of a bill of sale under this Act shall be effected by filing the bill of sale, together with such affidavits as are by this Act required, within thirty days from the date of its execution, in the office of the proper officer of the registration district in which the chattels comprised in the bill of sale are situate at the date of the execution of the bill of sale. If there are two or more grantors, the date of execution of the bill of sale shall be deemed to be the date of the execution by the grantor who last executes it.

Each judicial and sub-judicial district in the Province was a registration district. The registration clerk whose office was situated within a registration district was the proper officer for the registration of bills of sale in that district.[38] In 1955, the Conference of Commissioners on Uniform Legislation in Canada promulgated an updated Uniform Bills of Sale Chattel Mortgage Act. The registration requirements in this version of the Act remained virtually the same as its predecessor.[39]

Two decades later, Saskatchewan[40]and the other provinces and territories, began the process of repealing prior *Chattel Mortgage*, *Conditional Sales*, *Assignment of Book Debts* and *Corporation Securities Registration Acts* and substituting codes of secured transactions law in the form of the *Personal Property Security Acts*.[41] The adoption of the *Personal Property Security Acts* constituted a significant change in Canadian personal property security law. Ontario was the first Canadian province to adopt a Personal *Property Security Act*. This is often referred to as "first

[37] See *Bills of Sale Act, 1929* SS 1928-29, c 69.
[38] *Ibid*, s. 17.
[39] *Bills of Sale Act, 1957* SS 1957, c 96.
[40] For an overview of Bills of Sale/Chattel Mortgage legislation in Saskatchewan, see Rasmussen, Merrilee, Q.C., *Historical Table of Public Statutes 1909-1978*, (Published by the Law Society of Saskatchewan Library, 2019) at 26-27. Retrieved from: https://www.lawsociety.sk.ca/media/395348/historical-table-of-public-statutes-1909-1978.pdf
[41] Priority Competitions between Secured and Unsecured Creditors, *supra* note 11, 468.

generation" legislation.[42] In 1981, Saskatchewan passed its own *Personal Property Security Act*,[43] called "second generation" legislation, which contained innovations not found in the Ontario Act.[44] Both statutes were inspired by UCC Article 9, sharing a vision and mandate of unifying the fractured registries and modernizing, rationalizing, and consolidating personal property security law.[45]

The 1981 version of the Saskatchewan PPSA utilized a computerized registry system which required the registration of financing statements.[46] The practice of registering copies of security agreements was discontinued since it prevented parties to security agreements from having the flexibility necessary in modern business financing transactions and because it is incompatible with a computerized registry system.[47] Instead, the Saskatchewan Act required collateral to be described on a financing statement in a manner "which enables the type or kind of collateral taken under the security agreement to be distinguished from the types or kinds of collateral which are not collateral taken under the security agreement."[48] If, however, the security agreement provided for a security interest in all of the debtor's present and after-acquired property, a statement to this effect was sufficient.[49]

One of the unique features contained in the 1981 Act was the provisions dealing with pre-agreement registration. Pursuant to subsection 44(2) of the Act, a secured party could register a financing statement before a security agreement was executed. However, a person against whose

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[42] Donald Layh, "Navigating Through the PPR", (June 2003) Prepared for the Saskatchewan Legal Education Society Inc. Seminar at 1 [Navigating the PPR].
[43] SS 1979-80, c P-6.1
[44] Navigating the PPR, *supra* note 42, 1.
[45] Clayton Bangsund, "ABCD Remoteness Problems: Nemo Dat & Its Exceptions Under Subsection 26(1.2) of Saskatchewan's The Sale of Goods Act" (2018) Sask. Law Rev., Vol. 81, No. 2 at 7. [ABCD Remoteness Problems]
[46] Ronald C. C. Cuming, "Second Generation Personal Property Security Legislation in Canada" (1981) 46 Sask. L. Rev. 5, Vol. 5, No. 41 at 24 [Second Generation Personal Property Security Legislation].
[47] *Ibid*, 24-25.
[48] Rev. Reg. of Sask. c.P-6.1, Reg. I, s.5(j).
[49] *Ibid.*

name or property a financing statement was registered had the power to have the registration automatically removed.[50] The Act also provided a less restrictive approach to registration terms by allowing secured parties to choose the duration of a registration's effectiveness.[51] Pursuant to the Act, a registrant could choose a registration period of any duration from one to twenty-five years or infinity.[52]

The 1993 version of the Saskatchewan PPSA significantly modified and replaced the provinces' second-generation PPSA legislation.[53] The registry system, originally established under the 1980 Act, was modified by the 1993 version of the Act and employed the most up-to-date technology. All records were kept in electronic form rather than paper documents and interested parties could register and search for registered interests via electronic means.[54]

Further changes were made to Saskatchewan's personal property security legislation in 2020 when *The Personal Property Security Amendment Act, 2019* was Proclaimed by the Governor in Counsel.[55] The revised version of the Act contain numerous new features, including revised conflict of law rules, protections for pre-paying buyers, expansion of the "garage sale" priority rule, recognition of electronic chattel paper, and cross-collateralization of purchase money security interests in inventory.[56]

An additional feature of significance is the revised rule addressing serial number registration requirements in priority competitions between secured parties with security interests

[50] Second Generation Personal Property Security Legislation, *supra* note 46, 30.
[51] *Ibid.*
[52] Rev. Reg. of Sask. c.P-6.1, Reg. I, s.5(1)(b).
[53] Ronald C.C. Cuming, "Personal Property Security Act", The Encyclopedia of Saskatchewan. Located at: https://esask.uregina.ca/entry/personal_property_security_act.jsp
[54] *Ibid.*
[55] Ronald C.C. Cuming and Clayton Bangsund, "Imminent Personal Property Security Legislative Reform in Saskatchewan", CBA BarNotes, Winter 2019, 9-10.
[56] *Ibid.*

in consumer goods and the trustee in bankruptcy. The amended Act provides that in order to have priority over the debtor's trustee in bankruptcy, it is not necessary for a secured party to include the serial number of the serial numbered goods; indeed registration based only on the debtor's name is sufficient. The result is that the trustee in bankruptcy cannot defeat a security interest in consumer goods merely because the registration does not include the serial number of the goods.[57]

V. POLICY OBJECTIVES OF A REGISTRY SYSTEM FOR SECURITY INTERESTS

There are two policy objectives underlying the registry systems under review. The most important is to protect third parties from the effects of the fundamental common law principle: *nemo dat quod non habet.* The core of this principle is that where there are competing claims of interests in personal property, the first-in-time interest prevails. In the context of a secured transaction, when an owner has granted a security interest in the owner's property to Secured Party 1 (SP1) and then attempts to sell the property to B (the buyer) or give a security interest in it to Secured Party 2 (SP2), all the owner can give to B or SP2 is an interest in the property subject to SP1's security interest. In other words, the owner cannot give anything more than she has.

The common law protects property interests over the reasonable expectations of persons who deal with a person who appears to have full ownership in property. In this respect, commercial activity is hampered because anyone acquiring an interest in property must 'go behind' the appearance of ownership of a person purporting to grant an interest in the property. Registration provides information through which a person, who intends to acquire an interest in the property from the owner, can determine the legal risk of acquiring that interest. If the interest is not registered, the person who acquires an interest in the property from its owner is not subject to the *nemo dat* principle.

[57] *Ibid.*

The second underlying policy objective of a registry system is the determination of priority. In some circumstances, the principle of *nemo dat* is negated where potential deception of third parties is not at issue. These are circumstances in which a first-in-time registration can be an efficient way to address competing interests in property, even though there is no potential for deception. In these circumstances, a subsequent interest holder is given priority over a prior unregistered interest holder, even though the subsequent interest holder was fully aware when acquiring an interest in property that it was subject to a prior interest that, under the *nemo dat* principle, would have priority.[58] The policy objective of this approach is to have a surgical priority rule under which priority can be readily and easily determined without the need to inquire into the state of mind of the subsequent interest holder. As a result, the holder of an unregistered interest in personal property cannot rely on the *nemo dat* principle in a priority competition against a subsequently registered interest.

VI. ESSENTIAL FEATURES OF THE SYSTEMS EXAMINED

(a) Terminology

The terminology used by the SPPSA and UCC Article 9 demonstrates the difference in approach of the respective registry systems. The SPPSA provides for the 'registration' of interests – suggesting that its function is to disclose to the public, extant or potential interests in personal property.[59] UCC Article 9 provides for the 'filing' of documents that may (or may not) disclose the nature and extent of interests described in the filed documents. As a result, the UCC Article 9 system is essentially a 'notice-filing system'.[60]

[58] SPPSA, *supra* note 3, s. 20(3) & 35(10).
[59] SPPSA, *supra* note 3, ss. 43(12) & 50.
[60] UCC Article 9, *supra* note 4, §. 9-501.

(b) The Saskatchewan Personal Property Registry

The Registry is a central feature of the SPPSA regime. It is the mechanism for providing public disclosure by registration of the existence or potential existence of security interests and deemed security interests falling within the scope of the SPPSA and related statutes providing for registration of interests other than ownership.[61] Its role is to allow interested parties to take prophylactic measures to avoid loss when dealing with personal property.[62]

The Registry is a centralized, computerized system encompassing registrations relating to interests in all types of personal property. It offers two main services: the ability to effect a registration relating to personal property and the ability to search for interests or potential interests falling within the scope of the SPPSA regime and other statutes.[63] The web-based system provides users with a convenient mode of searching for and registering interests against personal property in 'real time'.[64] As a result, when a financing statement is transmitted to the Registry, there is no lag time between the registration and the time the registration is searchable. Each registration is searchable immediately after being registered.[65] Consequently, a searching party is entitled to rely on the results produced by the Registry and need not be concerned that a prior registration has not been disclosed in the search results.

Modern registry systems such as the PPR also provide benefits to the public. The features of the Registry that are particulary relevant to the public are accessibility and certainty. As mentioned, the Registry is accessible to the public; it is not reserved for use by lawyers or other

[61] Ronald C.C. Cuming and Roderick J. Wood, *Alberta Personal Property Security Handbook*, 2nd Edition (Thomson Canada Limited, 1993) at 394-395 [Cuming and Wood].
[62] While the PPR serves as a mechanism for providing public disclosure, it does not deal with priority rules relative to interests arising under or regulated by the *SPPSA* or other acts.
[63] ISC "Personal Property", online: https://www.isc.ca/SPPR/Pages/default.aspx [ISC - Personal Property].
[64] *Ibid.*
[65] *Ibid*.

professionals. As such, an individual can use the Registry to assess their risk in dealing with personal property without having to pay legal fees for someone to do so on their behalf. This feature of the Registry helps to reduce transactional costs for individuals who may otherwise have to expend resources to have a lawyer perform a search and interpret the results on their behalf.

Certainty is one of the most important feature of the Registry. A registry system that provides certainty to users is valuable because it helps reduce transactional costs. A registry system that does not provide certainty creates problems for searching parties, who must take additional steps to reach an acceptable level of certainty. Such a system would have a relatively higher transactional cost associated with use.

In Saskatchewan, the Registry provides certainty for its users by providing real-time registration and search results. This means there is no delay or lag time associated with use of the Registry. The search results produced by the Registry can be relied upon as an accurate reflection of the status of personal property from the time of the search.

Certain features such as accessbility and certainty are critical for the functioning of a modern registry system. It is the author's opinion that a registry system implementing these features benefits the public in particular because it facilitates risk assessment and thereby promotes economic activity. For example, in the sale of a used vehicle, the purchaser can utilize the Registry to search and assess the risk in dealing with both the seller and property. Upon considering the results, the searching party can decide whether to deal with either of the individual or property. This process can be completed quickly and efficiently while also providing the searching party with certainty as to the status of property. This is only one example of the public benefits associated with use of the Registry.

(c) A UCC Article 9 Registry

The UCC Article 9 system employs a bifurcated approach to registration, with an important distinction being made between specific and non-specific property.[66] Pursuant to UCC Article 9, interests in non-specific property may be filed in the public system by delivering a financing statement to an office designated under § 9.501 of the *Business and Commerce Code*.[67] Unlike the SPPSA system, the UCC Article 9 system draws a clear distinction between legal effectiveness and filing. This feature will be explored in greater depth in a later chapter.

VII. TYPES OF REGISTRY SYSTEMS

(a) Full WYSIWYG Registry System

A full WYSIWYG ["what you see is what you get"] registry system provides a searching party with all of the information needed to make an informed legal risk assessment when planning to buy or take a security interest in personal property in the possession or control of another person. The principal features of such a system would be the following:

1. The system would guarantee that the person recorded as debtor is the owner of the property being purchased or in which the security interest is to be taken.

2. The system would disclose all registerable charges or interests in the property to which the searching party would be subject should that person enter the contract with the debtor. There would be no valid but undisclosed interests other than those given priority by law without registration.

3. The search criterion (criteria) the searching party uses is clearly defined and unique.

4. The search result would disclose specifically or generally the property (collateral) that is subject to an existing or future security interest or charge.

5. The system would guarantee that the searching party can assume that information obtained from the system (including the absence of such information) is legally reliable.

[66] For the purposes of this work "non-specific property" refers to personal property that is not identifiable by reference to a serial number or other alphanumeric identifier.
[67] UCC Article 9, *supra* note 4, §. 9-501.

6. A person named as debtor in a registration has the power to require amendment or discharge of the registration to reflect the existence or extent of the interest of the registering party in the property described in the registration.

Both registry systems described in this examination fall short of qualifying as a full WYSIWYG system. In the following paragraphs, the author describes the differences between the systems that contribute to or detract from each system meeting the WYSIWYG standard.

(b) SPPSA – A Limited WYSIWYG System

The SPPR can be described as a 'limited WYSIWYG registration system' in two respects. It is limited in that it does not address ownership of collateral. As a result, a person acquiring an interest in personal property can rely on the public record only with respect to interests that require registration in order to have a priority status. If the transferor does not own the property or does not have the legal power to dispose of the property, the transferee is not protected with respect to the priority claim of the owner of the property or someone who has an interest in the property that need not be registered for protection against loss to subsequent interests.[68] The second limitation of the SPPR is that, except in the case of serial numbered goods, it does not require that the registered data relating to the collateral be specific.

The SPPR system guarantees (except to the extent that the interests of a debtor or person named as debtor are negatively affected) that, when conducting due diligence, with very few exceptions, a searching party can rely on a registry search as the source of information relating to the extent of interests to which that person would be subject should the person acquire an interest in personal property. For the most part, there is no need for a searching party to 'go behind' the registry record to determine the legal status of a registered interest; a search of the SPPR in the

[68] *E.G.* the deemed interest held by Her Majesty in the Right of Canada under sections 224 and 227 of the *Income Tax Act* RSC 1985, c, 1(5th Supp) relating to liability for unremitted source deductions.

name of the debtor or by serial number can be relied upon by a searching party as legally effective (i.e. WYSIWYG).

An important aspect of an effective registry system is that only the secured party has access to the registry to effect, amend or discharge a registration. It is obvious that registration data can be relied upon only when the secured party has full responsibility for them. This places the principal obligation on the secured party, who must ensure that the registration data transmitted to the registry are complete, accurate, and searchable.[69]

The ability of searching parties to rely on registry data is further enhanced by special measures that address registrations relating to non-existent interests or registrations containing collateral descriptions broader than those permitted by a security agreement.[70] In prescribed circumstances, s. 18 of the SPPSA permits specified categories of searching parties to require a secured party to provide full details of the security agreement. In addition, a person named as debtor in a registration is given the power to require a secured party to amend its registration to reflect accurately the terms of the security agreement between them.[71] These measures give to a person named as debtor in a registration the power to ensure that information in a registration is accurate and to enforce removal of registrations that do not relate to extant interests.[72]

(c) UCC Article 9 – Qualified Notice Filing System

The UCC Article 9 system is based on Part 5 (§§ 9-501 to 9-527) of UCC Article 9. It can be classified as a 'qualified notice filing system'. This type of system is one under which, except in limited circumstances, a searcher cannot rely on either the reliability or absence of information

[69] The Registry (and the *SPPSA*) provide measures designed to address fraudulent registrations or fraudulent or inadvertent amendment or discharges. These features are discussed in a later chapter.
[70] SPPSA, *supra* note 3, s. 18.
[71] SPPSA, *supra* note 3, s. 50.
[72] *Ibid.*

filed in the system. A policy objective of a qualified notice filing system is to inform searchers that there may be an interest in the personal property of a person identified as debtor in a filing. Whether or not such an interest exists is a matter of law and must be determined in ways other than reliance on the filing system. The absence of information in the system does not necessarily lead to the conclusion that the property is free of security interests.

The UCC Article 9 system draws a clear distinction between legal effectiveness and filing. Documents may be filed, but this does not lead to the conclusion that they are legally effective. The filing system allows anyone to file records actually or allegedly on behalf of a secured party or a debtor. A filing, including changes to or deletions from the record, are effective only to the extent that it was filed by a person authorized by § 9-509 of UCC Article 9.[73] The result is that a searcher must verify the authenticity of registered records before reaching a conclusion as to the status of the recorded interest.

The practical effect of a notice-filing system is to place on the searching party the obligation to determine whether and to what extent a filing and associated filed documents represent the relationship between the parties named as secured party and debtor. To do so, the searching party will use the information found in the filing system to communicate with the secured party identified on the financing statement. The risk of fraud is on the searching party, not the registering party. In this regard, a registered party has no obligation to file an information statement if, and when, it discovers that an unauthorized discharge statement has been filed.[74]

An important feature of a UCC Article 9 notice filing system, not addressed in a Canadian PPSA registry system, is that it functions in conjunction with the COT system when certain types of property are involved. The UCC Article 9 system requires public disclosure of interests in these

[73] UCC Article 9, *supra* note 4, §§. 9-509,9-510 and 9-512.
[74] *Ibid*, §§. 9-509, 9-510 and 9-513(d).

types of property through notations on the state-issued certificate of title relating to specific items of property. When this type of property is involved, a person intending to buy or acquire a security interest in the property can rely on the information disclosed on the COT.[75] *Prima facie*, a comparison of the treatment of specific property under the two systems may induce the immediate conclusion that the COT system is superior to its SPPSA counterpart. However, there are certain deficiencies associated with the COT system, which brings its efficacy into question. These deficiencies are addressed in a later chapter.[76]

VIII. DISCLOSURE OF OWNERSHIP OF COLLATERAL

(a) Relevance of "ownership" of the collateral in secured financing

The purpose of this study is to examine the legal significance of the information contained in two types of public registry systems and the efficiency of each system in reducing transactional costs associated with legal risk. A significant issue that must be addressed in this context is the extent to which each system addresses ownership of personal property. The basic principles of property law are an appropriate starting point.

The modern legal understanding of property ownership is often metaphorically described as a 'bundle of rights'. This abstract notion describes property as a collection of rights *vis-à-vis* others, rather than rights to a 'thing'. It is a legal construct that has evolved to describe the rights, as well as the responsibilities that attend ownership, independently of whatever 'thing' is owned. Moreover, the 'bundle of rights' analogy demonstrates the many ways in which property ownership can be divided.[77]

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[75] Texas has adopted an electronic COT system capable of recording interests in property. However, the electronic system is subject to restrictions that a physical COT is not. For further discussion on this matter, see the section on *Specific Property*.

[76] This topic is revisited in Chapter XII, *infra.*

[77] Denise R. Johnson, "Reflections on the Bundle of Rights" (2007) Vermont Law Review, Vol. 32:247 at 247.

The registry systems under examination can be divided into two categories: one that addresses *nemo dat* as it relates only to interests in property less than ownership, and the other that does so in the context of both ownership and interests less than ownership.

(b) The SPPR – Not an Ownership Registry

As noted above, the author has classified the SPPR as a limited WYSIWYG registry system. It is limited in one important respect in that it does not address ownership of property. Consequently, additional inquiries are required when an interested party wants to determine who the legal owner of property is.

(c) The Texas Certificate of Title System

A 'certificate of title' is a physical or electronic document that records ownership of and security interests in specific property.[78] In conjunction with UCC Article 9, the Texas *Certificate of Title Act*[79] and Chapter 502 - the *Registration of Motor Vehicles*[80] prescribe the kinds of goods that qualify as specific property and therefore must be titled in accordance with the COT Act.[81]

The COT system is reserved exclusively for property defined as a "motor vehicle" by the Texas Department of Motor Vehicles [hereafter "TxDMV"].[82] Any interest in property falling within this definition must be perfected in accordance with UCC Article 9 and the COT Act.[83] More specifically, Texas legislation provides that a COT related to collateral, other than inventory

[78] Tamara M. Buckwold, "The Conflict in Conflicts: Choice of Law in Canada – U.S. Secured Financing Transactions" (University of Saskatchewan, College of Law), 23 [Buckwold].
[79] *Certificate of Title Act,* Acts 1995, 74th Leg., ch. 165, Sec. 1, eff. Sept. 1, 1995, at ss. 501.004 [COT Act].
[80] Acts 1995, 74th Leg., ch. 165, Sec. 1, eff. Sept. 1, 1995 [Chapter 502 – Registration of Motor Vehicles].
[81] Texas Motor Department of Motor Vehicles, "Motor Vehicle Title Manual", (July 2018). Available for download at: https://www.txdmv.gov/txdmv-forms/doc_download/703-motor-vehicle-title-manual 1-1 [TxDMV - Motor Vehicle Title Manual].
[82] COT Act, *supra* note 79.
[83] UCC Article 9, *supra* note 4, §. 9-501.

held for sale or lease, is equivalent to filing a financing statement and as such, constitutes perfection of a security interest in the motor vehicle.[84]

Unlike the SPPR, a COT system is designed to provide information related to both legal ownership of and interests in prescribed property. The benefit of the COT system is that all information relevant to ownership and interests are contained in a single document. As a result, the party conducting due diligence in relation to specific property can examine the COT and determine both the legal owner of the property and whether any interests exist on title.[85] As noted below, unlike the SPPR, the COT system does not disclose other types of interest

In many respects, the COT system for motor vehicles can be analogized to the Torrens system for land titles.[86] The intended effect of this approach is that in Texas, and throughout the United States, an interested party can assess the legal risk in dealing with a motor vehicle solely by evaluating the corresponding COT.

IX. THE CENTRAL ROLE OF THE REGISTRATION SEARCH CRITERION

(a) The SPPR – the role of dual registration-search criteria

A central aspect of any registry system is the algorithm that is used to index or catalogue the information contained in the registry. This is often referred to as the 'registration-search criterion'.

The SPPSA and *The Personal Property Security Act Regulations*[87] draw a crucial distinction between registrations relating to serial numbered goods and those relating to all other types of goods. Two different registration-search criteria are used in the registration of secured

[84] COT Act, *supra* note 79, §. 501.113.
[85] See Chapter XI, *infra*, for a more detailed examination of the COT system and issues associated with it.
[86] Like the Torrens system, the COT system provides that a person disclosed as owner in the records of the relevant authority or the paper title issued by the authority is, in law, the owner.
[87] SS 1995, c P-6.2 Reg 1, s.2(h)(ii) [Regulations].

financing transactions: the debtor's name and, where serial numbered goods are involved, the serial number of the goods in which the security interest is taken.

The debtor's legal name (generally as set out in a government issued birth certificate) is the basic registration-search criterion. Pursuant to s. 10 of the Regulations, registration information is indexed under the debtor's name and, consequently, searches are focused on the debtor's name.[88] The use of a debtor name as a registration-search criterion is an essential aspect of a modern system because several of the important features of the system could not function on the basis of collateral description registration-search criteria.

However, a system that uses only the name of the debtor as the registration-search criterion has a fundamental weakness - it does not give protection to a third party who is not in the position to obtain a search of the registry based on the debtor's recorded name because the existence or identity of the debtor is unknown to that person. This deficiency, often referred to as the A-B-C-D problem, was described by Klebuc J. in *Royal Bank of Canada v Steinhubl's Masonry Ltd.*, as follows:

> A obtains a security interest in B's goods. B sells his goods to C who in turn offers to sell them to D. D conducts a registry search based on C's name, being the only search criterion available to him/her. The search does not reveal A's security in the goods because A's security interest was perfected by registration based on B's name. In the result, the registry system will not afford D any protection *vis-á-vis* A, notwithstanding his/her search.[89]

Under a system that provides only the debtor's legal name as the search criterion, D is not afforded the protection of the registry system, despite taking the necessary steps to protect herself. This deficiency can be addressed, in part, by the requirement that an additional registration search criterion be included which provides identification of the collateral with the result that D can discover A's security interest by using the collateral descriptor as a search criterion.

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[88] *Ibid,* s. 10.

[89] (2003 SKQB 299), 2003 CarswellSask 531 at para 12 [*Steinhubl's Masonry Ltd*].

Subsection 35(4) of the SPPSA and ss. 2(1)(o), 2(1)(u), 12, 13 and 14 of the Regulations are intended to reduce the risks associated with the "A-B-C-D" problem.[90] The serial numbered registration regime recognizes that serial numbered goods are often highly mobile and susceptible to pass between multiple parties through the course of "private sales".[91] For example, when a security interest in a motor vehicle is registered in a debtor's name and by serial number, a third party (such as D in the aforementioned scenario) will be able to determine, through a search using the serial number of the vehicle as the search criterion, whether an interest in the motor vehicle exists, even though D is unaware that a security interest was granted to A by B.

(b) Texas UCC Article 9

In Texas, interests in non-specific property may be registered with a state filing office designated by § 9.501 of the *Business and Commerce Code*.[92] A security interest in property subject to the COT system is to be recorded on the COT itself.

UCC Article 9 §§ 503(a)(4) and (5) prescribe the rules relating to the registration-search criterion of an individual debtor. These provisions stipulate that a financing statement sufficiently provides the name of the debtor, if the name of the debtor is as it appears on an unexpired driver's licence issued by the state that is the debtor's personal residence.[93] If a nickname or misspelling is on the driver's license, this must be used even though it is not the debtor's legal name. If the debtor does not have a license, a state-issued ID card may be used. [94] In other cases, the debtor is to be described by surname and personal name. As a result, multiple searches may be required when the debtor claims not to have a current driver's license issued by the state in which she lives.

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[90] SPPSA, *supra* note 3, s. 35(4) and SPPSA Regulations, *supra* note 87, ss. 2(1)(o), 2(1)(u), 12, 13 and 14.
[91] *Steinhubl's Masonry Ltd*, *supra* note 89, at para 16.
[92] UCC Article 9, *supra* note 4, §. 9-501.
[93] *Ibid*, §. 9-503(a)(4).
[94] *Ibid*, §. 9-503(a)(5). See generally, Richard Nowka, "Twenty Questions About an individual Debtor's Name under amended Article 9 Section 9-503(A)(4) Alternative A" (2012), 3 William and Mary Business Law Review at 139.

X. LAW APPLICABLE TO PERFECTION – CHOICE OF LAW RULES

(a) Overview

Both Canada and the United States are constitutionally federal states in which jurisdiction over secured transactions is governed by provincial (and territorial) law in the case of Canada and state law in the case of the United States. This gives rise to the necessity to have rules governing registration where aspects of a transaction involve more than one jurisdiction. Perfection of an interest is most often achieved by registration, and it is, therefore, crucial for parties to know what law applies to perfection of a security interest (i.e. where an interest is to be registered).

(b) The SPPSA Choice of Law Rules

The SPPSA has adopted a bifurcated approach to choice of law rules relating to registration. More specifically, the SPPSA makes a distinction between "intangibles, mobile goods (equipment or held for lease) and electronic chattel paper" and "goods other than intangibles, mobile goods and electronic chattel paper".[95] This distinction has important implications for registration purposes.

The perfection and priority of a security interest in property classified as "goods other than intangibles, mobile goods and electronic chattel paper" is generally governed by the law of the location of the collateral (i.e. *lex sitae*) when the issue being addressed arises.[96] The connecting factor relevant to perfection and priority of a security interest in this type of property is the location of the property itself, as the location of the collateral is the most stable point of reference for these types of goods.[97] It follows that perfection by registration will occur in the jurisdiction where the property is located.

[95] SPPSA, *supra* note 3, ss. 5 and 7.
[96] SPPSA, *supra* note 3, ss. 5(1) and (1.1).
[97] *Ibid.*

Problems can arise if collateral subject to a security interest perfected under the law of another jurisdiction is brought into Saskatchewan with the result that the law applicable to perfection is Saskatchewan. In many cases, the secured party may not be aware of the removal of the collateral to Saskatchewan. The SPPSA accounts for this problem by providing a 'grace period' for re-perfection of the interest in Saskatchewan. The grace period does not apply where the competing interest acquired in Saskatchewan is a buyer or lessee who acquires an interest without knowledge of the foreign security interest and before it is perfected in Saskatchewan.[98]

The amended SPPSA provides debtor location rules for the perfection and priority of security interests in property classified as "intangibles, mobile goods and electronic chattel paper" based on debtor type. In the case of an "individual" debtor, the law of the jurisdiction where the debtor has her "principal residence" is applicable.[99] A "principal residence" location rule for all individual debtors enables the applicable law to be determined with greater certainty and at a lower transactional cost.[100]

The SPPSA rules for determining the location of non-individual debtors have also been recently revised. Where the debtor is a provincial corporation or organization, the applicable law is where the debtor was incorporated or otherwise organized if incorporation or organizational records are available to the public for inspection.[101] Where the debtor is a corporation incorporated under a law of Canada, the applicable law is the location of the registered or head office as provided

[98] *Ibid*, s. 5(3).
[99] *Ibid*, s. 7(3).
[100] Ronald C.C. Cuming et al, "Report to the Canadian Conference on Personal Property Security Law on Proposals for Changes to the Personal Property Security Acts" (Report delivered at the Canadian Conference on Personal Property Security Law, (21-23 June 2017) at 81 [CCPPSL Report].
[101] SPPSA, *supra* note 3, s. 7(4)(b).

in the incorporation documents if the incorporation documents are available to the public for inspection.[102]

(c) Texas UCC Article 9 Choice of Law Rules

UCC Article 9 has a single, umbrella choice of law rule used to identify the law determining the perfection and priority of security interests in all types of collateral, subject to the exceptions specifically provided for in ancillary provisions.[103] The single rule related to registration provides that "while a debtor is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or non-perfection, and the priority of a security interest in collateral" (i.e. perfection is based on the debtor's location and not on the location of the collateral).[104] It follows that where both debtor and collateral are located in the United States, the rule will often allow for a single filing, notwithstanding that the collateral may be located in several states or moves across state borders.[105]

The default location of the debtor choice of law rule does not apply to the state COT system.[106] In this context, § 9-303 displaces the default choice of law rules, providing instead that the local law of the jurisdiction under whose COT the goods are covered governs perfection and priority in relation to the property.[107] The COT will evidence extant security interests and identify the governing law, thereby protecting third parties dealing with the property.[108]

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[102] *Ibid*, s. 7(4)(c). The SPPSA also contemplates cases in which the debtor is a US Corporation. In those circumstances, the debtor's location is determined in accordance with SPPSA ss. 7(1)(d),(f),(g) and (4)(e). For a detailed overview of debtor location rules see the CCPPSL Report at 79-81.
[103] Buckwold, *supra* note 78, 20.
[104] UCC Article 9, *supra* note 4, §. 9-301.
[105] Buckwold, *supra* note 78, 21. Pursuant to UCC Article 9, where corporate debtors are involved, the rules are essentially the same as those in s.7 of the Amended SPPSA. See the CCPPSL Report at pages 79-81 for a detailed examination of the debtor location rules.
[106] *Ibid,* at 23.
[107] *Ibid,* at 21 and UCC Article 9, *supra* note 4, §. 9-303.
[108] Buckwold, *supra* note 78, 23.

Pursuant to §. 9-301, when a debtor changes location to a different jurisdiction, the perfection continues in the new jurisdiction until it expires under the law of the original location; the expiration of four months after the debtor's change of location; or the expiration of one year after a transfer of the collateral to a person in the new location who becomes a debtor.[109] If the security interest perfected in the original debtor's location is not perfected in the new jurisdiction within the prescribed four-month period, it becomes unperfected and is deemed never to have been perfected as against a purchaser of the collateral for value.[110]

When a debtor takes collateral from the jurisdiction in which the debtor resides and in which the security interest was perfected to another jurisdiction (without also changing residence to that jurisdiction) the law relating to perfection of the security interest does not change.[111] Prospective buyers, other than buyers in the ordinary course of business,[112] and secured parties cannot rely on a search of the filing office of the jurisdiction in which the goods are located at the date of the sale or security agreement to determine whether the goods are subject to a perfected security interest. In order to make this determination, the buyer must conduct a search of the filing office of the jurisdiction in which the debtor is resident.[113] The problems associated with this approach are ameliorated to some extent by the COT system that applies to most highly mobile goods.[114]

(d) Assessment

A post-attachment change in collateral location can impact the interests of both secured and searching parties. The law applicable to a change in the location of non-mobile goods

[109] UCC Article 9, *supra* note 4, §. 9-301.
[110] *Ibid,* §. 9-316.
[111] *Ibid*
[112] UCC Article 9, *supra* note 4, §. 9-320(a)(b).
[113] *Ibid*. The seller's residence is to be determined in accordance with UCC §. 9-307.
[114] *Ibid*.

(including motor vehicles held by debtors as consumer goods) under the SPPSA and UCC Article 9 are particularly noteworthy as it relates to risk assessment and management.

Subsection 5(3) of the SPPSA allows a searching party to rely on the results provided by the SPPR when assessing the risk in dealing with personal property. Pursuant to s. 5(3), collateral in the form of non-mobile goods must be re-perfected in Saskatchewan within the prescribed period. Where consumer goods (including mobile consumer goods) are involved, no grace period is given.[115] In this respect, the SPPSA facilitates the ability of a searching party to assess the risk in dealing with personal property at a low transactional cost. However, it does so at the expense of the secured party, who may become subordinate to a buyer or lessee due to the failure to re-perfect an interest in time, or at all. The SPPSA's policy in such circumstances places the ability of a searching party to rely on the results produced by the SPPR ahead of the potentially arbitrary results that may affect a secured party.

The UCC Article 9 system does not afford the same type of protection for searching parties as the SPPSA. As noted above, pursuant to § 9-316, perfection of a security interest in collateral falling outside the COT system continues in the new jurisdiction until the expiration of four months after the change, regardless of the knowledge of the secured party that the change in location has occurred.[116] As result, prospective buyers (other than buyers in the ordinary course of business of the debtor-seller) and secured parties cannot rely on a search of the filing office in which the goods are located to determine whether or not the goods are subject to a perfected security interest.[117]

The UCC Article 9 approach to a post-attachment change in collateral location increases a subsequent searching party's risk in dealing with personal property. In this regard, it is noted that

[115] SPPSA, *supra* note 3, s. 5(3).
[116] UCC Article 9, *supra* note 4, §. 9-316.
[117] *Ibid.*

the UCC Article 9 approach protects the interests of secured parties over the ability of searching parties seeking to enhance risk mitigation in dealing with personal property. This approach is problematic for searching parties, who may have no means of discovering an interest in property exists during the four-month grace period.

XI. REGISTRATION (FILING): COMPARATIVE FEATURES OF THE SYSTEMS

(a) Registration (Filing) Life Duration and Renewal (Continuation)

The term 'registration life' refers to the prescribed length of time that an interest may be registered in a public registry. The maximum 'registration life' varies significantly between the jurisdictions under review and can impact priority rights and risk assessment.

(i) The SPPR

Subsection 44(1) of the SPPSA permits a registering party to select any period of time for registration.[118] This is subject to the Regulations which in conjunction with the SPPSA prescribe the rules regarding registration life. As per s. 4(2) of the Regulations:

> For the purposes of subsection (1), a registrant is to select:
>
> (a) The number of years, months and days in whole numbers not exceeding 25 years in total;
> (b) A specific expiry date not exceeding 25 years; or
> (c) Infinity.[119]

A registration can be extended beyond the original period by registering a financing change statement indicating the additional registration life.[120]

The SPPSA approach to registration life demonstrates an intention to give registering parties extensive autonomy. The caveat being that a registered party will not be notified of a lapse

[118] Cuming and Wood, *supra* note 61, at 419 & SPPSA, *supra* note 3, s. 44(1).
[119] SPPSA Regulations, *supra* note 7, s. 4(2).
[120] Cuming and Wood, *supra* note 61, at 419 & SPPSA, *supra* note 3, s. 44(2).

of interest. It is the registered party who bears the responsibility of ensuring the registration remains valid.[121]

Any registration effected after the expiry of the initial or extended registration life is treated as an entirely new registration and must be effected by registering a new financing statement.[122] Any security interest to which it relates has priority only as it relates to the date of the new registration.[123] An exception to this rule is contained in ss. 20(2.1) and 35(7) of the SPPSA, which permit a secured party to reinstate a registration that has lapsed, been discharged fraudulently, or without authorization if the renewal is effected within 30 days after the lapse or discharge. The effect of the reinstatement is that there is no loss of priority status in relation to competing interests in the collateral that arose prior to the lapse or discharge.[124]

(ii) Texas UCC Article 9

Section 9-515 of UCC Article 9 outlines the effects of filing a financing and continuation statement.[125] Pursuant to that section, a financing statement lapses five years after the initial date of filing, causing the once-perfected interest to become unperfected unless the secured party files a continuation statement.[126] The effectiveness of a filing may be continued for an additional five years by filing a continuation statement six months prior to the expiry of the initial filing.[127] However, if a lapse occurs, the filing is treated as never having been effective as against purchasers (i.e. buyers and secured parties). This provision has the effect of giving an unexpected priority

[121] Cuming and Wood, *supra* note 61*,* at 337.
[122] *Ibid,* at 419.
[123] *Ibid.*
[124] *Ibid* & SPPSA, *supra* note 3, s. 35(7). Note that the 2020 SPPSA amendments ensure that a judgment creditor and a trustee in bankruptcy have the same priority status as other competing security interests in the event of a discharged registration that is re-registered within the grace period.
[125] UCC Article 9, *supra* note 4, §. 9-515.
[126] *Ibid,* §. 9-5185 (a)&(c).
[127] *Ibid,* §. 9-515 (e)&(d).

windfall to a buyer who acquired her interest when a security interest in the collateral was perfected by registration, if thereafter, registration of the security interest lapsed.[128] It seems fair to assume that the purpose of the rule is to protect parties, other than purchasers, who were subject to the filing at the time of the lapse.[129]

UCC Article 9 also provides that a state filing office must maintain any information with respect to a filed financing statement for a period of one year after the end of the five-year period of effectiveness.[130] This policy assures searchers that they will receive all information with respect to a financing statements filed against a debtor and thereby be able to determine the state of the public record.[131]

(iii) Assessment

The SPPSA provides registering parties with the autonomy to determine the life of initial and subsequent registrations. This provides a registering party with the ability to protect her interest from lapse by registering for any period of time she considers appropriate. However, cost is a factor to consider when effecting registration in the PPR. In Saskatchewan, rates vary depending on the length of the registration.[132] A rate of $10.00 per year is charged to register an interest for up to 25 years unless the registration is for infinity, in which case the cost is $500.00.[133]

UCC Article 9 mandates that initial and subsequent filed financing statements are only effective for a five-year period.[134] The benefit of a fixed registration period is that expired filings are removed from the system. The weakness of such a system is that filings become completely

[128] *Ibid.*
[129] David Frisch, The Implied 'Takings' Jurisprudence of Article 9, (1995) 64 Fordam L.Rev. 11, at 35.
[130] UCC Article 9, *supra* note 4, §. 9-522(a).
[131] *Ibid.* See also Official Comment to §. 9-522, at para 2.
[132] ISC "Personal Property Fees", Retrieved from: https://www.isc.ca/SPPR/Pages/PersonalPropertyFees.aspx#SPPR-Statement [ISC - Registration Fees].
[133] *Ibid*.
[134] UCC Article 9, *supra* note 4, §. 9-515 (a)&(c).

ineffective after the specified time period.[135] The result is that greater responsibility is placed on the filing party to maintain the registration and prevent a lapse.

While flexible registration life does not directly affect risk assessment, it does provide a registering party with the ability to better protect against lapse. In this regard, the SPPSA approach is superior to UCC Article 9. However, it should be noted that while the SPPSA provides users with greater flexibility and requires less 'maintenance' on the part of the registered party, a UCC Article 9 filing can be maintained indefinitely with proper diligence.

(b) Inadvertent Discharge of a Registration (Filing)

An inadvertent discharge occurs when a registered interest is mistakenly discharged by a person who is otherwise authorized to deal with the registration. An inadvertent discharge can significantly affect the rights of both secured and searching parties.

(i) The SPPR

Pursuant to the SPPSA, a registration that is inadvertently discharged is removed from the SPPR and is no longer discoverable.[136] In this regard, the WYSIWYG approach provides a measure of certainty for searching parties, who may rely on the absence of information in the SPPR to conduct risk assessment. However, this can also be problematic for a secured party whose interest has been mistakenly discharged.

The SPPSA addresses inadvertently discharged registrations in ss. 20(2.1) and 35(7). Section 35(7) provides that:

> (7) Where:
> (a) registration of a security interest:
> (i) lapses as a result of a failure to renew the registration; or
> (ii) is discharged without authorization or in error; and
> (b) the secured party registers the security interest not later than 30 days after the

[135] *Ibid,* §. 9-515 (d).
[136] SPPSA, *supra* note 3, s. 46(2)(b).

lapse or discharge;

the lapse or discharge does not affect the priority status of the security interest in relation to a competing perfected security interest that, immediately prior to the lapse or discharge, had a subordinate priority position, except to the extent that the competing security interest secures advances made or contracted for after the lapse or discharge and prior to the re-registration.[137]

As a result of s. 35(7), a registration effected subsequent to the discharge but prior to re-registration has priority over the re-registered interest.[138] Competing security interests (i.e. interests that were subordinate to the discharged or lapsed interest at the time of the lapse or discharge) remain subordinate to the discharged interest if that interest is re-registered within the 30-day grace period.[139] The exception made for intervening interests and/or advances reflect the WYSIWYG approach.

Section 35(7) does not address one problem in particular. If immediately after a lapse or discharge of SP1's registration, the debtor becomes a bankrupt, SP1 cannot escape the effect of s. 20(2) which makes ineffective a security interest that is not perfected at the date (time) of bankruptcy. This is so even though the interest holder effects a registration within 30 days of the lapse or discharge. There is no concept of "reinstatement" where the competing interest is that of the trustee in bankruptcy.[140] Section 20(2.1) addresses this issue. The section provides that:

> If registration of a security interest lapses as a result of a failure to renew the registration or is discharged without authorization or in error and the secured party registers the security interest not later than 30 days after the lapse or discharge, the lapse or discharge does not affect the priority status of the security interest that existed before the lapse or discharge in relation to:
>
> (a) a trustee in bankruptcy if the bankruptcy of the debtor occurred after the lapse or discharge and before the re-registration; or
>
> (b) an enforcement charge that, immediately before the lapse or discharge, had a subordinate priority position.[141]

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[137] *Ibid*, s. 35 (7).
[138] *Ibid.*
[139] *Ibid.*
[140] CCPPSL Report, *supra* note 100, 134.
[141] SPPSA, *supra* note 3, s. 20(2.1).

There is no policy reason why reinstatement should not be available to SP1 to allow the secured party to maintain her pre-lapse or discharge priority status after the invocation of bankruptcy by effecting a registration relating to the interest within a short period of time following the lapse or discharge.[142]

The inadvertent discharge of a registration can have significant implications for a registered party. The following scenario demonstrates this:

> SP1 holds a perfected, first-priority security interest in the personal property of debtor. Through a clerical error her interest is removed from the registry. After 10 days, a putative lender (SP2) searches the registry to determine the status of the debtor's property. Upon searching the registry, SP2 finds no other interests in the property and registers in the prescribed manner. After 15 days, SP1 re-registers her interest in the prescribed manner.

Although SP1 re-registered her interest, SP2 is entitled to rely on the Registry; taking priority over SP1. Through no fault of her own, SP1 has lost her priority position.

The SPPR has, however, adopted certain administrative measures to protect secured parties affected by an inadvertent discharge. For example, if a discharge of a registration occurs, the SPPR sends an electronic notification to the secured party, alerting her of the discharge.[143] A notification of discharge allows the previously registered party to re-register the interest in accordance with ss. 20(2.1) and 35(7), thereby reducing the chance of becoming subordinate to an intervening interest. This protective measure mitigates the risks associated with an inadvertent discharge.

An additional risk associated with s. 35(7) is the "circular priority" competition. The following example demonstrates same:

> On January 1, 2018: debtor signs a security agreement in favour of secured party 1 (SP1), who registers her interest. On January 5, 2018: debtor signs a security agreement in favour of secured party 2 (SP2), who registers his interest. Due to her own carelessness, SP1's registration lapses on January 1, 2019. On January 2, 2019: debtor signs a security agreement

[142] CCPPSL Report, *supra* note 100, 134.
[143] SPPSA Regulations, *supra* note 87, s. 20.1(3).

in favour of secured party 3 (SP3), who searches the Registry and registers her interest. On January 10, 2019: SP1 re-registers her lapsed interest.

Sections 35(1)(a)(i) and 35(7) provide that SP1 has priority over SP2 due to her original registration[144] and subsequent re-registration.[145] SP2 has priority over SP3 as a result of his original registration.[146] SP3 has priority over SP1 as a result of her original registration and reliance on the PPR.[147] While a circular priority competition may be unlikely to arise outside of academia, the risk for such a priority competition is certainly possible.[148]

(ii) Texas UCC Article 9

The UCC Article 9 notice-filing system indicates only that a person may have a security interest in property.[149] Pursuant to §§ 9-509 and 9-510, a termination filing is effective only to the extent that it was filed by an authorized person.[150] If a termination statement is filed by an authorized person, the financing statement to which the termination statement relates ceases to be effective.[151] However, while a financing statement may be terminated, and thus no longer effective with respect to the secured parties of record, the financing statement (including the termination statement) will stay on record for at least one year after it lapses.[152] There is no mechanism for filing a "termination of a termination".[153] Therefore, financing statements that have been terminated, or are no longer legally effective, will remain discoverable in the 'file drawer'.

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[144] SPPSA, *supra* note 3, s. 35(1)(a)(i).
[145] *Ibid,* s. 35 (7).
[146] *Ibid,* s. 35(1)(a)(ii).
[147] *Ibid.*
[148] For further consideration of the circular priority problem see Roderick J. Wood "Circular Priorities in Secured Transactions Law" (2010) 47 Alberta Law Review 823. See also, Cuming, Walsh & Wood, *Personal Property Security Law,* 2nd ed. (Toronto: Irwin Law, 2012) at pp. 490-493 for an examination of circular priorities [Cuming, Walsh, & Wood].
[149] Uniform Laws Annotated, Volume 3: With Annotations from State and Federal Courts (Thomson Reuters, 2010), UCC §. 9-502, Official Comment 2 [Uniform Laws Annotated].
[150] UCC Article 9, *supra* note 4, §§. 9-509 & 510.
[151] *Ibid*, §. 9-513(d).
[152] *Ibid,* § 9-519(g) & Uniform Laws Annotated, *supra* note 149, 524.
[153] UCC Article 9, *supra* note 4, §. 9-513(d).

A search of the UCC Article 9 filing system will reveal all filings, including prior security interests, purported terminations, and correction statements.[154] However, a search does not provide definitive information relative to the current 'status' of the interest. Further investigation is required and is the responsibility of the searching party, who must use the information provided by the filing system to conduct this inquiry.

It is important to note that the UCC Article 9 system allocates risk to the searching party, who must determine whether a filing was authorized. In this regard, Official Comment 2 to § 9-518 states that:

> just as searchers bear the burden of determining whether the filing of an initial financing statement was authorized, searchers bear the burden of determining whether the filing of every subsequent record was authorized.[155]

In effect, a searching party must obtain and review the results of a search, then make additional inquiries based on the filings contained in the drawer. The transactional cost will again depend on the number of filings contained in the file drawer.

(iii) Assessment

The inadvertent discharge of a registered interest presents different issues for searching and registered parties. The SPPSA better enhances the ability of searching parties to assess risk prior to registration, while the UCC Article 9 system is more effective, albeit slightly, at protecting the inadvertently discharged interest of a secured party.

A. Searching Parties

Under the SPPSA, an inadvertently discharged registration is removed from the SPPR and will not be disclosed to searching parties. The SPPSA's WYSIWYG approach allows a searching party to rely on the results displayed by the SPPR without need to conduct further inquiry. In this

[154] *Ibid,* §. 9-518(a).
[155] Uniform Laws Annotated, *supra* note 149, UCC §. 9-518, Official Comment 2.

regard, the SPPSA allows a searching party to assess risk before dealing with personal property at a relatively low transactional cost.

Under the UCC Article 9 system, an inadvertently discharged filing is not removed from the system. As a result, a filing statement indicating a discharge is merely a notice and cannot be relied upon to reflect whether an interest exists. Official Comment 2 to UCC Article 9 §. 9-518 states, the onus is on the searching party to determine whether the filing of an initial or subsequent statement was authorized.[156] In this context, the UCC Article 9 system does not enhance the ability of a searching party to assess the risk because it requires a searching party to 'look behind' a filing(s) to determine whether an interest exists. This can make the risk assessment process arduous for searching parties, especially when there are numerous filings in the drawer.

B. Secured Parties

The legal effect of an inadvertent discharge varies under the SPPSA and UCC Article 9. Since the SPPSA employs a WYSIWYG system, an inadvertent discharge is treated as legally effective. However, the potential effects of an inadvertent discharge on a prior secured party, trustee in bankruptcy or judgment creditors are ameliorated by ss. 20(2.1) and 35(7) of the SPPSA, respectively, and the notice requirements of the SPPR. The effect is that a secured party whose interest is inadvertently discharged will be notified of the discharge and able to reinstate the registration in accordance with ss. 20(2.1) and 35(7). However, during the period of time the interest is legally discharged, there remains a risk, albeit slight, that the discharged interest could become subordinate to an intervening interest.

A secured party whose filing is inadvertently discharged pursuant to the UCC Article 9 system is not at risk of losing priority position to an intervening interest. This is because an

[156] Uniform Laws Annotated, *supra* note 149, §. 9-518, Official Comment 2.

inadvertent discharge is not treated as being legally effective. Thus, while a filing may indicate that an interest no longer exists, it is the duty of the searching party to make further inquiries to confirm this. If successful, this inquiry should reveal that a discharge is not legally effective and that an interest continues to exist in the property. Furthermore, while a searching party has the onus to conduct an inquiry before dealing with personal property, a registered party has no obligation to monitor or maintain her registration. In this respect, the UCC Article 9 system provides better protections for secured parties than the SPPSA but at a cost to the overall efficiency of the system.

(c) Unauthorized Discharge of Registration (Filing)

An unauthorized discharge occurs when a registered interest is discharged by someone who is not authorized to deal with the registration. The person could be an employee of the secured party or someone who has fraudulently discharged the registration.

(i) SPPR

Pursuant to the SPPSA, an unauthorized discharge is dealt with in the same manner as an inadvertent discharge. The interest is removed from the SPPR but may be re-registered in accordance with ss. 20(2.1) and 35(7).[157] When the registration is removed, the secured party is notified of the discharge, which provides the secured party an opportunity to re-register the discharged registration in a timely manner.[158]

In addition to the foregoing, the SPPR has adopted an additional protective feature - the Registration Identification Number (hereafter "RIN") system.[159] The RIN system acts as an

[157] SPPSA, *supra* note 3, s. 35(7).
[158] SPPSA Regulations, *supra* note 87, s. 20.1(3).
[159] ISC - Registration Identification Number. Retrieved from: https://www.isc.ca/SignedInHome/Help/SPPR/CustomerLearning/TouringSPPR/Pages/Registration-Identification-Number-(RIN).aspx [Registration Identification Number].

additional form of security and is comparable to a bank PIN.[160] When properly utilized, the system prevents anyone who does not possess the RIN from dealing with the registration. If a registering party chooses not to utilize the RIN system, it is possible for an unauthorized party to effect changes related to a registration.[161] However, while the RIN system is not mandatory, almost all registering parties utilize this feature as an additional form of security.[162] The near universal use of the RIN system has almost completely eliminated unauthorized discharges or amendments in Saskatchewan. Only in a case where the secured party has disclosed the RIN to someone else who then uses it without authorization can a registration be discharged.

(ii) Texas UCC Article 9

Pursuant to UCC Article 9 §§ 9-509, 9-510, and 9-513(d), unless authorized by the appropriate person, a document indicating a discharge (while available to a searcher) is a nullity and has no legal validity.[163] The risk of fraud is on the searching party and not the registering party, who has no obligation to file an "information statement" if and when it discovers that an unauthorized discharge statement has been filed.[164]

Prima facie, the filing of a fraudulent financing statement does not prejudice the effectiveness of the filing statement or other filed record with which it purports to deal.[165] However, pursuant to the UCC Article 9 system, a searching party cannot take the results of a search at face value; additional inquiry is required. For example, if a fraudulent financing statement is filed and a searching party discovers it, it is the responsibility of the searching party to determine whether the filing is legally effective. Upon further inquiry, the searching party

[160] *Ibid.*
[161] *Ibid.*
[162] *Ibid.*
[163] UCC Article 9, *supra* note 4, §§. 9-509, 9-510, and 9-513(d).
[164] Uniform Laws Annotated, *supra* note 149, UCC §. 9-518, Official Comment 2.
[165] UCC Article 9, *supra* note 4, §. 9-518 (c)&(d).

should discover that the financing statement was filed fraudulently. Consequently, a fraudulently filed financing statement does not result in prejudice to a secured party. However, reliance on a fraudulently filed financing statement without further inquiry, can result in prejudice to a searching party.

Determining who is an 'authorized party' pursuant to the UCC Article 9 system has been a matter of considerable disagreement in the courts. The American jurisprudence on the subject indicates that a termination effected in error by an employee can result in an effective termination.[166] However, in order to determine whether a party is authorized to effect a legal discharge, the law of agency must be applied to the facts of each particular case.

In *Re Motors Liquidation*, the Court, *inter alia,* sought to determine who had the relevant authority to file a legally effective termination statement. The issue arose out of General Motor's bankruptcy proceedings. The facts of the case are described below.

In 2001, General Motors entered a synthetic lease financing transaction (hereafter the "Synthetic Lease"), by which it obtained approximately $300 million in financing from a syndicate of lenders including JPMorgan Chase Bank, N.A. (hereafter "JPMorgan").[167] Five years later, General Motors entered a separate term loan facility (hereafter the "Term Loan"). The Term Loan was entirely unrelated to the Synthetic Lease and provided General Motors with approximately $1.5 billion in financing from a different syndicate of lenders.[168]

In 2008, a partner at the law firm Mayer Brown LLP instructed an associate of the firm to prepare a closing checklist and draft the documents required to pay off the Synthetic Lease and to terminate the lenders' security interests in General Motors' property relating to the Synthetic

[166] Appeal No. 13-2187 (2d Cir. Jan. 21, 2013) (Second Circuit Decision) [*Re Motors Liquidation*].
[167] *Ibid,* at 3.
[168] *Ibid.*

Lease.[169] When Mayer Brown LLP prepared the closing checklist of the actions required to unwind the Synthetic Lease, it mistakenly identified the main Term Loan for termination alongside the security interests that actually needed to be terminated.[170]

The mistake went unnoticed until General Motors' bankruptcy in 2009. After General Motors filed for Chapter 11 reorganization, JPMorgan informed the Committee of Unsecured Creditors (hereafter the "Committee") that a termination statement relating to the Term Loan had been inadvertently filed in 2008.[171] The Committee commenced an action seeking a determination that, despite the error, the termination statement was effective to terminate the Term Loan security interest and render JPMorgan an unsecured creditor on par with other unsecured creditors.[172]

To determine whether JPMorgan granted the authority to Mayer Brown LLP to terminate the main Term Loan or to file the statement, the law of agency was applied. In relation to agency law and the authorization to file a termination statement, the Court specified that:

> [a]ctual authority . . . is created by a principal's manifestation to an agent that, as reasonably understood by the agent, expresses the principal's assent that the agent take action on the principal's behalf.[173]

Although JPMorgan never intended to terminate the main Term Loan, it authorized the filing of a termination statement that had that effect.[174] JPMorgan's repeated manifestations to Mayer Brown LLP demonstrated that JPMorgan and its counsel knew that, upon the closing of the Synthetic Lease transaction, Mayer Brown LLP was going to file the termination statement that identified

[169] *Ibid,* at 4.
[170] *Ibid,* at 6.
[171] *Ibid.*
[172] *Ibid* at 6-7.
[173] Restatement (Third) of Agency § 3.01 (2006); accord *Demarco v. Edens*, 390 F.2d 836, 844 (2d Cir. 1968).
[174] *Re Motors Liquidation*, *supra* note 166, 14.

the main Term Loan for termination and that JPMorgan reviewed and assented to the filing of that statement.[175]

Inter alia, *Re Motors Liquidation* demonstrates the importance of knowing who is authorized to deal with a filing.[176] Further, while a secured party is not required to maintain a filing, it may be in the best interest of a secured party to regularly review filings to ensure they remain legally effective. Failing to do so can result in enormous financial consequences.

While most financing statements filed with the office of the Secretary of State are legitimate documents authorized by relevant parties, financing statements with no legitimate basis under are a persistent problem for state filing offices and individuals targeted by spurious claims.[177] If the Secretary of State believes that a document filed to create a lien is fraudulent, the Secretary must request that the prospective filer provide additional documentation supporting the existence of the lien.[178] With the assistance of the Attorney General, the Secretary will determine whether the proposed lien is fraudulent.[179]

Section 9-5185 of UCC Article 9, a non-uniform addition made to the Texas State Code, addresses the implications of filing a fraudulent financing statement.[180] Pursuant to § 9-5185, a person may not intentionally or knowingly file a UCC Article 9 financing statement that contains a materially false statement or is groundless.[181] A person who does so is subject to civil penalties[182]

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[175] *Ibid.*
[176] Jeffrey Wurst, "Unintended Consequence — JPMorgan's Costly Mistake" (2015), UCC 3 Financing Amendment and Termination Statements: Avoiding Loss of Lien Perfection or Priority, Strafford Publications, at 3.
[177] National Association of Secretaries of State, "State Strategies to Subvert Fraudulent Uniform Commercial Code" (UCC) Filings, A Report for State Business Filing Agencies" (2014), at 3 [Strategies to Subvert Fraud].
[178] Texas Government Code, Title 4. Executive Branch, Subtitle A., Executive Officers, Chapter 405. Secretary of State, Subchapter A. General Provisions, §. 405.022.
[179] *Ibid.*
[180] UCC Article 9, *supra* note 4, §. 9-518.
[181] UCC Article 9, *supra* note 4, §. 9-5185(a).
[182] Texas Civil Practice and Remedies Code, Title 2. Trial, Judgment, and Appeal, Subtitle A. General Provisions, Chapter 12. Liability Related to a Fraudulent Court Record or a Fraudulent Lien or Claim Filed Against Real or Personal Property, §. 12.002(a)(3).

and is liable for damages, court costs, and attorney's fees.[183] Additionally, the owner of property covered by the fraudulent financing statement may request a release of the fraudulent statement.[184]

Finally, in conjunction with § 37.101 of the Texas Penal Code, § 9-5185(c) of UCC Article 9 makes it an offence to file a filing statement in violation of § 9-5185(a).[185] Section 37.101 is intended to deter and punish those who attempt to file spurious claims using UCC Article 9 financing statements.[186]

(iii) Assessment

The SPPSA approach to an unauthorized discharge allows searching parties to assess the risk in dealing with personal property through the SPPR without the need for further inquiry. While a secured party whose interest has been discharged is at risk of losing priority position to an intervening interest, the SPPSA ameliorates this problem by allowing the interest to be re-registered in accordance with ss. 20(2.1) and 35(7). In addition, the SPPR provides additional protections through its notice of discharge and RIN system. The result is a low transactional cost for searching parties with minimal risks for secured parties.

Prima facie, an unauthorized discharge under UCC Article 9 is treated in a similar manner to an inadvertent discharge. To conduct risk assessment, searching parties will use the filing statements in the 'file drawer' to inquire about the existence of an interest before dealing with personal property. If a proper inquiry is conducted, a searching party should be able to ascertain the status of a filing and its effectiveness. However, the matter becomes more complicated when the legal effect of a filing is brought into question. In these circumstances, the court will look to

[183] UCC Article 9, *supra* note 4, §. 9-5185(a).
[184] *Ibid*, §. 9-5185(d).
[185] UCC Article 9, *supra* note 4, §. 9-5185(c).
[186] Strategies to Subvert Fraud, *supra* note 177, 10.

the law of agency to determine whether the person dealing with the filing had the authority to deal with same.

The problems associated with the file drawer system are accentuated in the case of an unauthorized discharge, as both a secured and searching party can be prejudiced. To assess risk and ensure priority position, a searching party must go 'behind' a filing to determine its legal effect. Failing to do so may result in the searching party becoming subordinate to an interest that appears to have been discharged but remains legally effective. Likewise, a secured party's filing can be unknowingly discharged by an authorized agent without the secured party's knowledge. In such circumstances, the secured party is not given notice of the discharge and may not realize the extent and effect of the unauthorized discharge until it is too late.[187]

In the context of an unauthorized discharge, the UCC Article 9 system has a relatively high transactional cost for searching parties and presents significant risks for secured parties.

(d) Effect of Expiry and Non-Renewal (Continuation) of a Registration (Filing)

(i) SPPR

Pursuant to ss. 20(2.1) and 35(7) of the SPPSA, an expired registration may be reinstated within 30-days of a lapse with preserved priority except with respect to intervening interests or advances made or contracted for after the lapse and prior to re-registration (not including the trustee in bankruptcy).[188] The exception in s. 35(7) reflects the WYSIWYG approach of the SPPR, as intervening interests are given priority over lapsed interests, even after reinstatement.[189]

[187] See *Re Motors Liquidation*, *supra* note 166.
[188] SPPSA, *supra* note 3, s. 35(7).
[189] *Ibid*.

(ii) Texas UCC Article 9

Pursuant to UCC Article 9, a failure to file a continuation statement within the six-month period prior to the expiry of the five-year registration period results in the filing having no legal effect. After lapse, a filing is treated as never having been effective as against a purchaser of the collateral for value.[190] Consequently, it is of the utmost importance that a secured party ensures a filing does not lapse, as there is no opportunity to regain priority position through re-filing. This is demonstrated in the following scenario:

> SP1 and SP2 both hold security interests in the same collateral. Both security interests are perfected by filing. SP1 filed first and has priority under Section 9-322(a)(1). The effectiveness of SP1's filing lapses. If SP2's filing remains perfected thereafter, SP2 is entitled over SP1's security interest, which is deemed never to have been perfected as against a purchaser for value (SP2).[191]

In the above scenario, the deemed retroactive unperfection of SP1's interest applies only to purchasers for value; and does not apply with respect to lien creditors (i.e. the trustee in bankruptcy and judgment creditors).[192]

(iii) Assessment

The WYSIWYG approach to registration allows a searching party to rely on what is revealed by the SPPR. If a registered interest has lapsed and re-registration has not occurred, the interest will not be discoverable and the searching party can rely on the results produced by the Registry without further inquiry. In this regard, risk assessment is completed in a simple and efficient manner. The transactional cost is low for the searching party, who need not perform any additional inquiries beyond searching the Registry.

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[190] UCC Article 9, *supra* note 4, §. 9-515.
[191] Uniform Laws Annotated, *supra* note 149, at 529.
[192] *Ibid*.

UCC Article 9 prescribes that a filing office must maintain any information with respect to a filed financing statement for at least one year after the end of the five-year period of effectiveness.[193] The rationale is to relieve the filing office from any duty to determine whether to substitute or delete information upon receipt of an amendment. It also assures a searching party that she will receive all information with respect to the financing statements filed against a debtor and thereby be able to determine the state of the public record.[194]

The result is such that a party undertaking a risk assessment prior to filing must search the 'drawer'[195] and review the filings to fully assess the risk in dealing with property. The transactional cost for the searching party depends on the number of filings in the drawer. The more filings that are present, the higher the transactional cost.

(e) Defects in Registration Data

In certain circumstances a registration/filing may be rejected by the registrar/filing officer. The result is an ineffective registration/filing. However, both Saskatchewan and Texas have implemented measures to mitigate the risks associated with a rejected registration/filing attempt.

(i) SPPR

The registrar plays a role in the administration and functioning of the SPPR. Pursuant to s. 42.1(1), the "minister"[196] may appoint a registrar of Personal Property Security; and one or more

[193] UCC Article 9, *supra* note 4, §. 9-522(a).

[194] Lynn M. Lopucki and Elizabeth Warren, *Bankruptcy and Article 9: 2016 Statutory Supplement*, VisiLawMarked Version, 213-214.

[195] The UCC Article 9 filing system is often referred to as a "file drawer" or "open drawer" system, even though financing statements are stored electronically and no physical "drawer" exists. The name is derived from the UCC Article 9 filing policy which limits a filing officer's discretion to reject a filing. In effect, anyone can file records on behalf of either the secured party or the debtor without proof of authority. Similarly, anyone will be able to search and locate a record, along with all related records, which will be automatically linked to it. Therefore, it can be said that the drawer is "open" to both filing and/or searching parties to review. For further discussion on this topic, see Cheatham, Charles, "Changes in Filing Procedures under Revised Article 9." Oklahoma City University Law Review, vol. 25, no. Issues 1 and 2, Spring and Summer 2000, at pp. 235-268. HeinOnline.

[196] "Minister" is defined in section 2(aa) of the SPPSA as "the member of the Executive Council to whom for the time being the administration of this Act is assigned".

deputy registrars.[197] The SPPSA grants the registrar numerous powers, including the ability to reject an attempted registration. The registrar's power to reject an attempted registration is derived from ss. 43(10)-(11) and 43.1(2) of the SPPSA. Section 43(10) provides the registrar with the power to reject a financing statement where, in the opinion of the registrar, the financing statement does not comply with the SPPSA or the Regulations or any other Act or regulation pursuant to which registration of a financing statement is authorized. Section 43.1(2) permits the registrar to refuse or discharge any registration, if the registration is inconsistent with the purpose and intent of the SPPSA.

Unless accepted by the registrar, data submitted for registration cannot result in an effective registration.[198] The Crown is not liable for loss or damage suffered by the failure of the registrar to register, or to register correctly, a financing statement in the form of electronic data that is transmitted to the SPPR for the purposes of effecting a registration.[199]

(ii) Texas UCC Article 9

Subsection 9-516(a) of UCC Article 9 provides that "communication of a record to a filing office and tender of the filing fee or acceptance of the record by the filing office constitutes filing".[200] However, filing does not occur with respect to a record that a filing office refuses to accept due to any of the reasons found in § 9-516(b).[201] Furthermore, pursuant to § 9-516(d), a

[197] SPPSA, *supra* note 3, s. 42.1(1).

[198] Since the great bulk of registrations in Saskatchewan are effected electronically, it is not possible to effect a registration that does not comply with the SPPSA and the Regulations. The Registry computer system will not accept data that does not comply with the algorithm used by the system. In other words, the problem addressed in UCC Article 9 §. 9-516 cannot arise in Saskatchewan.

[199] SPPSA, *supra* note 3, s. 52(2).

[200] UCC Article 9, *supra* note 4, §. 9-516(a).

[201] Section 9-516(b) provides that filing does not occur with respect to a record that a filing office refuses to accept because: (1) the record is not communicated by a method or medium of communication authorized by the filing office; (2) an amount equal to or greater than the applicable filing fee is not tendered; (3) the filing office is unable to index the record because: (A) in the case of an initial financing statement the record does not provide a name for the debtor; (B) in the case of an amendment or information statement, the record: (i) does not properly identify the initial financing statement or (ii) identifies an initial financing statement whose effectiveness has lapsed; (C) in the

record that is sent to a filing office with the required fee that is refused by the filing officer for a reason other than those listed in § 9-516(b) is effective except as against a purchaser or a secured party of the collateral who gives value in reliance on the absence of the record from the files.[202]

(iii) Assessment

Pursuant to ss. 43(10)-11 and s. 43.1(2) of the SPPSA, the registrar may reject any attempted registration where, in the registrar's opinion, the registering party has not complied with the SPPSA.[203] The result is that the attempted registration is not effective and will not be disclosed to a searching party.[204] This approach places the obligation on the registering party, who must ensure that her attempt to effect registration has been successful. She is aided by the requirement that the registrar provide a statement of reasons for rejecting an attempted registration[205] and by the requirement that the SPPR send to a registering party a verification statement confirming a registration or amendment.[206] The result is a low transactional cost for a searching party since she can rely on the results disclosed by the SPPR.

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case of an initial financing statement that provides the name of a debtor identified as an individual or an amendment that provides a name of a debtor identified as an individual which was not previously provided in the financing statement to which the record relates, the record does not identify the debtor's last name; or (D) in the case of a record filed [or recorded] in the filing office, the record does not provide a sufficient description of the real property to which it relates; (4) in the case of an initial financing statement or an amendment that adds a secured party of record, the record does not provide a name and mailing address for the secured party of record; (5) in the case of an initial financing statement or an amendment that provides a name of a debtor which was not previously provided in the financing statement to which the amendment relates, the record does not: (A) provide a mailing address for the debtor; or (B) indicate whether the name provided as the name of the debtor is the name of an individual or an organization; or (C) if the financing statement indicates that the debtor is an organization, provide: (i) a type of organization for the debtor; (ii) a jurisdiction of organization for the debtor; or (iii) an organizational identification number for the debtor or indicate that the debtor has none; (6) in the case of an assignment reflected in an initial financing statement under Section 9-514(a) or an amendment filed under Section 9-514(b) the record does not provide a name and mailing address for the assignee; or (7) in the case of a continuation statement the record is not filed within the six-month period prescribed by Section 9-515(d).

[202] UCC Article 9, *supra* note 4, §. 9-516(d).

[203] SPPSA, *supra* note 3, s. 43(10)-(11).

[204] The SPPSA system addresses "errors" in compliance automatically. Data is transmitted directly to the Registry and is not viewed by registry staff. Consequently, if an error results from non-compliance with the regulations, the data will be rejected by the system. The result is that an "error" never results in a registration.

[205] SPPSA, *supra* note 3, s. 43(10)-(11).

[206] SPPSA Regulations, *supra* note 87, s. 20(1).

Subsection 9-516(d) of UCC Article 9 provides that a filing, which the filing office wrongfully refuses to accept, is effective except as against a purchaser of the collateral who gives value in reasonable reliance upon the absence of the record from the files.[207] The term "purchaser" is defined as "a person who takes by purchase".[208] "Purchase" is defined as "taking by sale, discount, negotiation, mortgage, pledge, lien, security interest, issue or reissue, gift or any other voluntary transaction creating an interest in property."[209] It follows that those taking by purchase are protected from wrongly rejected filings which do not appear in the file drawer. However, the rejected filing remains effective against the trustee in bankruptcy and unsecured lien (judgment) creditors.[210]

The result is that a searching party who qualifies as a purchaser is entitled to rely on the lack of filing in the drawer when conducting risk assessment; the rationale being that the first filing party is in the best position to determine whether the filing office accepted the filing.[211] Section 9-515(d) imposes, upon the filing party, the risk that a record failed to make its way into the filing system because of the filing office's wrongful rejection of it.[212] This risk is mitigated by §. 9-520(b), which requires the filing office communicate to the person that presented the record the fact of and reason for the refusal, thereby allowing the filing party to correct the error.[213]

(e) Fraudulent Registration (Filing)

A fraudulent registration/filing may be characterized as one that is effected in a public registry despite there being no legal basis for it. While steps have been taken to limit fraudulent

[207] UCC Article 9, *supra* note 4, §. 9-516(d).
[208] *Ibid,* §. 1-201(b)(30).
[209] *Ibid,* §. 1-201(b)(29).
[210] Uniform Laws Annotated, *supra* note 149, UCC §. 9-516, Official Comment 3.
[211] Barkley Clark "Revised Article 9 of the UCC: Scope, Perfection, Priorities, and Default", 4 N. C. Banking Inst. 129 (2000), at 158.
[212] Uniform Laws Annotated, *supra* note 149, UCC §. 9-516, Official Comment 3.
[213] UCC Article 9, *supra* note 4, §. 9-520(b).

registrations, they have caused problems in Saskatchewan and, to a greater extent, in Texas and the United States.

(i) SPPR

Sections 43.1 and 50 of the SPPSA provide a means for interested parties to challenge the existence or validity of a registration and grant the registrar the power to permit, refuse, or discharge a registration. More specifically, in cases of alleged fraud, these provisions provide a mechanism by which an interested party and the registrar can verify a registration and, failing same, effect a discharge of the registration.[214]

In situations of alleged fraud, the party named as the debtor in the financing statement, or another interested party, can take steps to have the registration discharged. This involves the debtor making a demand pursuant to s. 50(1), which in the case of a fraudulent registration, would require the secured party to register a financing change statement pursuant to s. 50(4)(a). If the secured party complies with the demand, the registration will be removed from the SPPR. However, if the secured party fails to comply, the person making the demand may register the financing statement mentioned in s. 50(4) once she has provided the registrar with proof, satisfactory to the registrar, that the demand has been given to the secured party.[215]

Sections 43.1 and 50 of the SPPSA provide a simple and effective means of removing or, in some cases, verifying alleged fraudulent registrations by forcing the secured party to produce evidence of an underlying agreement or risk the registration being discharged. The practical effect is such that a secured party cannot effect and maintain a fraudulent registration simply by remaining idle or failing to respond to a demand for evidence. Sections 43.1 and 50 of the SPPSA

[214] SPPSA, *supra* note 3, ss. 43.1 & 50.
[215] *Ibid*, s. 50(5).

facilitate risk assessment by providing a means to clear the SPPR of fraudulent registrations such that they are not disclosed in the search results.

(ii) Texas UCC Article 9

Financing statements with no legitimate basis under the UCC Article 9 system have been a persistent problem for state filing offices. These bogus financing statement filings serve no legitimate purpose and are usually tendered in furtherance of either of two objectives: harassment or fraud.[216]

Harassment filings, often made by prison inmates, typically name public officials, banks, corporate employees, and others as debtors. They are thought to be made in retaliation for a perceived injustice wrought by the nominal debtor. Such harassment filings often come as a surprise, can be difficult to explain, and are expensive and time-consuming to remove.[217]

Fraudulent filings, by contrast, often name substantially the same person as debtor and secured party. While they do not generally harm third parties, a great many of these filings characterize the debtor as "transmitting utilities" - filings which do not lapse after five years and thus need not be renewed.[218]

One UCC Article 9 commentator, Norman Powell, has observed that while some lament the permanent cluttering of the public record, the fee paid in connection with a fraudulent filing is no different than that paid in connection with a legitimate filing, and thus, one assumes, is a net source of revenue for the filing office. Nonetheless, Powell goes on to note that some jurisdictions

[216] Norman M. Powell, "Bogus Filings: Some Legal and Policy Considerations" (2017) UCC Law Journal, Volume 47 at 43 [*Powell*].
[217] *Ibid,* 44.
[218] *Ibid*.

find harassment and fraudulent filings intolerable and have taken steps to lessen the likelihood that such filings will appear in their records.[219]

In cases of fraudulent filing, a party named as debtor has limited options available to correct or remove the filing statement. The debtor may file an information statement with respect to any financing statement indexed in the debtor's name which the debtor believes is inaccurate or was wrongfully filed.[220] The debtor may also demand that the secured party file a termination statement, commencing a 20-day period for compliance.[221] However, as Powell points out, these responses, at best, offer incomplete relief since neither can be utilized unless and until the purported debtor knows of the harassment filing.[222]

Since all financing statements, even those for which termination statements have been filed, remain in the searchable record until at least one year after their effectiveness lapses, as a practical matter, neither of these responses respond adequately to the interests of persons named as debtor in unauthorized filings.[223] The result is such that purported debtors must seek judicial relief, including injunction against further harassment and (theoretical) entitlement to recover any loss resulting from inability to obtain, or increased costs of, alternative financing, and statutory damages. However, doing so is both expensive and time-consuming, especially when considering the possible outcomes.[224]

(iii) Assessment

The SPPSA's framework dealing with fraudulent registrations facilitates risk assessment to a greater extent than UCC Article 9. In this regard it is noted that the SPPSA provides interested

[219] *Ibid*.
[220] UCC Article 9, *supra* note 4, §. 518(a). Also see Powell, *supra* note 216, 44-45.
[221] UCC Article 9, *supra* note 4, § 9-513.
[222] Powell, *supra* note 216, 45-56
[223] *Ibid,* 45.
[224] *Ibid.*

parties with an effective approach to discharging a fraudulent registration. And, perhaps most importantly, this approach results in the fraudulent registration being removed from the SPPR.

While the UCC Article 9 system permits a financing change statement to be registered, the systems' filing retention policy is such that both a fraudulent filing and financing change statement will be disclosed in the search results. It therefore remains the responsibility of a searching party to review the filings produced by the system and make the relevant inquiries regarding the status of a particular filing. As with any due diligence search involving the UCC Article 9 system, the associated transactional costs are largely contingent on the number of filings in the drawer. However, from a practical perspective, it seems difficult to ascertain the status of a filing when it has been made fraudulently since the filing party is likely unknown to the searching party and/or is difficult to locate.

(f) Effect of Registrar's Indexing Errors

(i) SPPR

The SPPSA (by implication) provides that a registry error in dealing with registry data (e.g. inaccurately recording registered data transmitted to the registry) does not affect the right of a searching party to rely on the data except to the extent that the error indicates a secured party has a security interest in the collateral not granted in a security agreement. Except in a very few situations where paper registrations are used, there is no data entry made by the registrar. Data transmitted to the registry is electronically transmitted directly into the data base if the data comply with the registry algorithm. Consequently, there is very little chance that an error will be made in data entry. It follows that a registration will be effective, but only to the extent that the description is accurate.

(ii) Texas UCC Article 9

Pursuant to § 9-517 of UCC Article 9, the failure of the filing office to index a record correctly does not prejudice the effectiveness of the filed record.[225] Even though the record is not revealed in a search, the filing is effective. This is obviously problematic for a searching party, who is unable to discover the existence of the incorrectly indexed record.

In *Sheehan v Peoples Bank, NA (In re The Feed Store, LLC)*[226] the Court dealt with the inability of a searching party to discover an incorrectly indexed filing. At issue, *inter alia*, was whether Peoples Bank's filing was effective even though the filing was not disclosed because of the filing office's indexing error.[227] In this regard, the Court stated:

> [p]rinciples regarding the filing of a financing statement, Article 9 of the UCC in general, are centered upon the premise of providing predictability for all parties, security for senior lenders in their interests, and notice to potential junior secured lenders and purchasers. The Secretary of State does make mistakes occasionally, however, and either the searcher or the filer must suffer the consequences in priority based upon those mistakes.[228]

The official comment to UCC Article 9 adds that § 9-517 "imposes the risk of filing-office error on those who search the files rather than on those who file".[229]

(iii) Assessment

The treatment of a registrar's indexing error under the SPPSA and UCC Article 9 are fundamentally different. The SPPSA approach allows searching parties to rely on the data disclosed by the SPPR, regardless of the registrar's failure to properly index the registration data. The result is that searching parties are protected from the consequences of a registrar's error.

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[225] UCC Article 9, *supra* note 4, §. 9-517. Note that the Texas version of this provision reads "correctly index information contained in a record".
[226] Case No. 5:16-bk-1257, Adv. No. 5:17-ap-8, 2018 Bankr. LEXIS 697 *5-9 (Bankr. N.D. W. Va. March 13, 2018) [*Sheehan*].
[227] *Ibid.*
[228] *Ibid*, at para 6.
[229] Uniform Laws Annotated, *supra* note 149, UCC §. 9-516, Official Comment 3.

The SPPSA also provide a means of protection for secured parties by requiring the SPPR to send to the registering party a verification statement confirming the registration or amendment.[230] A secured party can use this information to ensure that her registration has been properly effected. In this regard, the SPPSA balances the rights of searching parties to rely on the results produced by the registry with a secured party's ability to protect the registered interest.

Pursuant to UCC Article 9, the *Sheehan* decision and the UCC Official Commentary, a searching party who has taken all the prescribed steps, may still find her filing subject to an incorrectly indexed and undiscoverable filing. This approach is reflective of the UCC Article 9 system's desire to protect registered parties to the detriment of searching parties. It is the author's opinion that this approach seriously diminishes the reliability of the UCC Article 9 system and, as a result, increases the transactional costs associated with use of same.

Comparatively, it is clear the SPPSA takes a far more balanced approach to the same problem. The result is that a searching party is entitled to rely on the results produced by the Registry and will not generally be subject to undiscoverable registration.[231]

(g) Expired Registrations (Filing) or Inaccurate Registration (Filing) Information

(i) SSPSR

Section 50 of the SPPSA permits a person named as a debtor to require a secured party to discharge or a change a registration in circumstances where no security agreement exists, the obligations under a security agreement have been discharged, or the collateral description in the registration does not reflect the scope of the secured party's interest under the security

[230] SPPSA Regulations, *supra* note 87, s. 20(1).
[231] When inventory is involved, there is potential for prejudice to the searching party. See *RBC v Wheaton Pontiac,* 1990 CanLII 7474 (SK QB), 88 Sask R 151 (QB). Also see Professor Clayton Bangsund's discussion in *ABCD Remoteness Problems*, *supra* note 45, at pp. 9-10.

agreement.[232] Where consumer goods are collateral, the secured party is required to discharge the interest no later than 30 days after the obligation is retired.[233]

If a demand is made pursuant to s. 50(3) and the secured party fails to discharge or amend the financing change statement within the fixed time-period,[234] the person giving the demand may register a financing change statement upon providing the registrar with satisfactory proof that the demand has been given to the secured party.[235] The only way the registering party can maintain the registration is through a court order.[236]

(ii) Texas UCC Article 9

UCC Article 9 requires that upon receipt of an authenticated demand of a debtor who did not authorize the original filing, or a debtor when the obligation secured by the security interest have been discharged and there is no outstanding obligations, a secured party must send to the debtor a termination statement or file a termination statement with the appropriate filing office.[237] However, where the collateral is consumer goods and the original filing was authorized by the debtor, no mechanism, other than judicial intervention, exists to force a discharge or correction of the data filed.[238]

(iii) Assessment

The SPPSA facilitates risk assessment by providing a party named as a debtor with a mechanism to 'clean' or 'empty' the Registry of inaccurate, completed, or non-existent interests. This might involve changing a registration to reflect the terms of the security agreement or

[232] SPPSA, *supra* note 3, ss. 50 (2) & (3)(a) & (c)(ii).
[233] *Ibid*, s. 50(2)
[234] *Ibid,* ss. 43 (10)-(11) & 50 (4).
[235] *Ibid,* s. 50 (5).
[236] *Ibid,* s. 50 (7).
[237] UCC Article 9, *supra* note 4, §. 9-514.
[238] *Ibid,* §. 9-513(a).

removing an expired or non-existent registration with or without the compliance on the part of the registering party.

UCC Article 9 provides debtors with a similar mechanism to have a filing corrected or terminated. The caveat being that when consumer goods are involved a distinction is made between "authorized" and "unauthorized" filings for the purposes of demanding a termination. If the debtor did not authorize the filing, then he or she can make a demand to the secured party. However, if the debtor authorized the filing, she has no mechanism available to force a termination.

While the UCC Article 9 system allows a debtor to demand a termination statement be filed, the termination filing will remain in the file drawer for the statutorily prescribed period such that a searching party will have to inquire into the validity of the termination filing.[239] The result is that until the expiry of the statutorily prescribed period, a searching party will be able to discover the termination filing and, to assess risk, must inquire into the legal effectiveness of the termination filing.

XII. SPECIFIC COLLATERAL IDENTIFICATION: SPPR SERIAL NUMBER REGISTRATION AND THE TEXAS CERTIFICATE OF TITLE SYSTEM

(a) The Rationale for Detailed Disclosure of Specific Types of Property

(i) Saskatchewan

Prima facie, Saskatchewan's approach to specifically identifiable property demonstrates an intention to protect individuals purchasing or taking an interest in serial numbered property. Section 35(4) of the SPPSA and ss. 2(1)(o), 2(1)(u), 12, 13 and 14 of the Regulations are intended to eliminate, or at least abate, the "A-B-C-D" problem discussed in *Steinhubl*.[240]

[239] *Ibid*, § 9-522. Note that a filed record, including a discharge notice, is retained by the filing office for one year after termination of the five-year period prescribed for all registrations.
[240] *Steinhubl's Masonry Ltd.*, *supra* note 89.

The imposition of a serial numbered registration regime recognizes that serial numbered goods are often highly mobile and susceptible to pass between multiple parties through the course of private sales.[241] When a motor vehicle is registered in a debtor's name and by serial number, a third party will be able to determine through a search, using the serial number of the vehicle as the search criterion, whether an interest in the property exists, regardless of whether ownership of the vehicle has changed. Thus, the imposition of serial number registration deals with a pragmatic problem: providing protection to D in the A-B-C-D scenario as a matter of public policy.

(ii) Texas

The primary purpose of a COT system is to prevent criminal activity (i.e. theft and/or fraud) associated with property that is highly mobile and, due to its common and valuable nature, vulnerable to criminal activity.[242]

The COT system in Texas and across the United States functions to prevent criminal activity by requiring specific property classified as a "motor vehicle" have a corresponding physical or electronic title documenting the legal owner of the property. A perfectly functioning COT system allows an interested party to rely on the information recorded on the COT as a guarantee of ownership. However, as will be discussed, there are certain issues associated with the COT system which prevent absolute reliance on a COT as a guarantee of ownership.

The secondary purpose of a COT system is disclosure of lien(s) affecting specific property. Unlike the SPPSA, a COT system provides information relating to both ownership of and interests in specific property. Section 9-311(a)(2) of UCC Article 9 states that:

> except as otherwise provided in Subsection (d), the filing of a financing statement is not necessary or effective to perfect a security interest in property subject to: the following statutes of this state: a certificate of title statute of this state or rules adopted under the statute to the extent the statute or rules provide for a security interest to be indicated on the

[241] *Ibid,* at para 16.
[242] *In Re Clark Contracting Services, Inc.,* 399 B.R. 789 (Bankr. W.D. Tex. 2008) [*Re Clark*].

> certificate of title as a condition or result of perfection or such alternative to notation as may be prescribed by those statutes or rules of this state or Chapter 261, relating to utility security instruments.[243]

For the purposes of this examination, the relevant statutes include: Chapter 501, Transportation Code – the *Certificate of Title Act*, relating to COT's for motor vehicles, subchapter B-1, Chapter 31, *Parks and Wildlife Code*,[244] relating to the certificate of title for vessels and outboard motors; and Chapter 1301, *Occupations Code*,[245] relating to the document of title for manufactured homes.[246]

(b) SPPR

(i) Overview

The SPPR discloses registrations related to several types of interests in collateral but is not a property ownership registry. Consequently, a party conducting due diligence in Saskatchewan must rely on other sources of information to address the risk that a seller or debtor is not the legal owner of the subject property. This is a deficiency of the Saskatchewan system not found in the United States. However, the relatively simple steps an interested party can take to ascertain with considerable accuracy who is, in law, the owner of specific personal property in Saskatchewan mitigates the negative effects of this deficiency.

(ii) The Scope of Specifically Identifiable Property

The Regulations define "serial numbered goods" as "a motor vehicle, trailer, mobile home, aircraft, boat, or an outboard motor for a boat".[247] The definition imposes serial number registration on goods that possess a high-degree of mobility whether by their self-propulsion or portability.

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[243] UCC Article 9, *supra* note 4, §. 9-311(a)(2).
[244] *Water Safety Act*. Acts 1975, 64th Leg., p. 1405, ch. 545, Sec. 1, eff. Sept. 1, 1975.
[245] *Plumbing License Law*. Added by Acts 2001, 77th Leg., ch. 1421, Sec. 3, eff. June 1, 2003.
[246] Uniform Laws Annotated, *supra* note 149, at 267.
[247] SPPSA Regulations, *supra* note 87, s. 2(1)(u).

The premise being that these types of goods are generally of high value and are particularly susceptible to being passed from a debtor to a buyer, and from one buyer to another via second hand or private sale markets.

One issue that has arisen regarding the scope of serial numbered goods is the interpretation of the term "motor vehicle".[248] Pursuant to the Regulations, a "motor vehicle" is defined as:

> a mobile device that is propelled primarily by any power other than muscular power:
> (i) in, on or by which a person or thing may be transported or drawn, and that is designed for use on a road or natural terrain; or
> (ii) that is used in the construction or maintenance of roads;
> and includes a pedal bicycle with a motor attached, a combine and a tractor, but does not include a device that runs on rails or machinery designed only for use in farming other than a combine or tractor;[249]

The definition is broad enough that a large majority of serial numbered goods are captured by this heading.[250]

In the *Steinhubl* decision, the Court dealt with the interpretation of the term "motor vehicle" within the context of the SPPSA.[251] At issue, *inter alia*, was whether a forklift used on a construction site should be defined as a "motor vehicle" and therefore classified as a serial numbered good.[252] The focus of the analysis revolved around s. 2(1)(o)(i) of the Regulations – and, more specifically, on the term "natural terrain" and the mobility of "motor" and "non-motor" vehicles.[253]

In the decision, the Court determined that "natural terrain" was, in the serial numbered registration context, intended to mean something similar to that of "road" and was said to

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[248] See generally *Steinhubl's Masonry Ltd.*, *supra* note 89.
[249] SPPSA Regulations, *supra* note 87, s. 2(1)(0).
[250] Kim Lemieux. "Re: Personal Property Registry Questions" [sent to Derek Gianoli] 24 October 2018, E- mail. Ms. Lemieux provided me with details regarding the most commonly registered type of personal property in the Saskatchewan Personal Property Registry.
[251] *Steinhubl's Masonry Ltd.*, *supra* note 89.
[252] *Ibid*, at para 1.
[253] *Ibid*, generally.

contemplate areas, places or facilities suitable for use by self-propelled mobile devices designed with a high degree of mobility.[254] This interpretation was contrasted to areas, places, or facilities of a confining or limiting nature, suitable for devices with limited mobility such as motorized wheel chairs and wheelbarrows.[255]

The Court determined that a forklift is able to drive on the road between job sites and can be used to haul hay bales over ordinary ground in order to feed cattle.[256] Therefore, due to its "high degree of mobility", the Court determined that the forklift fell under s. 2(1)(o) of the Regulations.[257] As a result, the forklift was determined to be a motor vehicle within the meaning of the Regulations and was to be registered with reference to its serial number.[258]

Upon review of the decision, one may be inclined to conclude that the question was answered incorrectly. Practically speaking, forklifts are rarely seen on public roadways and are not generally thought of as being a highly mobile item. However, an equally compelling argument can be made in support of the Court's decision on the basis that a forklift is capable of driving on roadways and other types of terrain at a reasonable speed. In this regard, the forklift may be more comparable to a typical automobile than a motorized wheelchair. Regardless of the outcome, the decision provides meaningful insight into the judicial interpretation of serial numbered goods in the SPPSA context.

In summary, the scope of the Saskatchewan registry regime is as broad as practically achievable. However, there are some limitations to the regime because a serial numbered system can only be extended to specific property that has a reliable serial number. The definition of serial

[254] *Ibid*, at para 17.
[255] *Ibid*, at paras 21-23.
[256] *Ibid*, at para 25.
[257] *Ibid*, at para 2.
[258] *Ibid*, at para 30.

number goods contains the types of personal property that have been determined to be consistent in this regard. For this reason, certain types of specific property with a high value (i.e. other types of farming equipment not falling with the terms "combine" or "tractor") are omitted from serial numbered registration system because of the difficulties associated with establishing reliable serial numbers for this type of goods. Therefore, while the SPPSA registration regime has been effective and provides for a wide range of goods to be registered by reference to a serial number, there are certain practical realities that limit its overall scope.

(iii) Proof of Ownership

A. Saskatchewan Government Insurance Registration

In Saskatchewan, the primary purposes for registration of a motor vehicle are to provide government revenue, obtain insurance, and identify vehicles. Consequently, registration of a motor vehicle with Saskatchewan Government Insurance (hereafter "SGI") is completed as a matter of compliance with provincial legislation rather than as a means of establishing ownership.[259]

To establish proof of ownership for the purposes of registration, an individual needs to provide either an original bill of sale, lease agreement, or transfer of ownership form.[260] Once an individual establishes proof of ownership and registers her motor vehicle, the person gains the benefit of the province's auto insurance policy.[261]

In *Langham Credit Union Ltd v Clayton*[262] and *Saskatchewan (Director under the Seizure of Criminal Property Act, 2009) v Harris*[263] the purpose of the SGI registration regime was reviewed. In the *Langham* decision, the Court took judicial notice of the fact that Saskatchewan

[259] *Traffic Safety Act*, SS 2004, c T-18.1, Section 57 [*The Traffic Safety Act*].
[260] SGI, "New and Used Vehicles" (10 November 2018), online: https://www.sgi.sk.ca/new-and-used-vehicles [SGI Webpage].
[261] *Ibid.*
[262] (2002) SKQB 80, (2002) CarswellSask 137 [*Langham*].
[263] (2018) SKQB 121, (2018) CarswellSask 206 [*Harris*].

does not have a title registry system but rejected the idea that the SGI regime's purpose was solely insurance related.[264] In this regard, the Court stated that "[f]or all practical purposes, the owner of a motor vehicle in Saskatchewan is the person who is named in the current registration certificate pertaining to that vehicle".[265]

The Court also acknowledged that the SGI registration regime has a valid commercial purpose, stating:

> [m]ost chattel property is not the subject of any form of registration and in such cases possession is the principal and primary determinant of ownership. Motor vehicles are unique in that their registration creates a presumption of ownership and follows a declaration of ownership by the registry. Since vehicles, next to real property, constitute the most valuable and probably the most frequently financed property in our society, reliance upon the registration system is an important facet of our commerce. To take away the reliance upon vehicle registration certificates as evidence of ownership would create chaos in the marketplace.[266]

Therefore, while a vehicle's registration does not equate to proof of ownership, [267] once a vehicle has been properly registered with SGI, a presumption arises in favour of the holder of the registration certificate, so that other parties (e.g. lenders, police, insurers, repairmen, etc.) are justified in relying on it.[268]

To summarize, registration of a motor vehicle with SGI, after a declaration of ownership, leads to a presumption of ownership in favour of the holder of the registration.[269] However, interested persons relying solely on the motor vehicle registration will not be able to discover any legal interests in the property because the SGI registration process does not convey any information relating to security interests, commercial liens, or enforcement charges registered against the motor

[264] *Langham*, *supra* note 262, at para 2.
[265] *Ibid,* at para 6.
[266] *Ibid,* at para 4.
[267] *Ibid,* at para 6.
[268] *Ibid*.
[269] *Ibid*.

vehicle in the SPPR.[270] Additionally, while registration of a motor vehicle with SGI gives rise to a presumption of ownership, this presumption is rebuttable by proof that someone other than the registered owner has legal title to the vehicle.

B. Vehicle Identification Number and Canadian Police Information Centre

There are additional measures available to purchasers and secured parties to reduce the risk of fraud on the part of an immediate or earlier seller. The first step in the process involves determining a Vehicle's Identification Number (hereafter **"VIN"**). Using the VIN, the purchaser can search for information related to a vehicle's history and status using the SGI system accessible through its webpage. A search of the SGI system will provide users with a vehicle's Saskatchewan status (if any), most recent Saskatchewan registration expiry date, damage claims history in Saskatchewan (subsequent to November 1, 2002), and whether the Saskatchewan Provincial Sales Tax (hereafter "PST") has been paid.[271]

Additionally, an interested party can perform a Cross-Canada VIN search which will disclose whether a vehicle has been stolen and if there has been any previous accidents or damages that have occurred in any Canadian jurisdiction.[272] Information related to stolen vehicles is drawn from the Canadian Police Information Centre (hereafter **"CPIC"**) database.[273] The CPIC system is a separate, national entity and can be accessed for free online. However, this service alone will not disclose information related to past accidents or damages. Therefore, an interested party should perform a search of the SGI provincial database, Cross-Canada database, and the CPIC database to fully assess the status of a motor vehicle prior to purchasing or taking an interest in same.

[270] *Ibid*, at para 5.
[271] SGI Webpage, *supra* note 261.
[272] *Ibid.*
[273] *Ibid*.

(iv) Disclosure of Legal Interests

Interests taken in specific personal property classified as consumer goods or equipment must be registered in the SPPR using the serial number as the registration criterion to be effective against subsequently registered interests and/or purchasers.[274] The Saskatchewan approach to disclosure of interests against specific property provides users with a greater degree of certainty than the COT system. For example, an interested party can search the SPPR by serial number and, upon reviewing the results, determine most of the legal risks associated with the property. There is no need to conduct further evaluation.

(c) Texas UCC Article 9

(i) Overview

As discussed, a certificate of title is a physical or electronic certificate that functions as an ownership document and purports to authenticate ownership of and record security interests in specific property.[275] Dating back to 1939, the COT Act[276] mandates the "titling" of all "motor vehicles".[277] The Texas COT system functions in conjunction with UCC Article 9, the TxDMV, and other state legislation.[278] The system is reserved exclusively for property classified as a "motor vehicle"[279] by the TxDMV - a state agency focused on vehicle registration titling, regulation of vehicle dealers, issuance of permits, and reduction of vehicle thefts.[280]

[274] SPPSA, *supra* note 3, s. 35(4). Note that registration by serial number is not required to be effective as against the trustee in bankruptcy or judgment creditors.
[275] Buckwold, *supra* note 78, 23.
[276] COT Act, *supra* note 79.
[277] TxDMV - Motor Vehicle Title Manual, *supra* note 81, 1-1.
[278] UCC Article 9, *supra* note 4, generally.
[279] COT Act, *supra* note 79, at §. 501.004.
[280] TxDMV –Motor Vehicle Title Manual, *supra* note 81, 1-1.

(ii) The Scope of Specifically Identifiable Property

UCC Article 9, in conjunction with the COT Act and Chapter 502, Transportation Code - the Registration of Motor Vehicles,[281] prescribes the kind of personal property subject to the COT system. Further, while UCC Article 9 provides a definition of "certificate of title", reference must be made to the *Certificate of Title Act* to determine the applicability of the regime to specific property. Section 501.004 of the *Certificate of Title Act* provides that:

> (a) Except as provided by this section, this chapter applies to all motor vehicles including a motor vehicle owned by the state or a political subdivision of the state.
> (b) This chapter does not apply to
> (1) a farm trailer or farm semitrailer with a gross vehicle weight of not more than 34,000 pounds used only for the transportation of farm products if the products are not transported for hire;
> (2) the filing or recording of a lien that is created only on an automobile accessory, including a tire, radio, or heater;
> (3) a motor vehicle while it is owned or operated by the United States; or
> (4) a new motor vehicle on loan to a political subdivision of the state for use only in a driver education course conducted by an entity exempt from licensure under Section 1001.002, Education Code.[282]

The term "motor vehicle" is defined in §. 501.002(17) as:

> (A) any motor driven or propelled vehicle required to be registered under the laws of this state;
> (B) a trailer or semitrailer, other than manufactured housing, that has a gross vehicle weight that exceeds 4,000 pounds;
> (C) a travel trailer;
> (D) an all-terrain vehicle or a recreational off-highway vehicle, as those terms are defined by Section 502.001, designed by the manufacturer for off-highway use that is not required to be registered under the laws of this state; or
> (E) a motorcycle, motor-driven cycle, or moped that is not required to be registered under the laws of this state.[283]

[281] Chapter 502 - Registration of Motor Vehicles, *supra* note 80.
[282] COT Act*, supra* note 79, §§. 501.004 (a)-(b).
[283] *Ibid,* §. 501.002 (17).

The terms "all-terrain vehicle", "recreational off-highway vehicle", "motorcycle", "motor-driven cycle", and "moped" referred to in §§. 501.002(17)(d)-(e) are defined in §. 502.001 of the Registration of Motor Vehicles.[284]

The UCC Article 9 system, in conjunction with the *Certificate of Title Act* and Chapter 502 - Registration of Motor Vehicles, provide the scope of the COT system as it relates to motor vehicles and for the purposes of this evaluation, specifically identifiable property. Pursuant to these statutes, the following qualify as a "motor vehicle":

- motor vehicles (as defined by the *Certificate of Title Act*);
- trailers and semitrailers;
- camper trailers;
- off-highway motorcycles;
- mopeds;
- all-terrain vehicles;
- recreational vehicles; and
- farm tractors owned by exempt agencies and farm tractors used as road tractors to mow the right-of-way or used-for-hire to move commodities over the highway. [285]

However, the term "motor vehicle" does not apply to a wide range of property, with the result that these items do not need to be titled.[286]

[284] Chapter 502 - Registration of Motor Vehicles, *supra* note 80.
[285] TxDMV –Motor Vehicle Title Manual, *supra* note 81, 5-2 to 5-4.
[286] These items include: implements of husbandry; construction machinery; mobile cranes; water well drilling units; oil well servicing units; mini trucks; golf carts; vehicles missing or stripped of their motor, frame, or body, to the extent that it materially alters the manufacturer's original design or makes the vehicle unsafe for on-road operation as determined by the department; vehicles designed or determined by the department to be a dune buggy; vehicles designed or determined by the department to be for on-track racing, unless such vehicles meet the Federal Motor Vehicle Safety Standards for on-road use and are reported to the National Highway Traffic Safety Administration; vehicles designed or determined by the department to be for off-road use only, unless specifically defined as a "motor vehicle" in, Chapter 501; vehicles assembled, built, constructed, rebuilt, or reconstructed in any manner with a body or frame from a vehicle which is a non-repairable motor vehicle or a motor or engine from a vehicle which is flood damaged, water damaged, or any other term which may reasonably establish the vehicle from which the motor or engine was obtained is a loss due to a water related event; some types of unconventional machinery; or federal government motor vehicles.

(iii) Proof of Ownership

In Texas, and throughout the United States, an interested party can determine the legal owner of a motor vehicle by evaluating the corresponding COT. The COT system relating to motor vehicles can be analogized to the Torrens system for land – i.e., a person disclosed as owner in the records of the relevant authority or the paper title issued by the authority is, in law, the owner.[287] As such, when a vehicle, whether new or used, is offered for sale, the seller, subject to certain provisions related to motor vehicle dealers and manufacturers, must possess either the vehicle's COT or a title receipt.[288] Failure to comply with these requirements constitutes an offence under the COT Act.[289]

A COT also provides an area to record an assignment and/or reassignment of title for transfer of ownership.[290] The assignment (or transfer) of title is completed when the purchaser's name and address are shown, and the seller signs and dates the assignment of title.[291] When signed by the seller, the wording on the COT constitutes a statement that the motor vehicle described is free of all liens and encumbrances except those liens noted on the title or fully described in an attached statement.[292] The requirement that a motor vehicle must not be sold without an accompanying COT or receipt of title protects interested parties from purchasing a vehicle that has been stolen and/or is subject to an interest.

Theoretically, the simplicity and reliability of a COT system make it particularly well suited to protect interests in specific property that, because of its ease of movement between

[287] Ronald C.C. Cuming, Walsh, Catherine, Wood, Roderick J. "Secured Transactions Law in Canada – Significant Achievements, Unfinished Business and Ongoing Challenges" (2011) 50 CBLJ 156 at footnote 6 [Secured Transactions Law in Canada].
[288] TxDMV –Motor Vehicle Title Manual, *supra* note 81, 9-2.
[289] COT Act, *supra* note 79, §. 501-152.
[290] TxDMV –Motor Vehicle Title Manual, *supra* note 81, 9-2.
[291] *Ibid.*
[292] *Ibid.*

jurisdictions, is vulnerable to criminal activity.[293] A buyer or lender should be able to rely on a COT as a reflection of the vehicle's ownership status. However, while the reliability of the COT is a strength of the system, it can also be a source of weakness.

Contrary to common belief, physical possession of a COT is not an absolute guarantee of ownership.[294] This is because it is possible for a COT to be forged and subsequently assigned to an unassuming purchaser. In most circumstances, a stolen or forged COT does not result in a legal transfer of title under property law.[295] By providing evidence to the contrary, the true owner of the property may overcome the presumption of ownership that a COT carries.[296]

Another problem associated with the COT system is the potential fraudulent use of a Certified Copy of Title (hereafter "CCO"). A CCO is essentially a duplicate title and may be issued when an application is submitted to the TxDMV stating that the original title has been either lost or destroyed.[297] In *Nxcess Motor Cars, Inc v JPMorgan Chase Bank, NA*[298] the owner of a car (encumbered by a security interest) forged a release of lien and applied for a CCO indicating that no lien existed on the vehicle.[299] The vehicle was then sold to a car dealership under a "clean" COT issued by the TxDMV, which then issued a second "original" COT.[300] A number of subsequent transfers followed, which led to another "original" certificate being issued, with one lienholder noted on the title.[301]

[293] Larry T. Bates, "Certificates of Title in Texas under Revised Article 9", (53 Baylor L. Rev. 735, 2001) at 736.
[294] Michael W. Dunagan, "How Safe is that Certificate of Title" (2017) Texas Dealer: Volume XVII / Issue 2 at 9.
[295] *Ibid*.
[296] *Ibid*.
[297] *Ibid.*
[298] 317 S.W.3d 462 (Tex. App.- Houston [1st Dist.] 2010, pet. Denied) [*Nxcess*].
[299] John Krahmer, "Commercial Transactions" (2011) (64 S.M.U. L. Rev. 153) at 169-170.
[300] *Ibid.*
[301] *Ibid*.

When the fraudulent activity was discovered, the purchaser argued that he took the vehicle free and clear of the lien as a buyer in the ordinary course of business. The Court rejected this argument on the grounds that forging a release of lien breaks the "chain of title", making the title void and preventing a subsequent purchaser from acquiring ownership of the vehicle. In these circumstances, the secured party, whose lien was noted on the original certificate, had the superior claim to the vehicle.[302]

The *Nxcess* decision highlights the importance of distinguishing between "title" meaning true ownership and "certificate of title" meaning a piece of paper that creates a presumption of true ownership.[303]

(iv) Disclosure of Legal Interests

A COT is intended to reflect both ownership of and interests in specific property. Under state legislation, and in accordance with UCC Article 9, a COT with respect to collateral, other than inventory held for sale or lease, is equivalent to filing a financing statement and as such, constitutes perfection of a security interest in the subject vehicle.[304] Any legal interests in specific property must be noted on the corresponding COT in either its physical or electronic form.

When the COT system functions as intended it provides interested parties with a simple and efficient means of evaluating and accounting for risk prior to dealing with specific property. However, despite the benefits associated with its use, the COT system continues to suffer from issues relating to fraud and theft. In an effort to prevent physical theft and inter-state fraudulent activity associated with motor vehicles, Texas opted to participate in the National Motor Vehicle Title Information System (hereafter the **"NMVTIS"**) and to implement the Texas Electronic Lien

[302] *Ibid.*
[303] *Ibid*.
[304] COT Act, *supra* note 68, §. 501.113.

Titling (hereafter the **"ELT"**) system. The introduction of the NMVTIS and ELT systems have enhanced consumer protections, but also indicate that a COT is not, on its own, sufficient to guarantee clear title.

A. National Motor Vehicle Title Information System

The NMVTIS is an electronic system that provides consumers with valuable information about a vehicle's condition and history.[305] Established by the United States Federal Department of Justice, the stated purpose of the NMVTIS system is to:

> prevent the introduction or reintroduction of stolen motor vehicles into interstate commerce, protect states and individual and commercial consumers from fraud, reduce the use of stolen vehicles for illicit purposes including fundraising for criminal enterprises, and provide consumer protection from unsafe vehicles.[306]

The stated purpose of the NMVTIS reflects, *inter alia*, a changing technological landscape and the evolution of motor vehicle theft and fraud.[307] It also suggests that consumers are unable to rely on a COT to fully assess the risk in dealing with specific property.

The NMVTIS was developed to serve as a reliable source of title and brand history for automobiles that helps consumers make informed decisions.[308] The NMVTIS has produced positive results, including time and cost saving for state motor vehicle titling agencies, reductions in consumer wait time, decreases in motor vehicle thefts, improved recovery rates of stolen vehicles, increased ability to identify cloned vehicles prior to title issuance, and improved investigative abilities.[309] The availability of the NMVTIS has benefitted prospective purchasers

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[305] National Motor Vehicle Information System (Wyoming), "About NMVTIS – Motor Vehicle Theft Law Enforcement Act". Retrieved from: http://www.dot.state.wy.us/files/live/sites/wydot/files/shared/Compliance_and_Investigation/NMVTIS%20Manual.pdf at 5 [DOT Manual - Wyoming].

[306] Department of Justice "National Motor Vehicle Title Information System (NMVTIS); Final Rule" Federal Register, 28 CFR Part 25, (2009), 5740 [NMVTIS].

[307] *Ibid,* at 5741.

[308] DOT Manual – Wyoming, *supra* note 30, 10.

[309] *Ibid,* at 6.

and lenders who are more readily able to avoid dealing with fraudulent property.[310] In this regard, the NMVTIS strengthens the COT system by providing interested parties with an additional means of assessing risk prior to dealing with specific property.

However, the effectiveness of the NMVTIS is limited due to a lack of uniformity amongst states. The information maintained by the NMVTIS is derived from a variety of sources, including state motor vehicle agency records and other sources (e.g. insurance, auto recyclers/junk/salvage, etc.).[311] Consumers, state agencies and other interested parties use this information to review and verify the history and status of a motor vehicle.[312] However, the information contained in the NMVTIS is only as reliable as the information entered into the system.

Some states fully participate with the NMVTIS (i.e. provide data to the system and make title inquiries before issuing new titles), while others provide data only or are currently developing the capacity to participate fully with NMVTIS.[313] A state that provides data but fails to make further inquiry before issuing a title puts consumers at risk of fraud.[314] For example, assume:

> [a] customer applies for a duplicate title in Jurisdiction A when the vehicle is currently titled and registered in Jurisdiction B. State A does not make an inquiry to verify that it is the current state of title and issues the duplicate title, subsequently taking the pointer record from Jurisdiction B.[315]

In this scenario, Jurisdiction A has unknowingly issued a duplicate title. As a result, two titles on the same vehicle are now in circulation. This creates the potential for fraudulent activities.[316]

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[310] *Ibid.*
[311] *Ibid,* at 10.
[312] TxDMV –Motor Vehicle Title Manual, *supra* note 81, *supra* note 70, 1-2.
[313] DOT Manual – Wyoming, *supra* note 304, 10.
[314] American Association of Motor Vehicle Administrators, "NMVTIS Best Practices for Title and Registration Program Managers", (Vehicle Standing Committee, 2018) 14 [NMVTIS Best Practices].
[315] *Ibid.*
[316] *Ibid.*

Additional discrepancies in state laws further reduce the integrity of the data available in the NMVTIS. This is particularly true of "vehicle branding". A vehicle brand is a descriptive label that a state assigns to a vehicle to identify the vehicle's current or prior condition, such as junk, salvage, flood, or other designation.[317] For example, in the aftermath of Hurricane Katrina, authorities reported truckloads of flooded vehicles being taken from Louisiana to other states, where they were dried out, cleaned, and readied for sale to unsuspecting consumers within states that did not brand flood vehicles.[318]

When fully implemented, the NMVTIS is intended to eliminate fraud associated with vehicle branding. However, the issue has not been eliminated completely. Consider the following:

> [a] vehicle is titled in Jurisdiction A with a Flood Damage brand. The vehicle moves to Jurisdiction B, and Jurisdiction B does not recognize or carry over the Flood Damage brand from Jurisdiction A; therefore, a clear title is issued. The vehicle then moves to Jurisdiction C; Jurisdiction C queries NMVTIS and sees the brand issued by Jurisdiction A, although it is not listed on the current paper title from Jurisdiction B. This would require research by Jurisdiction C to determine if the vehicle should be branded and the reason the title issued by Jurisdiction B was not branded.[319]

As a result of the disparity in state law, the integrity of data available to state agencies as it relates to vehicle branding can be compromised.[320] Only when there is complete uniformity amongst states will the NMVTIS operate as intended.

Overall, a lack of participation among states has created gaps in the NMVTIS, which have permitted further fraudulent activity to occur. While the number of non-participating states has fallen, it has been stated that "the effectiveness [of NMVTIS] can only be truly measured [when] all jurisdictions are participating, because of the holes that are currently in the system due to lack

[317] DOT Manual – Wyoming, *supra* note 305, 5.
[318] *Ibid.*
[319] NMVTIS Best Practices, *supra* note 305, 14.
[320] *Ibid,* 16.

of full participation".[321] Therefore, while the NMVTIS provides important information and protections for consumers, it should be treated as a supplementary tool to the COT system.

B. Electronic Lien Titling System

Texas began administering the ELT System in 2013. The ELT system is optional, but when utilized it permits users to electronically record their vehicle title in the Registration and Title System's (hereafter the **"RTS"**) database.[322] In addition to ameliorating the administrative burden of a paper-based system, the ELT system is designed to prevent the theft of a physical COT.[323]

The ELT system also allows lienholders to record their interest in property in electronic form.[324] The caveat being that the ELT system only supports one lien entry.[325] The policy behind this limitation is unclear. Nevertheless, at present, if a second lienholder becomes involved, the physical COT will be sent to the first lienholder recorded on the *Application for Texas Title and/or Registration* (Form 130-U).[326] Therefore, while the transition to an ELT system is a positive step towards increased efficacy and security, the decision to limit the number of liens that can be recorded electronically significantly restricts the effectiveness of the system.

(d) Scenarios and Assessment

(i) Scenario #1: Private Sale of a Motor Vehicle

The first scenario involves the sale of a used car between two individuals. Assume that both the purchaser and seller are dealing in good faith, that the seller honestly believes that she

[321] Department of Justice, "National Motor Vehicle Title Information System (NMVTIS); Final Rule – Rules and Regulations" (National Archives and Records Administration, 2009), 5742 [NMVTIS Final Rule].
[322] TxDMV –Motor Vehicle Title Manual, *supra* note 81, 12-18.
[323] Texas Department of Motor Vehicles, "TxDMV launches first paperless vehicle title system" Media at Texas DMV (12 November 2013).
[324] TxDMV –Motor Vehicle Title Manual, *supra* note 81, 12-18
[325] *Ibid*.
[326] *Ibid,* 12-4.

owns the car, and that there are no security interests in the property. This example is intended to demonstrate the process a purchaser should take under each system to ensure she is fully protected against other interests to the extent possible.

A. SPPR

In Saskatchewan, the purchaser should first ensure that the vehicle is registered in the seller's name, which, as noted above, provides a presumption that the seller is the registered owner of the vehicle.[327] The purchaser should then obtain and use the vehicle's VIN to undertake an online or telephone search of the SGI facilities. This will give the purchaser access to the bill of sale relating to the seller's purchase of the vehicle, the CPIC database, which will confirm the car is not stolen; and the Cross-Canada VIN Search, which will disclose all prior registrations of the vehicle in Canada and indicate whether the vehicle has been registered in another jurisdiction. Given the ease of access to the online databases listed above, a purchaser should be able to complete these steps in a relatively short period of time.

B. Texas System

In Texas, the purchaser should first review the vehicle's COT. If the purchaser is satisfied with the COT, additional inquiry should be completed. This is supported by the *Nxcess* case and the implementation of the NMVTIS, both of which suggest that a COT is not guaranteed to reflect the vehicle's ownership status or any security interests to which it may be subject. In this regard, the purchaser can perform a search of the NMVTIS to check the vehicle's title, most recent odometer reading, brand history, and, in some cases, historical theft data.[328] It should be noted

[327] *Langham*, *supra* note 262.

[328] Department of Justice, "National Motor Vehicle Information System" (Accessed on 15 November 2018) Online: https://www.vehiclehistory.gov/nmvtis_consumers.html.

that despite taking the aforementioned precautions, further inquiry is required if the purchaser wants to ensure that the vehicle is not subject to a writ of execution.[329]

(ii) Scenario #2: Security Interest in Specific and Non-Specific Collateral

In this scenario, assume that a lender is planning to take an interest in the debtor's car and non-specific property. The purpose of this example is to demonstrate the steps that a lender must take to evaluate priority position and register/file against both specific and non-specific property.

A. SPPR

The SPPSA and SPPR provide a uniform registration framework which lenders can use to evaluate their potential priority position and register security interests in specific and non-specific collateral. The lender can search the SPPR for interests in both specific and non-specific collateral using the proper search criteria. If satisfied with the results of the search, the lender can register against both specific and non-specific property using the proper registration criterion. In this regard, the SPPR provides the lenders with the ability to assess priority status and register an interest in a simple and efficient manner, regardless of the type of property involved.

B. Texas System

There is a distinct lack of uniformity as it relates to the treatment of security interests in personal property in Texas under the UCC Article 9 system and the COT Act. The registration of security interests in specific property is governed by the COT and administered by the TxDMV, while the registration of security interests in non-specific collateral is governed by UCC Article 9 and administered by the state filing offices designated by §. 9.501 of the *Business and Commerce Code*.[330] Adding to the complexity is the fact that both the COT Act and the designated filings offices allow for paper and electronic notation/filing of an interest.

[329] A writ of execution will not be disclosed on a COT. This issue will be explained further in Chapter XIII, *infra*.
[330] UCC Article 9, *supra* note 4, §. 9-501.

Under the Texas framework, the lender must do a significant amount of work to fully assess the risks associated with taking a security interest in the specific and non-specific property of the debtor. If the property is a motor vehicle, the lender will need to take the same steps as a private buyer to assess who the legal owner of the motor vehicle is and whether it is subject to any interests. If the lender is satisfied, the lender's interest is noted on the physical COT or through the ELT system.[331] When the COT is in physical form, the lien noted on the COT will take priority according to the date on which it is recorded.[332] If recorded electronically, the lien will be noted and maintained on the electronic RTS database.[333] However, if, for example, a second lien is taken on the motor vehicle, the title will be printed and a COT sent to the first lienholder, who will hold it in physical form.[334]

For the lender to protect an interest in non-specific property, it will conduct a search of the filing office designated by § 9.501 of the *Texas Business and Commerce Code*.[335] For the purposes of this analysis, assume that the property is to be registered pursuant to § 9.501(a)(2), meaning that the financing statement will need to be filed with the Secretary of State.[336] The lender will search the UCC Article 9 system to determine whether the debtor has other interests filed against them.[337] If satisfied with the filings, the lender will fill out a financing statement, listing the debtor, secured

[331] COT Act, *supra* note 79, §. 501.113.
[332] TxDMV –Motor Vehicle Title Manual, *supra* note 81, 12-5.
[333] *Ibid,* 12-19.
[334] Texas Department of Motor Vehicles Forms, "Additional Lien Statement: Form VTR-267" (Accessed 25 November 2018). Online: https://www.txdmv.gov/txdmv-forms/cat_view/21-forms/71-lienholders.
[335] UCC, *supra* note 4, §. 9-501. Also note that where non-COT goods are involved, the third party in Texas is in no better position than a third party under the SPPSA where non-serial numbered goods are involved.
[336] *Ibid,* §. 9-501(a)(2).
[337] Texas Administrative Code, Title 1. Administration, Part 4. Office of the Secretary of State, Chapter 95. Uniform Commercial Code, Subchapter E. Search Requests and Reports, Rule 95-505 [Texas Administrative Code].

party, and collateral.[338] The financing statement will then be delivered to the filing office, where it will be entered into the system.[339]

XIII. REGISTRATION OF UNSECURED JUDGMENT ENFORCEMENT MEASURES

(a) Overview

Saskatchewan and Texas secured transaction laws have much in common, however, the rules affecting priority competitions between secured creditors and judgment creditors are significantly different. A security interest under the SPPSA and UCC Article 9, on the one hand, and an enforcement charge under Saskatchewan law and a judicial lien under Texas law, on the other, are functionally similar. Each is an interest in the property of the debtor that secures payment of a debt. However, a security interest is consensual, while a judgment charge or judicial lien is created by law.

(b) *The Saskatchewan Enforcement of Money Judgments Act*

The Enforcement of Money Judgments Act [340] in conjunction with the SPPSA and the SPPR prescribe the rules for registration of a judgment. Section 18 of the EMJA establishes the "judgment registry".[341] This is the registry provided for in Part IV of the SPPSA. It is central to the creation of "enforcement charges" affecting personal property.[342] However, for searching purposes, there are, in effect, two registries: the SPPR and the judgment registry.[343] Judgments are registered in both, though registrations are disclosed and searchable in different ways.[344]

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[338] Texas Secretary of State, "Instructions for UCC Financing Statement: Form UCC1" (Accessed 25 November 2018). Online: https://www.sos.state.tx.us/ucc/uccforms.shtml
[339] Texas Administrative Code, *supra* note 337, Rule 95-401.
[340] SS 2010, C. E-9.22 [EMJA].
[341] *Ibid,* s. 18.
[342] Ronald C.C. Cuming and Donald Layh, *The Saskatchewan Enforcement of Money Judgments Act: Commentary and Analysis* (Sask. Queen's Printer, 2016), at 89 [Cuming and Layh].
[343] *Ibid*.
[344] *Ibid*.

Most of the structure applicable to registrations relating to enforcement charges created under the EMJA are contained in the SPPSA and Regulations.[345] Section 6 of *The Enforcement of Money Judgment Act Regulations*[346] provides that:

> (1) Unless modified by these regulations, the registry is to use the procedures of the personal property registry, as set out in *The Personal Property Security Act, 1993* and the regulations made pursuant to that Act, for the registration, renewal and discharge of judgments.
> …
> (3) An application to register or renew a judgment in the registry must be in the form required by the personal property registry.
> (4) Subject to these regulations, an application to amend a registration with respect to a judgment in the registry must be in the form required by the personal property registry.[347]

Proper registration of a judgment results in an enforcement charge against the exigible property[348] of the judgment debtor.[349]

Section 29 of the EMJA sets out the sections of the SPPSA relevant to registration.[350] While most of Part IV applies to registration under the EMJA there are a number of exceptions, the most significant of which are outlined by Professor Ronald C.C. Cuming and the Honourable Justice Donald H. Layh in *The Enforcement of Money Judgments Act – Commentary and Analysis.*[351] One important distinction relates to the timing of registration. Pursuant to the SPPSA, a financing statement may be registered before or after a security agreement is made and before or

[345] *Ibid,* 90.
[346] E-9.22, Reg. 1 [EMJA Regulations].
[347] *Ibid,* s. 6.
[348] Section 2(u) of the EMJA defines "exigible property" as property of a judgment debtor that is not exempt property, and includes: (i) property owned by co-owners; and (ii) property owned by a person other than the judgment debtor that is subject to an enforcement charge.
[349] Cuming and Layh, *supra* note 186, at 89. A pre-requisite to invocation of the system for collection of a money obligation is an enforceable judgment or order of the appropriate court or tribunal. This could be a judgment of the Saskatchewan Court of Queen's Bench, a court of another Canadian jurisdiction registered under *The Enforcement of Canadian Judgments Act* or *Inter-jurisdictional Support Orders Act,* a judgment of the court of another country registered under *The Enforcement of Foreign Judgments Act* or an arbitration award registered as a judgment as provided in *The Arbitration Act,* or *The International Commercial Arbitration Act.*
[350] Cuming and Layh, *supra* note 342, 91.
[351] *Ibid*.

after a security interest attaches.[352] However, an enforcement charge cannot come into existence until after judgment has been obtained.[353]

Registration of a judgment in the prescribed manner results in the creation of an enforcement charge. The enforcement charge covers all exigible personal property owned by the judgment debtor at the date the charge comes into existence or acquired thereafter prior to discharge.[354] Although an enforcement charge is not technically a security interest to which the SPPSA applies, it is treated as such in the context of most priority competitions arising in connection with the personal property charged. Subject to some exceptions, an enforcement charge has the same priority status in relation to both prior and subsequent interests in the charged property as a perfected non-purchase money security interest in the non-inventory property of the debtor.[355]

The EMJA implicitly provides a complete set of priority rules found within the Act, in the SPPSA, and in the common law principle of *nemo dat quod non habet*. When addressing a priority competition between an enforcement charge and another interest in the property subject to the charge, it is necessary to determine whether any special priority rules exist. Subsection 23(1) of the EMJA states that:

> [e]xcept as otherwise provided in this Act or the regulations, an enforcement charge has the same priority in relation to both prior and subsequent interests in property charged as a perfected security interest, other than a purchase money security interest, to which The Personal Property Security Act, 1993 applies.[356]

The term "security interest" in s. 23(1) of the EMJA is to be interpreted in accordance with s. 2(1)(qq) of the SPPSA, which states that:

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[352] SPPSA, *supra* note 3, s. 43(4).
[353] Cuming and Layh, *supra* note 342, 91.
[354] EMJA, *supra* note 340, s. 22(1).
[355] *Ibid, s.* 23(1).
[356] *Ibid.*

"security interest" means:

(9) An interest in personal property that secures payment or performance of an obligation, …and
…
(ii) The interest of:
(A) A transferee pursuant to a transfer of an account or a transfer of chattel paper;
(B) A consignor who delivers goods to a consignee pursuant to a commercial consignment; or
(C)A lessor pursuant to a lease for a term of more than one year;
that does not secure payment or performance of an obligation.[357]

A priority competition between a registered security interest and an enforcement charge is to be resolved by reference to the residual priority rules contained in s. 35 of the SPPSA.[358]

When addressing priority competitions between a registered security interest and enforcement charge three important features must be considered. First, the generalization that an enforcement charge takes priority over a security interest if it is registered first does not apply where a purchase money security interest (hereafter "PMSI") is involved.[359] Second, a security interest gets priority from the date of registration of a financing statement, even though no security interest exists at that date.[360] There is no similar pre-registration feature applicable to enforcement charges. Third, there are special rules dealing with advances made by a secured party under a prior registered security agreement.[361] Subsection 23(4) of the EMJA provides that a security interest has priority over a judgment charge for future advances, but only to the extent of the advances made under the security agreement without the secured creditor's knowledge of the enforcement charge. The knowledge must be actual knowledge.[362]

[357] SPPSA, *supra* note 3, s. 2(1)(qq).
[358] *Ibid*, s. 35(1).
[359] *Ibid*, s. 34.
[360] *Ibid*, s. 35.
[361] EMJA, *supra* note 340, s. 23(4).
[362] *Ibid*, s. 19 & Cuming and Layh, *supra* note 342, 110.

(c) Texas Judgment Enforcement Law

In Texas, upon obtaining a final judgment, the judgment creditor can evaluate the non-exempt property of the debtor and decide on the appropriate enforcement measure. For the purposes of this examination, this includes requesting a writ of execution.[363] A judgment lien can only be registered against real property.[364]

An execution is a judicial writ directing the enforcement of a district, county, or justice court judgment.[365] Unlike a judgment lien, a writ of execution may deal with both real and personal property.[366] In most cases, the writ of execution is issued after the expiration of 30 days from the time a final judgment is signed or after the order overruling a motion for new trial is signed.[367] The writ has a life of 30, 60, or 90 days depending on what is requested by the judgment creditor.[368]

Acting under a writ, the sheriff or constable can seize the debtor's non-exempt property, sell it, and deliver the proceeds to the creditor to be applied toward satisfaction of the judgment.[369] Property that has been pledged, assigned, or given as security for a debt or contract can be levied upon and sold under execution against the judgment debtor, but the execution officer can sell only the judgment debtor's interest.[370]

In Texas, a priority competition between a judgment creditor and a secured party involving personal property is resolved in accordance with UCC Article 9 § 9-317(a)(2). If the writ is served prior to a security interest being perfected or a financing statement filed and later perfected, the

[363] Donna Brown, "Post Judgment Remedies: Judgment Liens, Garnishments, Execution, Turnover Proceedings, Receiverships under the DTPA, Charging Orders and "Other Stuff" (2015) State Bar of Texas at 1 [Post Judgment Remedies].
[364] *Ibid*.
[365] Post Judgment Remedies, *supra* note 363, 8 and Texas Rules of Civil Procedures, Section 3 – Executions, Rule 621 [Texas Rules of Civil Procedure].
[366] Post Judgment Remedies, *supra* note 363, 10.
[367] *Ibid,* at 8 & Texas Rules of Civil Procedure, *supra* note 365, Rule 621.
[368] Post Judgment Remedies, *supra* note 363, 10.
[369] *Ibid* & Texas Rules of Civil Procedure, *supra* note 365, Rule 637.
[370] *Ibid,* at 19 & Texas Rules of Civil Procedure, *supra* note 365, Rule 643.

lien creditor has priority.[371] However, if the writ is served after perfection of a security interest, the lien creditor will be subordinate to the perfected interest, subject to advances made under § 9-317(a)(2).[372]

(d) Assessment

One of the risks associated with the potential acquisition of an interest in personal property is that the property is subject to a money judgment enforcement measure invoked by an unsecured creditor of the owner. However, the interface between the SPPSA, EMJA and SPPR enhance the ability of a searching party to assess this risk.

Prior to enforcement, a judgment must be registered. Registration gives the judgment creditor priority as contemplated in the EMJA and SPPSA. The registration exists for the time chosen by the judgment creditor and is not subject to short periods of effectiveness. The result is that a properly registered enforcement charge will be disclosed to a searching party when conducting a search in the name of a judgment debtor. If a judgment has been obtained but not registered, a searching party is able to rely on the WYSIWYG approach prior to registering her interest. In this respect, the transactional cost for a searching party is low, regardless of whether a competing interest is in the form of a judgment.

Pursuant to UCC Article 9, a judgment creditor is not required to give notice to third parties of an intent to enforce a writ of execution against the debtor's property. This is obviously problematic for searching parties, who cannot rely on the registry file drawer to determine if a writ exists. Instead, the searching party must rely on the debtor disclosing this information or by searching through court records in the name of the debtor. The result is a relatively high

[371] UCC Article 9, *supra* note 4, §. 9-317(a)(2).
[372] *Inwood National Bank v Wells Fargo*, 463 S.W.3d 228 (Tex.App. – Dallas 2015, no pet.) & Post Judgment Remedies, *supra* note 363, 20.

transactional cost for the searching party, who must conduct inquiry beyond the results contained in the file drawer if she is to determine whether the debtor's property is subject to a writ of execution.

XIV. REGISTRATION OF LIENS

(a) Overview

An interest in property can arise by operation of law, rather than through a consensual agreement.[373] The laws that regulate non-consensual security interests are drawn from numerous sources and can have important implications in priority competitions involving security interests.[374] While there are numerous types of non-consensual interests, this section focuses on the commercial lien in Saskatchewan and the Texas equivalent, the worker's lien.

(b) *The Saskatchewan Commercial Liens Act*

Commercial liens often come into competition with SPPSA security interests. Although the SPPSA gathers many different types of security interests under a single legislative umbrella, it is not comprehensive in its scope. For the most part, it does not regulate non-consensual security interests (i.e. those that arise by operation of law rather than through consensual agreement).[375] However, in Saskatchewan, s. 32 of the SPPSA and ss. 11, 12, and 13 of *The Commercial Liens Act*[376] provide rules with respect to the priority status, registration, and enforcement of a commercial lien.[377]

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[373] Roderick J. Wood, *Supplementing PPSA Priorities: The Use and Abuse of Common Law and Equitable Principles*, (2014) 56 CAN. BUS. L.J. 31 at 37 [Wood – Supplementing PPSA Priorities].
[374] *Ibid.*
[375] *Ibid.*
[376] SS 2001, c. C-15.1 [CLA]
[377] Wood – Supplementing PPSA Priorities, *supra* note 373, 37.

A commercial lien is a statutory interest acquired by a person who either provides labour or materials to repair or improve goods; stores goods; or transports goods".[378] For example, a commercial lien can attach when a person takes her car to a mechanic for repairs but does not pay for the services.[379] The repairer is given a lien on the car by virtue of having performed repairs without being remunerated.[380] A lien arising under the CLA secures the amount that the person who requested the services agreed to pay for the services.[381] However, if no amount is agreed on, the lien secures the fair value of the services provided.[382]

The CLA permits perfection of a lien through possession of the repaired, stored or transported goods or by registration in the SPPR.[383] Subsection 9(2) of the CLA states that "possession of goods by a lien claimant or by a person acting on behalf of a lien claimant perfects a lien on the goods".[384] Alternatively, s. 9(4) allows a lien to be perfected by registration,[385] the section provides that:

> [r]egistration of a financing statement in the Personal Property Registry perfects a lien if:
> (a) either:
> (i) in the case of serial numbered goods, the goods are described in the financing statement by serial number; or
> (ii) in the case of goods that are not serial numbered goods, both the owner of the goods and the person requesting the services, if that person is not the owner, are identified as debtors in the financing statement; and
> (b) all other requirements of The Personal Property Security Regulations have been met.[386]

[378] ISC – Acts and Regulations. Retrieved from: https://www.isc.ca/SPPR/Pages/ActsandRegulations.aspx
[379] ISC – Customer Learning. Retrieved from: https://www.isc.ca/SignedInHome/Help/SPPR/CustomerLearning/TouringOurServices/Pages/DifferentActs.aspx
[380] *Ibid.*
[381] CLA, *supra* note 376, s. 4(1).
[382] *Ibid,* s. 4(2).
[383] *Ibid,* s. 9.
[384] *Ibid,* s. 9(2).
[385] *Ibid,* s. 9(4).
[386] *Ibid.*

Part IV of the SPPSA applies, with any necessary modification, to a financing statement registered pursuant to s. 9(4).[387]

Section 10 of the CLA provides lienholders with a "grace period" regarding the perfection of goods, which allows a lienholder to relinquish possession of the goods without affecting the perfection of the lien.[388] Subsection 10(1) provides that:

> [w]here a lien is perfected by possession, returning the goods to the control of the person who requested the services does not affect the perfection of the lien if the lien claimant registers a financing statement pursuant to subsection 9(4) respecting the goods within the first 15 days after returning control of the goods to that person.[389]

Alternatively, lien claimants who are not in possession of the goods when a lien attaches may utilize s. 10(2).[390] The subsection reads:

> [w]here a lien claimant does not have possession of goods when a lien attaches to the goods and the lien claimant registers a financing statement pursuant to subsection 9(4) respecting the goods within the first 15 days after completion of the services, the lien is deemed to be perfected during that 15-day period.[391]

In conjunction with s. 9, ss. 10(1)-(2) provide lien claimants with protection against other interests.

Sections 11, 12 and 13 of the CLA deal with the priority status and enforceability of a commercial lien in relation to other interests.[392] In this regard, s. 11 states that:

> (1) Except as provided in this Act or any other Act, a perfected lien has priority over an interest that was created after the lien attached.
> (2) Notwithstanding subsections 35 (2) and (5) of The Personal Property Security Act, 1993, a lien, whether perfected or unperfected, has priority over a security interest that attached before the lien attached.[393]

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[387] *Ibid,* s. 9(5).
[388] *Ibid*, s. 10.
[389] *Ibid,* s. 10(1).
[390] Pursuant to CLA s. 13(5), a good faith buyer is not affected by the grace period.
[391] CLA, *supra* note 376, s. 10.
[392] CLA, *supra* note 376, ss. 11-13.
[393] *Ibid,* s. 11.

Section 12 of the CLA qualifies the foregoing provisions by declaring that an unperfected lien is subordinate to a security interest affecting the goods[394] and to the interest of a buyer or lessee of the goods who gives value and acquires the interest without knowledge of the lien and before the lien is perfected.[395] As a result of s. 12(4), a lien is unenforceable against a trustee in bankruptcy if the lien is unperfected at the date of bankruptcy;[396] or a liquidator appointed pursuant to the *Winding-Up and Restructuring Act*[397] if the lien is unperfected at the date the winding-up order is made.[398]

Section 32 of the SPPSA furnishes a special rule that applies to a priority dispute between a SPPSA security interest and certain types of liens.[399] The section provides that:

> [w]here a person in the ordinary course of business furnishes materials or services with respect to goods that are subject to a security interest, a lien that the person has with respect to those materials or services has priority over a perfected security interest unless the lien is given by an Act that provides that the lien does not have the priority.[400]

Pursuant to s. 32, a commercial lien on goods that arises in connection with the provision of materials or services in relation to those goods is given priority over a SPPSA security interest.[401] This section applies whether the SPPSA security interest is perfected and applies to both possessory and non-possessory liens.[402]

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[394] *Ibid,* ss. 12(2).
[395] *Ibid,* ss. 12(3), 13, and generally.
[396] *Ibid,* s. 12(4)(a).
[397] R.S.C., 1985, c. W-11.
[398] *Ibid,* s. 12(4)(b).
[399] Cuming and Wood, *supra* note 61, 302.
[400] SPPSA, *supra* note 3, s. 32.
[401] *Ibid,* & Wood – Supplementing PPSA Priorities, *supra* note 373, at 37.
[402] Cuming and Wood, *supra* note 61, 302.

(c) Texas Lien Law

The Texas equivalent of the commercial lien is the worker's lien.[403] Section 70, Subchapter A of the Texas Property Code defines a worker's lien as a "possessory lien".[404] Section 70.001 of the Texas Property Code states that:

> (a) A worker in this state who by labor repairs an article, including a vehicle, motorboat, vessel, or outboard motor, may retain possession of the article until:
> (1) the amount due under the contract for the repairs is paid; or
> (2) if no amount is specified by contract, the reasonable and usual compensation is paid.[405]

A lienholder who retains possession of the goods described in s. 70.001 may continue to hold the goods until ss. 70.001 (a)(1) or (2) are satisfied.[406] There are no notice provisions required to perfect the possessory lien – simple possession constitutes perfection.[407]

A worker who relinquishes possession of the goods and is not properly remunerated pursuant to s. 70.001(b) of the Texas Property Code, is entitled to take possession of the goods in accordance with the provisions of s. 9.609 of the Business & Commerce Code.[408] A prerequisite to the operation of s. 70.001(b) of the Texas Property Code is compliance with s. 70.001(c), which provides that a worker may only take possession of goods if the person obligated under the repair contract has signed a notice stating that the article may be subject to repossession under this section.[409] As a result, it is imperative for a worker to ensure that the notice has been signed prior to taking possession of the property.

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[403] Texas Property Code, Title 5. Exempt Property and Liens, Subtitle B. Liens, Chapter 70. Miscellaneous Liens, Subchapter A. Possessory Liens, §§. 70.001 & 70.003 [Texas Property Code].
[404] *Ibid,* Chapter 70, Subchapter A.
[405] *Ibid,* §. 70.001 (a).
[406] *Ibid.*
[407] Brian W. Erikson "Vehicle Repair Shop Lien in Texas" (2011) AVVO Law. Retrieved from: https://www.avvo.com/legal-guides/ugc/vehicle-repair-shop-lien-in-texas.
[408] Texas Property Code, *supra* note 402, §. 70.001(b).
[409] *Ibid,* §. 70.001(c).

Section 9-333 of UCC Article 9 deals with the priority of common law and statutory liens.[410] The section provides

> (a) In this section, "possessory lien" means an interest, other than a security interest or an agricultural lien:
>
> (1) That secures payment or performance of an obligation for services or materials furnished with respect to goods by a person in the ordinary course of the person's business;
>
> (2) That is created by statute or rule of law in favor of the person; and
>
> (3) Whose effectiveness depends on the person's possession of the goods.
>
> (b) A possessory lien on goods has priority over a security interest in the goods unless the lien is created by a statute that expressly provides otherwise.[411]

Accordingly, a possessory lien has priority over a security interest unless the possessory lien is created by a statute that expressly provides otherwise.[412]

A workers lien arises by operation of s. 70.001 of the Texas Property Code when it satisfies the requirements of a 'possessory lien' as outlined by §. 9-333(a).[413] The Texas Property Code does not expressly provide that a worker's lien is to be limited in a priority competition with a security interest. As a result, a lienholder who is in possession of the goods subject to the lien has priority over a security interest in the goods.

(d) Assessment

Sections 11 and 12 of the CLA enhance the ability of a searching party to assess risk, while also providing lienholders with priority over prior registered interests up to the amount of the lien. In this respect, a commercial lien is subordinate to a buyer or lessee (i.e. a searching party), who gives value and acquires an interest without knowledge of the lien, and before the lien is registered and to a security interest that attaches after the lien attaches and is perfected before the lien is

[410] UCC Article 9, *supra* note 4, §. 9-333.
[411] *Ibid.*
[412] Uniform Laws Annotated, *supra* note 149, UCC §. 9-333, Official Comment 2.
[413] Texas Property Code, *supra* note 403, §. 70.001.

perfected.[414] The effect of the CLA is to allow a searching party to rely on the results, or lack thereof, displayed by the Registry when assessing risk.

There are no notice facilities for the registration of a workers' lien under Texas law. For a lien claimant to maintain priority position, the claimant must remain in possession of the repaired goods. Until the amount owing is paid, the owner of the repaired goods loses the use and productive value of same. As a result, searching parties conducting a risk assessment prior to dealing with the property can ascertain that the property is subject to a lien because the owner will not have possession of same. The law effectively prevents a searching party from taking possession of property subject to the worker's lien.

XV. CONCLUSIONS

The use of registry systems is widespread in both the legal profession and public domain. From multi-million-dollar transactions to the purchase of a used vehicle, registry systems are available to provide the information necessary to assess and account for the risks associated with personal property.

The purpose of this study has been to review the Saskatchewan and Texas registry systems and determine which system produces the desired outcomes at the lowest transactional cost. In this regard, it is the author's conclusion that the SPPSA is superior to the UCC Article 9 and COT systems. The major considerations in reaching this conclusion are the SPPSA's uniform structure and scope of registerable interests, which allow interested parties to assess the risk in dealing with personal property efficiently and at a low transactional cost. The practical effect is such that an

[414] CLA, *supra* note 375, s. 12.

interested party can perform a comprehensive due diligence assessment *vis-à-vis* a person and/or specific property through the SPPR without the need to conduct further inquiry.[415]

More specifically, it is the author's opinion that the SPPSA system expertly balances the interests of searching and registered parties. This is evident upon reviewing the foregoing commentary on inadvertent and unauthorized discharges, defective and fraudulent registrations, and registrar indexing errors. These features of the SPPSA system allow searching parties to rely on the SPPR's WYSIWYG approach while also facilitating a registered parties ability to protect a registration and, when necessary, to re-register. Indeed, the SPPSA is the far more balanced of the two systems in terms of the rights and responsibilities offered to searching and registered parties.

Another important consideration in this comparison is the SPPSA's uniform approach to different types of legal interests. In this regard, it is noted that the SPPR provides searching parties with information relating to money judgments and commercial liens. The result is that a search of the SPPR will display these types of legal interests, in addition to other consensual registrations. The benefit is that a searching party can evaluate the status of personal property in one search, as opposed to three separate searches. The result is a comparatively lower transactional cost for searching parties.

Of course, the SPPSA system is not flawless. Due to certain limitations, the SPPSA system falls short of being a full WYSIWYG system. The principal reasons for this shortcoming are the need for flexibility in collateral descriptions, registration before security interests are given, and the fact that the SPPSA system does not deal with or provide information relating to ownership of property. However, as discussed, s. 18 of the SPPSA ameliorates some of these issues by

[415] Personal property may be subject to the deemed interest held by Her Majesty in the Right of Canada under sections 224 and 227 of the *Income Tax Act* RSC 1985, c, 1 (5th Supp) relating to liability for unremitted source deductions. A deemed interest will not be discoverable through the SPPR.

permitting certain parties to make a demand for information, which further enhances a searching parties ability to rely on the results produced by the SPPR.

The UCC Article 9 system does not facilitate risk assessment to the same extent as the SPPSA. This is due, in large part, to the bifurcated nature of the UCC Article 9 system and, more specifically, the treatment of non-specific property. When dealing with non-specific property, an interested party must search the file drawer for potential interests in the property of the debtor. However, due to the unreliability of the information contained in the file drawer, an interested party must conduct further inquiries to determine the status of a filing rather than relying solely on the information contained in the file drawer. The result is a potentially time-consuming exercise for a searching party, who, despite taking the necessary precautions, may still find that property is subject to a previously filed, but undiscoverable interest.[416]

An obvious strength of the UCC Article 9 system is its treatment of specific property. In fact, one may conclude that the UCC Article 9 system's framework relating to the treatment of specific property is superior to that of the SPPSA. The reason being that, in theory, an interested party can use a COT to determine who the legal owner of the property is and whether any interests are noted on the title without need for further inquiry. When functioning correctly, the COT system provides a simple and reliable means of assessing risk.

However, in practice, a COT should not be relied upon as a guarantee of either legal ownership of or security interests in specific property. This is due, in large part, to the risk of fraudulent activity associated with property subject to the COT system. Instead, a COT should be viewed as creating a strong presumption of legal ownership of and security interests in specific property but not as a guarantee of either. Therefore, while there are benefits associated with a

[416] See *Sheehan*, *supra* note 226.

COT system, these benefits do not justify the use of separate registry systems for specific and non-specific property; particularly when one considers the weaknesses associated with the UCC Article 9 filing system.

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