

“The Security Interests in Personal Property Act”

Presented by:

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OVERVIEW, OBJECTIVES, AND WEAKNESSES

1. The Government of Jamaica has for some time been discussing ways to go about simplifying the process of giving collateral with the hope of facilitating greater access to loans. The effort in relation to the establishment and regulation of credit bureaus was felt to be one step in this direction, but a step which needed to be supported by greater ease in giving collateral over the types of assets which are more widely available, particularly, to the micro, small and medium-sized enterprises (“MSMEs”), being in particular their movable assets such as equipment, inventory or accounts receivable. Lenders, in particular banks who need to be concerned about their regulatory restrictions have, however, been concerned about their ability to take security over these kinds of assets and therefore are often reluctant to accept these assets as the sole form of collateral: can they be sure that it has not already been charged or that if the borrower defaults that they will be able to quickly go in, get the asset and sell it? When dealing with sole proprietors, the bank may even be concerned about whether they can legally take the kind of security that they would like over these assets. Floating charges, the form of security typically taken over shifting assets such as inventory, cannot now legally be given by an individual. One form of security is therefore now not even an option available to a large number of MSMEs.
2. The cost of perfecting any kind of security over these assets may also create its own bar. These costs include not only the legal fees payable in drafting the required documentation, but also the cost of stamping and registering or recording the appropriate document in the several places where registration may be required (if required at all), with all of these costs, of course, generally being passed on to the borrower for payment.
3. After several discussions and consultations with stakeholders in Jamaica, the Government proposes to introduce a simplified system of registration under new legislation to be known as the Security Interests in Personal Property Bill, 2013 (the “SIPP”). They suggest that the introduction of similar legislation in other countries has resulted in an increase in lending and a decrease in the costs of borrowing.

4. SIPP, once introduced will require changes not only for bankers and lenders generally, but will also require us as practitioners to approach security documentation in a new way. The Commercial Law Sub-Committee therefore proposes in this discussion to introduce the principles that should guide the creation of SIPP legislation. Kerry-Ann Heavens will therefore take us through some of the principles discussed in and underpinning the United Nations Commission on International Trade Law (“UNCITRAL”) legislative guide on secured transactions. Donovan Walker will then discuss with us some of the experiences of some other countries who have already introduced SIPP legislation and what kind of impact this kind of legislation has had in those jurisdictions. Donovan will look particularly at Canada, New Zealand and Australia and will discuss with us some of the lessons that we can learn from those jurisdictions. Peter Goldson and Stephanie Sterling will take us through the provisions of the SIPP Bill (a copy of which has been provided) and will highlight some of the ways in which the legislation proposes to address the issues which were seen as hindering this form of lending. Julie Thompson-James and I will then wrap up the initial discussions before we open the floor for questions by highlighting some of the practical concerns which we see as still remaining in SIPP, notwithstanding the previous drafts and the various consultations which have been undertaken.¹

¹ This paper is for general information purposes only and does not constitute legal advice.

COMPARATIVE ANALYSIS:
REVIEW OF THE UNCITRAL LEGISLATIVE GUIDE

1. The United Nations Commission on International Trade Law (“UNCITRAL”) was established in 1966 by the General Assembly of the United Nations to promote the progressive harmonization and unification of the law of international trade.² It is now the core body within the United Nations system in the field of international trade law.
2. UNCITRAL commenced its work on the issue of security interests in 1967. The UNCITRAL Legislative Guide (“the Guide”) was created to assist States that do not have workable secured transaction laws as well as those States that wish to modernize their laws in this area.
3. A modern secured transaction legislative framework is beneficial to a State’s economy because it increases the availability of secured credit. This, in turn, facilitates the successful operation and expansion of businesses and improves their ability to compete both locally and internationally. It is accepted that capital is required by all businesses, regardless of structure and studies have shown that the most effective means of providing capital to commercial enterprises is through secured credit.
4. The Guide is premised on the view that the provision of security will have the effect of reducing the risk of non-payment of loans and that reduction of risk will, in turn, result in a reduction of the costs involved and an increase in the credit available to small and medium-sized enterprises. It is further believed that credit at a lower risk will have the spin-off effect of promoting the economic development of the State.
5. While recognizing that States could derive significant economic benefits from modern secured transaction laws, the Guide emphasizes that this will not automatically occur unless a number of other factors are addressed. For example, the country must have an

² U.N. General Assembly resolution 2205 (XXI) OF 17 December 1966 in UNCITRAL Yearbook, vol.:1968-1970

efficient judicial system (or have available other effective enforcement mechanisms) and other modern laws must be in place (in particular a sound insolvency regime).

6. The Guide includes an analysis of the policy issues and the choices available to legislators when developing the laws to govern secured transactions and provides recommendations on the various issues that may arise in relation thereto.
7. This aspect of the presentation involves a brief review of the contents of the Guide. It includes a discussion on some of the key points addressed and recommended by the Guide with a view to highlight the most salient factors that ought to be included in our law so as to achieve a modern and effective secured transaction regime.

Overview of the Guide

8. The Guide is divided into thirteen sections; each chapter contains two parts: 1) general commentary and analysis of the topic being discussed and 2) recommendations for each issue set forth in the commentary. Outlined below is a synopsis of the contents of each section. Given the importance of certain topics, particular attention will be paid to the chapters dealing with the creation, registration and enforcement of security rights as well as the chapter on priority rights.

Introduction

9. The introductory section of the Guide is geared towards outlining the key objectives and principles underlying the Guide. It also explains the terminologies used in the Guide; for example, the term “security rights” is used in lieu of “security interests”; debtors that grant security rights are called “grantors” and collateral is referred to as “encumbered assets”.

Chapter I: Scope of Application

10. Chapter I discusses the proposed scope of the law and the basic approaches to secured transactions. The Guide takes the position that the broader the scope of a State’s secured transaction regime, the more efficient and effective it will be. As such, it proposes that the law should encompass the widest array of assets, parties, obligations and transactions.

The law should apply to all rights in moveable assets (tangible, intangible, present or future)³ regardless of the form of the transaction.

Chapter II: Creation of Security Rights

11. The Guide proceeds from the position that a security right ought to be created by an agreement concluded between the grantor and the secured creditor. The existence of this agreement will suffice to facilitate *inter partes* effectiveness (as distinct from third party effectiveness, which is achieved through registration, as discussed below).
12. Interestingly, the Guide proposes that an oral agreement may suffice provided it is accompanied by a transfer of actual possession of the encumbered asset to the secured creditor. However, generally, the agreement should be in or evidenced by writing that, by itself or in conjunction with the course of conduct between the parties, indicates the grantor's intent to create a security right. The Guide proposes flexibility with respect to what may be considered "writing" and even includes recommendations for the inclusion of electronic communication to serve as security agreements.
13. It is proposed that at a minimum, the security agreement ought to:
 - ✓ Reflect the intent of the parties to create a security right;
 - ✓ Identify the secured creditor and grantor;
 - ✓ Describe the secured obligation;
 - ✓ Describe the encumbered assets in a manner sufficient to allow for the identification of such assets; and
 - ✓ State the maximum monetary amount for which the security right may be enforced.

³ With the exception of assets specifically excluded, such as: immoveable property, aircraft, railway rolling stock, space objects and ships, securities, financial contracts. It is proposed that the law should apply to intellectual property only insofar as it inconsistent with national law or international agreements.

Chapter III: Third-Party Effectiveness

14. Chapter III deals with the effectiveness of a security right against third parties, it discusses the basic policy issues relating to the distinction between creation and third-party effectiveness. The chapter also details the three principal methods for achieving third-party effectiveness, that is: 1) registration of a notice of a security right in a general security rights registry 2) possession of the asset and 3) registration in a specialized asset-specific registry.

Chapter IV: The Registry

15. Chapter IV discusses the registry system outlining the optimal design, organization and operational features. It includes, *inter alia*, a discussion on what ought to be included in the notice and the allocation of responsibility for loss or damage caused by an error in the administration of the system.
16. The creation of a central filing system is a key component of the Guide. To facilitate perfection of a security right, the Guide proposes that States should enact a law that creates a filing registry and sets forth clear and concise rules to govern registration and searching procedures. Further, information on the existence and role of the registry should be widely disseminated.
17. The Guide deviates from the normal practice of States, in that, it neither adopts the title registration system or the documentation registration system. Rather, it recommends a system whereby registration is effected by submission of a simple notice that provides only basic details about the security right in question. It is proposed that the notice should contain the following limited information: (a) the identities of the parties (b) a description of the encumbered assets and (c) the maximum sum for which the security is granted and d) the duration of the registration. This simplifies the registration process and minimizes the administrative process and the archival burden on the registry system.
18. The aim underlying this type of system is to facilitate registration without the requirement of further formalities (such as affidavits and notarization of document)

provided the requisite registration fees are paid and the information fields in the notice are completed.

Chapter V: Priority Rights

19. Chapter V addresses the concept of priority, which the Guide regards as the core of every successful transactions regime. It, therefore, outlines the importance of priority rules and highlights the different approaches that may be adopted when drafting priority rules.
20. The Guide adopts a first-to-register approach in its priority rules for registered security. This means that as between two security rights, the one that registered first has priority over the one subsequently registered. A security right in a future asset or after-acquired property and proceeds of encumbered assets is entitled to priority based on the time of registration, not the time that such property is acquired or comes into existence. The most poignant exception to the first-to-register rule involves security rights that are perfected by possession.

Chapter VI: Rights and obligations of the parties to a security agreement

21. This chapter discusses the principle of party autonomy (freedom of contract) and its limitations based on grounds relating to public policy. It addresses how certain key issues should be resolved in the absence of contrary agreement of parties for example, duty of care with respect to the encumbered asset.

Chapter VII: Rights and Obligations of Third-party Obligors

22. Where the value of the encumbered asset is the right to receive performance from a third party that owes an obligation to the grantor, the Guide refers to such a third party as a “third party obligor”. Such rights against third parties may, for example, include receivables, rights embodied in negotiable instrument or rights to receive the proceeds under an independent undertaking.
23. In instances where the encumbered asset is a right against a third party obligor, the secured transaction affects not only the grantor and the secured creditor but may also affect the third-party obligor. As such, this chapter discusses the need for the law to

provide for the protection of such third-party obligors, particularly in light of the fact that he/she is not a party to the secured transaction.

Chapter VIII: Enforcement of a Security Right

24. The Guide does not specifically define “default” and simply leaves it up to the parties to define the term in the applicable security agreement. The Guide encourages enforcement of security rights upon default through “*expeditious judicial and, subject to appropriate safe-guards, non-judicial methods for the secured creditor to exercise its rights.*”⁴ The chapter discusses judicial and extra-judicial enforcement. Remedies discussed include, repossession of the assets by the secured creditor, public as opposed to private sale, discharge of the debtor, treatment of surplus or shortfall left after satisfaction of the secured obligation from the proceeds of the sale of the encumbered asset.

Chapter IX: Acquisition Financing

25. The Guide uses the term “acquisition financing” to embrace the full range of transactions that can be used to enable an enterprise or consumer to acquire tangible assets on credit. This chapter considers the ways in which States may achieve an efficient and effective regime to govern all types of acquisition financing transaction.

Chapter X: Conflict of Laws

26. This chapter covers conflict of laws issues in relation to the creation of the security rights, third party effectiveness, priority and enforcement of a security right. Of particular interest are the rules relating to the cross-border recognition of security rights.

Chapter XI: Transition

27. This chapter discusses the need for the establishment of the date as of which the new legislation should be effective, as well as the clear demarcation of a transition period to avoid undermining existing relationships.

⁴ Chapter VIII, Recommendations 133-177

Chapter XII: Insolvency

28. Chapter XII looks on the interplay between a contemplated secured transaction law and a state's insolvency law. It sets out the general principles underlying the treatment of security rights in the case of the insolvency of the grantor. The main principles are that, while security rights may be affected by insolvency proceedings, the pre-commencement effectiveness of a security right should be respected in insolvency proceedings.

Objectives and Recommendations

29. The Guide includes a discussion of the key objectives that should inform the design of an efficient and effective secured transactions regime. It is important to note that the Guide specifically encourages States to take all the objectives into account to the fullest extent possible and to avoid choosing selectively from amongst them. This is because each objective addresses specific needs that must be met by the law and when taken together, provide an integrated and coherent framework to guide the creation of the law.

30. These objectives are:

1. *To promote low-cost credit by enhancing the availability of secured credit*

The main objective is to facilitate secured financing with respect personal property so as to enhance the amount of credit that can be made available and reduce the costs of such credit.

2. *To allow debtors to use the full value inherent in their assets to support credit*

To achieve this objective the law should apply to all types of debtor (natural or legal persons). It should also permit the use of a broad range of assets including tangible, intangible, present and future assets. Also, in order to fully maximize the value that is inherent in an asset, the debtor must be able to obtain secured credit from more than one creditor using the same asset as security. This necessitates an efficient registration system and clear priority rights.

3. *To enable parties to obtain security rights in a simple and efficient manner*

The process to obtain security rights ought to be simple and efficient. The law should aim to minimize the formalities involved. There should be a single method in place to create security rights rather than a multiplicity of options- selection being based on the type of encumbered asset.

4. *To provide equal treatment of diverse sources of credit and of diverse forms of secured transactions*

The law should be applicable to a wide range of credit providers (both domestic and non-domestic) including, financial institutions and other lenders, manufacturers and suppliers. This will increase competition and help in the reduction of the cost of credit.

5. *To validate non-possessory security rights in all types of asset*

The law should not impose a requirement on the grantor to relinquish possession of the encumbered asset to the secured creditor. Instead, it should provide for the creation of non-possessory rights over a broad range of assets. In the case of a business, this will allow the grantor to continue to operate its business.

6. *To enhance certainty and transparency by providing for registration of a notice of a security right in general security rights registry*

The law must establish an efficient registration system for recording notices about the possible existence of a security right. This will allow parties to be able to determine with a reasonable degree of certainty the extent of the rights of the grantor and any third party in the asset to be encumbered.

The Guide recommends that efficiency will be enhanced if the State establishes a registry with the following features:

- a) it is a single general security rights registry;
- b) it records notices relating to existing or potential security rights and not documents;

- c) registry files are available for searching by an interested party; and
- d) it provides that third-party effectiveness and priority are determined according to the time of registration.

7. *To establish clear and predictable priority rules*

The law should allow a prospective creditor to be able to determine the priority that its security right will enjoy relative to other creditors at the outset of the transaction. This must be achieved in a timely, cost efficient and reliable manner. Clear priority rules will allow for the concurrent existence of security rights having different priority status in the same asset, thereby maximizing the inherent value of the asset.

The Guide recommends that priority should be determined by the order of registration of a notice in the registry and not the time of creation.

8. *To facilitate efficient enforcement of a secured creditor's rights*

There must be effective enforcement mechanisms in place. Creditors should have the option of enforcing their security rights out of court. The law should detail the rights and obligations of the grantor and the secured creditor upon enforcement.

As it relates to enforcement, there must be close coordination between the secured transaction laws and the State's insolvency laws.

9. *To allow parties maximum flexibility to negotiate the terms of their security agreement*

The freedom to contract is the underpinning of *laissez-faire* economics. The law should, to the greatest extent possible, allow the parties flexibility to tailor their agreements to meet their precise needs. The Guide proposes that mandatory rules governing the parties' rights prior to default ought to be kept at a minimum. However, it cautions that the law must respect consumer protection legislation.

10. To balance the interests of all persons affected by a secured transaction

The law must balance the interest of all parties affected by a secured transaction: debtors, creditors (whether secured or unsecured), third parties (such as buyers or other transferees of an encumbered asset) and the State.

11. To harmonize secured transaction laws, including conflict-of laws rules relating to secured transactions.

One of the basic underlying principles of the Guide is the need to harmonize secured transaction laws through the adoption of similar laws by States so as to facilitate the financing of international trade and promote the movement of goods/services across national borders.

Other Recommendations

1. The State should aim to enact legislation that is comprehensive in scope. This means, that to the fullest extent possible, the law should embrace all forms of secured transactions, all categories of grantors and secured creditors and all types of moveable assets.
2. All transactions that create a right in any type of asset meant to secure the performance of an obligation should be considered secured transactions and regulated by the same rules.
3. The law should allow for the creation of a security right in the future assets of a grantor.
4. The law should extend the security right to cover the proceeds that may be obtained through the disposition of the asset.
5. The law should be effective not only between the grantor and the secured creditor but also as against third parties. Upon the creation of the security (which facilitates effectiveness as between the parties) there should be minimal additional steps necessary to facilitate third party effectiveness (registration of notice in the registry).

Conclusion

31. The Guide serves as a path to enact a modern secured transaction regime which, if supported by an efficient and effective judicial system and other enforcement mechanisms, can lead to significant economic benefits. The key objectives and recommendations discussed above provide a strong foundation for the specific rules that ought to be included in the law. The question now is whether the proposed legislation in Jamaica satisfies these objectives and recommendations.

COMPARATIVE ANALYSIS (cont'd):

THE SECURITY INTERESTS IN PERSONAL PROPERTY ACT, 2013 – APPROACHES BY AND ISSUES FACED IN OTHER JURISDICTIONS – A COMPARATIVE ANALYSIS^{5 6}

1. *It is hoped that “...Secured transactions reform for Jamaica will modernize the system of pledging collateral for loans, which will bring it into line with countries that have extensive access to credit for businesses of all sizes...Evidence from countries in the South Pacific region shows that this reform has had a beneficial impact, through reducing the cost of borrowing and making credit available to borrowers that were previously excluded...”⁷*

2. The objective of this aspect of the presentation is to highlight some issues that are faced in other jurisdictions regarding their respective Personal Property Security Acts and the lessons we in Jamaica can learn from these jurisdictions as our legislature embarks on the introduction of this type of legislation and we as practitioners advise our clients in its application to their businesses and lives. We cannot highlight every issue and challenge faced in the below mentioned jurisdictions instead we identify some key issues and challenges as well as problems faced by them and how it can help us to understand this new legislation conceptually and practically.

Jurisdictions with comparative personal property securities legislation

A. CANADA

3. The Canadian Provinces of Saskatchewan, New Brunswick and Ontario are perhaps the

⁵ I acknowledge with appreciation the assistance I received from the research undertaken by Miss Janeve Williams, final year student at the Norman Manley Law School during her period of in-service at Hart Muirhead Fatta.

⁶ This Paper contains general information about personal property securities legislation and the reform of same and, due to space constraints, is not comprehensive. This paper is not legal advice and does not purport to contain all information pertaining to personal properties securities legislation.

⁷ Background Paper – The economic benefits from secured transaction reforms for Jamaica through implementing a Secured Transactions Act. Ministry of Industry Investment and Commerce – Jamaica.

best places to start as they are amongst the first Commonwealth jurisdictions to introduce wide scale personal property security legislation and establishing electronic registries. In 1990 Ontario passed its Personal Property Security Act, and in 1993 both New Brunswick and Saskatchewan passed their respective Personal Property Security Acts in 1993 (the Canadian Acts are hereinafter referred to collectively as “*the Canadian PPSA*”). Many jurisdictions (including New Zealand, Australia and to some extent the Jamaican Bill) have relied, examined and borrowed features of the Canadian PPSA to develop their laws (albeit New Zealand and Australia have developed their own jurisprudence and models that have now somewhat departed from the Canadian template).

4. It is of interest to note that the Canadian (and for that matter, the Australian and New Zealand models) are very similar in structure, scope and application to Article 9 of the Uniform Commercial Code of the United States (hereinafter referred to as “*the UCC*”). In a nutshell the structure has been described as a “...*unitary concept of a security interest...*”⁸. That is, although there are various types of security interest that can be given in personal property, that such security interests should be governed by the same set of principles in the same legislation.
5. So, in Canada, one commentator surmises that “...*the courts at the highest level have recognized that the transformation has been more profound. The concept of a unitary security interest is not one that applies only within the context of the {Canadian} PPSA; the juridical nature of a security interest has been pervasively altered. The old dichotomies that characterized security interests as fixed or floating, legal or equitable were swept away, as was the division between true security interests and quasi-security interests...*”⁹.

⁸ “**The Concept of a Security Interest: The Canadian Experience**” – Professor Roderick J. Wood, University of Alberta – Page 2.

⁹ **The Concept of a Security Interest: The Canadian Experience**” – Professor Roderick J. Wood, University of Alberta – Page 2.

6. The Canadian model of the PPSA is described as “...*all embracing, all devouring; it covers everything...*”¹⁰, as it is applicable to all transactions which in substance create a security interest, without regard to the form or the party having title to the security/collateral. Generally, there are minor differences between the Canadian Provinces as to how far this extends, but the concept is basically the same. In all Canadian Provinces, there are some security/collateral items that are specifically excluded:

- i. interests in land (other than interests arising under a license), including leases
- ii. liens given by statute or by law (except as otherwise stated),
- iii. interests in annuities and insurance policies,
- iv. a deemed trust arising under the Canadian PPSA,
- v. assignments for the general benefit of creditors,
- vi. interests in any compensation for labour or personal services, and
- vii. other specifically excluded transactions.

7. Personal property is classified into the following categories:

- i. goods (further classified into consumer goods, equipment and inventory)
- ii. instruments
- iii. documents of title
- iv. chattel paper (including leases and conditional sales contracts)
- v. securities
- vi. money and investment property
- vii. intangibles (licenses and any other matter not included above)

General priorities of security interests under Canadian PPSA's

8. In the absence of any other special priority rules, the general order of priority is as follows:

¹⁰ “Security Interests in Personal Property, Volume 1 “ – Grant Gilmore (Boston: Little, Brown & Co.:1965) at 295.

Event	Priority given
Competing interests are perfected by registration	First interest to register
Competing interests are perfected other than by registration	First interest to perfect
One interest is perfected by registration, and the other interest other than by registration	Registered interest takes priority if registered and perfected before the other is perfected. Interest perfected other than by registration takes priority if it is perfected prior to the registration of the other interest.
Competing interests are both unperfected	First interest to attach
One interest is perfected, and the other is unperfected	Perfected interest

SOME ISSUES FACED IN CANADA AS REGARDS PPSA SECURITIES

9. The below issues are not exhaustive and only serve to highlight important practical issues that we can consider as regards the genesis of Jamaican PPSA jurisprudence and legislation.

1. The reduced usage of floating charges

Following the adoption of the Canadian PPSA many commercial draftsmen have abandoned floating charge form of debentures in favour of modernized forms of security agreements adopting terminology utilized in the Canadian PPSA. Therefore “...*drafters produced a ‘general security agreement’ under which the debtor grants to the secured party as security interest in all of its present and after-acquired personal property. If the security agreement contains a permissive provision, the drafter will generally*

*ensure that the language will not constitute a subordination unless so intended by the parties...*¹¹.

The Canadian PPSA security interest differs from the concept of the floating charge in two material ways:- **Firstly**, the secured party will be granted a legal rather than an equitable interest, and **Secondly**, the legal interest is fixed (as opposed to floating) and arises as soon as the conditions for attachment have been satisfied. The transformation has had the effect of elevating the priority status of a Canadian PPSA security interest over that formerly obtained by a floating charge under the law prior to the passing of the Canadian PPSA.

2. PPSA interests vs. Non-PPSA Interests - Bank of Montreal vs. Innovation Credit Union - 2010 SCC 47 and Royal Bank of Canada vs. Radius Credit Union Limited 2010 SCC 48

In 2011, the Canadian Supreme Court has ruled in 2 landmark cases that the Canadian PPSA has a more pervasive effect than the previous method of categorizing/characterizing security interests (i.e. pledge, mortgage, charge, title retention and fixed vs. floating charge). In those cases the priority competition was between a PPSA Security and a Federal Bank Act Security (not a security interest covered by the PPSA). In the Bank of Montreal case the court observed “...*It is true that the internal priority rules of the PPSA cannot be invoked to resolve the dispute. However, it does not follow that the provincial security interest created under the PPSA does not exist outside these priority rules. Nor can the fundamental changes brought about by the PPSA be ignored in determining the nature of the prior competing interest...*”.

At issue in both cases were the competing rights between a prior unregistered security interest and a subsequent security interest that was registered under the Canadian Federal Bank Act but was not registered under the relevant provincial Canadian PPSA.

¹¹ “The Concept of a Security Interest: The Canadian Experience” – Professor Roderick J. Wood, University of Alberta – Page 9.

The Supreme Court of Canada held that a bank seeking to rely upon the Federal Bank Act to support its rights in collateral can acquire no greater interest in that collateral than the debtor has at the time that the security interest is granted. Even if at the time of taking its Federal Bank Act security the bank has no practical way of knowing that a prior unregistered security interest exists, simply registering a security interest in accordance with the Bank Act will not give the bank priority over that prior unregistered security interest.

In order to most effectively maintain priority over unregistered security interests, a bank must perfect its security interest in personal property (by registration or otherwise) in accordance with the applicable provincial Canadian PPSA.

“...The two Supreme Court of Canada decisions referenced above are based upon highly similar fact patterns. The chronology of events, in very general terms is as follows:

Time Point 1: *The original secured creditor provides financing to the borrower and takes a general security interest to secure the repayment obligation. The original secured creditor does not immediately perfect its security interest in accordance with the applicable provincial Personal Property Security Act.*

Time Point 2: *A Canadian financial institution to which the Bank Act applies provides financing to the same borrower and takes a general security interest in respect of which a notice of intention is registered in accordance with the Bank Act.*

Time Point 3: *The original secured creditor registers its security interest in accordance with the applicable provincial Personal Property Security Act.*

Time Point 4: *The borrower defaults on its loans from both secured creditors, and the financial institution with Bank Act security takes enforcement steps under its security and a priority dispute arises.*

The primary difference between the two Supreme Court of Canada decisions is the subject collateral. In one case, the disputed collateral was already in possession of the

borrower at the date that the competing creditors each took their security interests. In the other case, the borrower did not come into possession of the disputed collateral until after both competing creditors had taken their security interests in present and after acquired property.

In either case, the Supreme Court of Canada held that the original secured creditor, regardless of the fact that its registration post-dated the bank's Bank Act registration, took priority.

In both cases, the court's decision was built on the premise that the Bank Act security regime is "proprietary-based". Therefore, the security interest acquired by the bank asserting its rights under the Bank Act must be evaluated based upon the proprietary interest that the debtor had in the collateral at the time that security was granted. The court determined the security interest taken by the original secured creditor in either case to be analogous to a proprietary right, thus limiting the rights that the borrower had in the collateral at the time of the grant of security to the bank. Simply put, the bank could not use the Bank Act to assert a security interest in collateral that was already subject to a pre-existing proprietary interest of a third party (such as a security interest), regardless of whether that proprietary interest was or was not registered or otherwise perfected.

The court was unmoved by attempts to draw any distinction between priority rights for security interests in after-acquired property and security interests in collateral existing on the date of execution of a security agreement. The court explained that at the time of execution of its security agreement, the original secured creditor acquired a statutory interest in the nature of a fixed charge over the borrower's after-acquired property, which effectively derogated from the proprietary rights that the borrower had available to assign to the bank in that same after-acquired property.

The court also considered the reality that there was, practically speaking, no way that the bank could have known of the pre-existing security interest encroaching on the priority of

its Bank Act security interest. The court acknowledged this issue but held that it could not be remedied given the language of the existing provisions of the Bank Act... ”¹².

Following these decisions, in Canada, the advisable best practice is that a bank must register its security interest in personal property in accordance with the relevant provincial *Personal Property Security Act* in order to ensure that its priority rights are protected and cannot place reliance upon the Federal Bank Act for that purpose.

3. Legislative Superpriority Issues

An example of superpriority issues occurs in PAYE issues where income tax is deducted and paid at source by the employer on behalf of its employees. Although an employer is required to hold and pay these deductions over to the government, an insolvent/bankrupt employer will oftentimes fail to do so with the result that the common law requirements for the creation of a trust for that deducted tax will not have been satisfied. In Canada (and arguably Jamaica) the revenue authorities are given a proprietary interest in the debtor’s assets by virtue of the imposition of a deemed trust on the assets of the debtor. Upon the insolvency/bankruptcy of an employer, priority competitions may very well arise between prior secured parties and the deemed trusts in respect of source deductions.

“...Prior to the PPSA, Canadian courts resolved these priority competitions through the application of conventional property law principles. A prior fixed charge had priority over a subsequent deemed trust, since the latter only operated in respect of the debtor’s interest in the asset. The situation was different if the security interest took the form of a floating charge.

Canadian courts held that the statutory deemed trust was entitled to priority if it arose before crystallization of the floating charge (Dauphin Plains Credit Union Ltd. v. Xyloid Industries Ltd., [1980] 1 S.C.R. 1182). As a result, the statutory deemed trust was typically subordinate to a fixed charge, but usually had priority over a floating charge.

¹² “Supreme Court of Canada clarifies Bank Act/Personal Property Security Act priority scheme” – Evan Cobb, Norton Rose Fulbright Canada LLP

The implementation of the PPSA disturbed this equilibrium and provided a nasty shock to the taxation authority. Secured creditors were able to take security interests in all the assets of the debtor and these security interests were no longer regarded as floating charges. They were fixed legal interests that attached to new assets the moment that the debtor acquired rights in the property. Since the PPSA security interest attached to the asset before the deemed trust arose, the security interest was entitled to priority over the deemed trust.

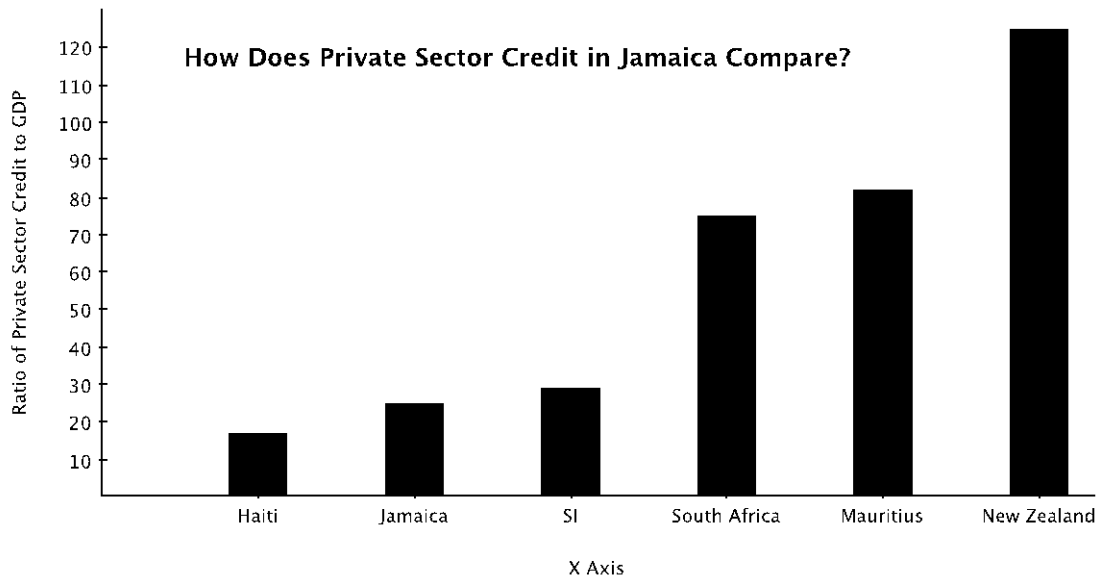
The victory was only temporary. Parliament soon passed amendments to ensure that the deemed trust was given priority. The legislation, however, did not simply attempt a return to the status quo. The deemed trust was afforded a priority over almost all prior or subsequent security interests of any nature...”.¹³

B. NEW ZEALAND

10. The New Zealand “*Personal Property Securities Act, 1999*” was passed into law on 14th October, 1999 and the Regulations thereunder were passed into law on 23rd April, 2001 (the New Zealand Act and regulation hereinafter referred to as “*the New Zealand PSPA*”). The New Zealand PSPA came into force on 1st May, 2002 by virtue of the “*Personal Property Securities Act Commencement Order, 2002*”. The New Zealand PSPA relied heavily on the PSPA passed by the province of Saskatchewan.
11. In the leading New Zealand case of *Stiassny & Ors v. CIR* [2012] NZSC 106 it was confirmed that “...*the New Zealand PPSA has introduced, in the place of the general law, an entirely new set of rules governing priorities in the case of an insolvency...*”.
12. An oral security agreement is registrable on the New Zealand PPSA and enforceable against the debtor. However, it is important to note that a security agreement is only

¹³ **The Concept of a Security Interest: The Canadian Experience** – Professor Roderick J. Wood, University of Alberta – Pages 11-12.

enforceable against a 3rd party if the debtor signs a written agreement with the terms above. A written contract is therefore essential¹⁴.



13. New Zealand, which pre-reform had a collateral framework very similar to that of Jamaica's, experienced a dramatic expansion of credit available to the private sector following the passage of the New Zealand PPSA and its implementation. It is reported that the ratio of domestic private sector credit to GDP rose from 70 per cent to over 140 per cent. At the same time, revenue from registrations under the new framework has risen compared to the old system. While many factors obviously affect access to credit, an improved collateral framework undoubtedly made a significant contribution to the increases in New Zealand.
14. It is of interest to note that 5 countries in the Pacific Region have undertaken secured transactions reform, namely, the Federated States of Micronesia, the Republic of the Marshall Islands, Solomon Islands, Tonga and Vanuatu. The result has been an increase in lending and a decline in the costs of borrowing.¹⁵
15. In summarizing the impact of the New Zealand PPSA 10 years after its coming into force

¹⁴ This also applies to S. 20 of the Australian PPSA. See also - *Maiden Civil (P&E) Pty Ltd; Richard Albarran and Blair Alexander Pleash as receivers and managers of Maiden Civil (P&E) Pty Ltd & Ors v Queensland Excavation Services Pty Ltd & Ors [2013] NSWSC 852*

one commentator notes that:-

“...The New Zealand Courts have responded well to the new Act. The cases have searched for, and developed, the principles and policies underpinning the new regime. They have generally applied the Act in a way that promotes the integrity of the PPSA regime, rather than being unduly swayed by sympathy for particular parties’ unfortunate circumstances New Zealand’s most recent textbook on the PPSA summed up the experience of the last decade well by saying that:

“Now that the unfamiliar concepts and strangeness have worn off, it is apparent that it is a well-knit piece of law, though not without its faults, which provides uniform rules that, in comparison to pre-PPSA law, operate and provide answers consistently and predictably.”

*Regrettably, the legislature has not responded as well. New Zealand’s other statutes do not adopt or respond well to the new terms and concepts in the PPSA...”*¹⁶

SOME ISSUES FACED IN NEW ZEALAND AS REGARDS PPSA SECURITIES

16. The below issues are not exhaustive and only serve to highlight a important practical issues that we can consider as regards the genesis of Jamaican PPSA jurisprudence and legislation.

1. Security Documents for finance transactions

“...New Zealand did not change its security instruments in a wholesale and immediate way. Other than to include some waivers by the debtor, of the right to receive certain notices and similar, it was not necessary. Rather, new forms were introduced slowly, as

¹⁵ Background Paper – The economic benefits from secured transaction reforms for Jamaica through implementing a Secured Transactions Act. Ministry of Industry Investment and Commerce – Jamaica.

¹⁶ 10 years of the Personal Property Securities Act in NZ: Lessons and Trends – Personal Property Security Law Conference – Adelaide Law School – February, 2013 – Michael Arthur – Partner – Chapman Tripp.

facilities were refinanced or amended and restated. Essentially, it was believed that old forms and documentation would continue to work successfully. The PPSA does not regulate the form required to create a security interest (other than the requirement that it be evidenced in writing or by possession). It regulates the relative priority of security interests.

...following the Act's introduction, new forms of security agreement became widely used for new lending. For personal property, the old legal classifications of charges and mortgages etc have all but disappeared. In their place, lenders will often seek merely a "security interest" on terms that are set out in the particular document. A financier will take either a general security interest, by a general security agreement ("GSA"), or a specific security interest, by a specific security agreement ("SSA"). Those abbreviations, as with "PMSI" (purchase money security interest), "ROT" (retention of title), "ALLPAAPP" (all present and after-acquired personal property) and others have entered our commercial language.

Our new forms of security documentation do not generally refer to fixed or floating charges, or to circulating or revolving assets. In some GSAs, those terms will receive a mention in respect of assets that fall outside the PPSA. However, they are usually expressed more simply than in old-style debentures. The clause will provide that in respect of assets not covered by the PPSA, the debtor grants a charge which is of a fixed nature to the extent permissible, and is otherwise floating. A simple crystallisation clause will follow...".¹⁷

2. **Registration of security documentation before completion.**

The New Zealand Court of Appeal Case of *The Healy Holmberg Trading Partnership v. Damian Grant and Stephen Khov (liquidators) of LBD Civil Limited (in Liquidation) and Riga Investments Limited (etal) [2012] NZCA 451* is instructive as regards which of two competing security interests is first ranking under the New Zealand PPSA. The Court

¹⁷ 10 years of the Personal Property Securities Act in NZ: Lessons and Trends – Personal Property Security Law Conference – Adelaide Law School – February, 2013 – Michael Arthur – Partner – Chapman Tripp. Pages 2-3.

of Appeal held (inter alia) that registration prior to completion of the security documentation is effective to establish priority and so, New Zealand lenders now ensure that registration has been completed even before drawdown. Time and speed to register and ensure priority is of the essence coupled with a proper and detailed search of the electronic registry.

The practical effect in New Zealand is that “...*If a potential GSA creditor discovers an “ALLPAAPP” registration already on the register, or indeed anything broader than a retention of title registration, the proposed new creditor (assuming it is intending to rank above that registration) will seek to have the earlier registration removed or reduced in scope. It is not uncommon for suppliers or other holders of specific security interests to incorrectly register by ticking the ALLPAAPP box. An assurance from that creditor that it does not currently hold a GSA should be of no great comfort to the proposed new GSA creditor. Because registration can precede the creation of a security interest, that first-registered security holder could later obtain a wider security interest, which would then have priority over the second registered GSA, despite being entered into subsequently...*”.

“...*A notable result of the PPSA in New Zealand has been the emergence of an industry (albeit small) whereby independent firms will manage PPSR registrations. Given the need not only to register in the first place, but to maintain and update registrations, significant users of the system (e.g. leasing companies) either need to develop or buy the capability to comply with the Act. Financiers of such entities will sometimes insist that a third party provider is retained, in order to reduce the risk that the security interests held by the debtor are prejudiced in any way...*”¹⁸.

3. Case Law as Regards the New Zealand PPSA

Two years after the New Zealand PPSA came into force the first New Zealand judgment on the PPSA appeared. By the end of 2006, there were only eight decisions of substance.

¹⁸ 10 years of the Personal Property Securities Act in NZ: Lessons and Trends – Personal Property Security Law Conference – Adelaide Law School – February, 2013 – Michael Arthur – Partner – Chapman Tripp. Pages 4-5

Seven followed the next year. Since 2008 there has been a fairly consistent number of decisions each year; between ten and thirteen. While this is not a great number, the cases have been on varied topics, and have identified and clarified both broad principle and technical detail. Having lived with the Act now for more than a decade, New Zealand has seen 73 judgments¹⁹, arising out of 52 pieces of litigation, in which some significant discussion of the PPSA has featured.

“...An interesting aspect of New Zealand’s case law is the relative absence of reliance on Canadian and US authority and academic writing. Given that the regime is, as noted by the Supreme Court, “entirely new”, and given that its only predecessors are in Canada and the United States, one might have expected to see a much greater reliance on precedent from those jurisdictions. Of the 13 substantive Court of Appeal decisions, only six referred to Canadian case law and only four referred to Canadian academic texts or other papers. The sole New Zealand Supreme Court decision referred to a number of Canadian cases, but relied on only one, despite being a decision that covers a variety of issues. It also referred to a Canadian law reform commission report, and text. No US authority or writings have been referred to in the New Zealand appellate decisions...”²⁰.

It is interesting to note that New Zealand (like Jamaica) has a large primary goods economy and a number of their cases concern livestock, potatoes, wool, logging trucks, wine and farming assets.

Important Cases:

- ***Graham v Portacom New Zealand Limited [2004] 2 NZLR 528 (HC)***
- ***Waller v. New Zealand Bloodstock [2006] 3 NZLR 629 (CA)***

¹⁹ 6 District Court, 52 High Court, 14 Court of Appeal, 1 Supreme Court

²⁰ 10 years of the Personal Property Securities Act in NZ: Lessons and Trends – Personal Property Security Law Conference – Adelaide Law School – February, 2013 – Michael Arthur – Partner – Chapman Tripp. Page 9.

These cases establish that title no longer determines priority, time of registration and not perfection of the security will determine priority. The relevance of the established doctrine of *nemo dat quod non habet* (none can give or transfer goods what he does not himself own) seems to be challenged by the courts interpretation of the New Zealand PPSA.

- ***Michael Peter Stiassny (etal), and Forestry Corporation of New Zealand (in receivership) v. CNI Forest Nominees (etal) [2012] NZSC 106.***

This case makes it clear that a PPSA regime establishes priority in particular circumstances. It does not rely on either the common law notion of title or the equitable concepts of beneficial interest or equity of redemption to resolve priority disputes. Instead, for interests that come within the scope of the Act, the PPSA rules prescribe priority rankings.

- ***MJN McNaughton Limited v. Richard James Thode [2012] NZHC 982.***

This case reiterates the statutory right of a secured party under a PPSA contract to take possession of collateral where the debtor is in default under a PPSA contract and the collateral is at risk.

- ***Colin Thonas McCloy etal as receivers of Mainzeal Property and Construction Limited (in receivership) v. Manukau Institute of Technology (etal) [2013] NZHC 936.***

This case involves the competing claims of a receiver and a party claiming to have acquired goods. The learned Judge examined and interpreted various sections of the New Zealand PPSA. As regards determining the priority of two competing security interests where there is a claim for “perfection by possession” such possession would generally not take priority over a perfected security interest on the New Zealand PPSA. Regard must be had to the underlying policy rationale of the New Zealand legislature which recognizes the priority of registered security interest on the New Zealand PPSA.

4. **SAMPLE CLAUSES USED IN NEW ZEALAND PPSA AGREEMENTS**

NB: - The below clauses are for discussion purposes only and no warranty or guarantee is made for their enforceability efficacy or applicability under Jamaican law.

Supply Agreement – Terms and Conditions - Personal Property Securities Act,

“...Upon assenting to these terms and conditions in writing the Buyer acknowledges and agrees that:

- (a) These terms and conditions constitute a security agreement for the purposes of the PPSA; and***
- (b) A security interest is taken in all Goods previously supplied by the Seller to the Buyer (if any) and all Goods that will be supplied in the future by the Seller to the Buyer during the continuance of the parties relationship...”.***

“...The Buyer undertakes to:

- (a) sign any further documents and/or provide any further information, such information to be complete, accurate and up to date in all respects, which the Seller may reasonably require to register a financing statement or financing change statement on the Personal Property Securities Register....”²¹***

C. AUSTRALIA

- 17. Australia is the “neophyte” compared to Canada, USA and New Zealand having passed the Personal Property Securities Act, 2009 which recently came into force on January 30, 2012 (hereinafter called “*the Australian PPSA*”). The Australian PPSA has a transition period of 2 years until January 30, 2012. The Australian PPSA is based on Canadian and New Zealand PPSA as well as Article 9 of the UCC of the United States. One could arguably be justified in presuming that the Australian PPSA, having the benefits of reliance upon the “issues and concerns” faced by pre-existing legislation in other jurisdictions.
- 18. As regards the Australian PPSA one commentator notes the objective of that legislation as being “*...to overhaul the law relating to security interests in personal property,*

²¹ Chester Wayne Haar v. Eastland Tyres Limited [2013] NZHC 692

*particularly in relation to the determination of priorities. It will establish a set of codified priority rules that rely on the concepts of attachment, enforceability and perfection, rather than legal title...*²².

19. Unlike Jamaica, Prior to the reforms, the Australian, State and Territory governments were all responsible for regulating security interests in personal property. This was done through an array of complex and often inconsistent Acts and registers. In total, there were 70 different Acts covering personal property security in 2009. To register security interests in private property, each jurisdiction had a number of different registers. These were a mix of paper and electronic registers with some not having changed format since the 1920s and 1930s.²³

1. **The cost saving benefit from PPSA in Australia**

The development of the Australian PPSA is intended to make use of new technology, which will reduce the operational cost of the registry. This is intended to lower search and registration costs for users compared to previous systems (the Australian PPSA will operate under the Australian Government's Cost Recovery Guidelines). On the Australian PPSA, the average prices are \$3.76 per search and around \$16.40 per registration. This compares favourably to costs under the State and Territory registers as identified by Access Economics. To give a rough idea of the possible reduction in registration costs, it currently costs between \$12 and \$15 to register a security interest on the Register for Encumbered Vehicles (REVS) depending on the State of registration. While to register a charge with the Australian Securities and Investment Commission currently costs AUS\$135.00. A study showed that in pre-PPSA Australia the registration fee for a charge was AUS\$135.00 and these fees contrast sharply to the PPSA charge registration fee in New Zealand of NZ\$3.00 to register and NZ\$1.00 to search²⁴.

²² Australia: The PPSA priority rules: lessons from abroad – Thynne & Macartney – Amanda Bull, 31st August, 2011, page 1.

²³ Impacts of COAG Reforms – Business Regulations – Chapter 4 – Personal property securities – page 72.

²⁴ As at September 26, 2013 – AUD\$1.00=NZD\$1.13.

Reductions in search costs are harder to identify, given many businesses undertake these activities in-house. Nevertheless, to the extent that search costs are reduced and registration costs are lowered, the Australian PPSA would reduce costs to PPSA providers.

2. **Electronic Platform for PPSA Australia – how does it work – an overview**²⁵



Create a Registration

*From the PPSR home page move your mouse over the **Registrations** tab. This will open a menu containing the different options for dealing with registrations.*

*Click the **Create a registration** option.*

*This will open the **Create a registration** page. This page contains information about the registration process. Further information on specific terms used in creating a registration is available via the **About PPSR** and **Glossary links**.*

*To begin, click the **Start application** button.*

Step 1 - Start application

*Select the **Collateral Type** for the item to be registered. An item can be registered with a **Collateral Type** of either **Consumer** or **Commercial**.*

*For this example, we will select the **Collateral Type** of **Commercial**.*

²⁵ Source – www.ppsr.gov.au.

Select whether the registration is **Transitional**. A *Transitional Security Interest* is a security interest which was in effect before commencement of the PPSR.

For this example, the registration is **Not transitional**.

A new registration needs to be linked to a secured party group. A tutorial on creating a secured party group is available on the tutorials homepage.

Enter a secured party group number, and then click the **Retrieve group** button. This will retrieve the details of the secured party group.

Click the **Next** button to continue.

Step 2 – Collateral

The **Collateral** page contains a list of possible collateral classes. Collateral classes are categories which are used to describe personal property in a registration.

Select the collateral class which best describes the item to be registered. For this example, we will select the **Collateral class of Other Goods**.

Click the **Use collateral class** button.

The following fields will vary depending upon the collateral class chosen.

Select or enter the **Duration of Registration**. Registration duration cannot be set to a value higher than the maximum duration.

The **Giving of notice identifier** field is where you can enter text to help identify the new registration. The details you enter are publicly available and must be used by someone giving notice to a secured party under the PPS Act.

Enter suitable text into the **Giving of notice identifier** field, such as customer reference number or the name of the department responsible for the registration.

Click the **Next** button to continue.

Step 3 – Grantor

Select the **Grantor Type**. For this example, the grantor is an organisation.

Click **Yes** to enter the grantor's ACN, ARBN or ARSN number.

Select the **Identifier Type** and enter the related identifier.

Based on the identifiers you may have available, you should make sure you use the correct type of identifier for the organisation (e.g. for a body corporate, you should use ARSN, ACN, or ARBN in that order of importance). Only if none of the previous identifiers are available should you enter an organisation's name.

For this example, the grantor does not have an ARSN, but does have an ACN.

Click **Add another grantor** to include the details of another grantor in the registration. Otherwise click the **Next** button to continue.

Step 4 - Application Review

The register will then display all the details you have entered for you to check. You have the option to make any changes (using the relevant **Edit** button) or to proceed to the payment page.

If all of the details are correct, click the **Pay now** button. Where applicable, the Payment Details page will be displayed.

Step 5 – Payment

As a casual user, you will need to enroll your credit card to make a payment. Credit card details are only stored for a single session.

Click the **Enroll** button.

*This will open BPOINT. BPOINT allows you to securely enter your credit card details. Enter your credit card details in the fields provided then click the **Submit** button.*

*If the credit card was registered correctly, a confirmation message will be displayed. Click the **Close** button to return to the payment page.*

*Once a credit card has been set up using BPOINT, click the **Pay for application** button to continue.*

Confirmation

*This will open the **Confirmation** page. The **Confirmation** page contains a brief summary of the new registration and a link to detailed registration information.*

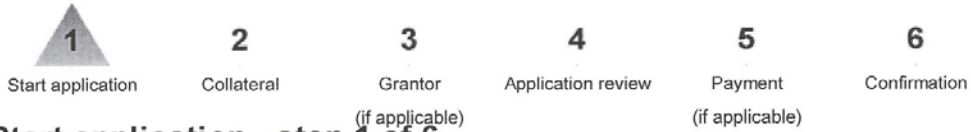
Two notifications will be sent to the secured party group address for service:

- *a token for this particular registration which enables you to amend or discharge, and*
- *a verification statement containing the details of the registration.*

You may also be required to send a notice of the verification statement to the grantor in the registration under the PPS Act.



[PPSR Home](#) >
[Registrations](#) >
Create a registration



Start application - step 1 of 6

Application details

Registration kind:

Security interest

What is the collateral type? [?]

- Commercial
- Consumer

Is the registration transitional? [?]

- Not transitional
- Transitional

Secured party group details

By entering your Secured Party Group number, the PPS Register will retrieve the Secured Party details and save you from re-entering them. You can [create a Secured Party Group](#), if you do not have one.

Enter secured party group number: [?]

Retrieve group

Don't have a secured party group?

[Create a secured party group](#)

< Previous

Cancel

Save as pending

Next >

²⁶ <http://www.youtube.com/watch?v=pWRhikHxzN4>.

3. **Intellectual Property and the Australian PPSA.**

“...The Australian PPSA provides for protection of security interests in IP through a procedure of:

- i. A security interest attaching to the relevant IP;*
- ii. A security interest then becoming enforceable against a third party; and*
- iii. The security interest being "perfected".*

Perfection, in this context, will occur when the security interest has been registered on the Registry of the Australian PPSA...”²⁷.

The same holds true for the New Zealand PPSA²⁸

Lessons to be learned from other jurisdictions in establishing the Jamaican PPSA model and utilizing same

- A. *“...The PPSA concept of a security interest involves the idea that the characterization of a transaction as a security interest should depend upon its function rather than the form of the transaction or the location of title. The emphasis is now on the economic realities. If the effect of the transaction is such that a debtor has given a creditor a proprietary right in the debtor’s assets such that the creditor may have recourse to the assets in the event of a default, it is to be regarded as a security interest. The fact that the parties may have set it up as a lease, consignment, bailment, trust or other transaction is not relevant if the transaction functions as a security interest...”²⁹* The PPSA legislation establishes some fundamental concepts – title no longer determines

²⁷ “Are your security interests in any intellectual property protected? - Personal Property Securities Act deadline is looming?” - Addisons, Australia (Per:- Karen Hayne and Mary Huang) - September 10, 2013.

²⁸ “New Zealand: The Personal Property Securities Act 1999 (PPSA) and Intellectual Property” – Nikki Fisher – Duncan Cotterill – 27th May 2013. See also, Viacom Global (Netherlands) B. V. v. Scene 1 Entertainment Ltd. (in Receivership)(unreported) 18th September, 2009, Andrews J, HC Auckland (New Zealand), CIV 2009-404-4305 (HC).

²⁹ “The Concept of a Security Interest: The Canadian Experience” – Professor Roderick J. Wood, University of Alberta – Page 16.

priority, time of registration and not perfection of the security will determine priority and there is no longer a distinction between a fixed and floating charge.

- B. The goals for a well-run PPSA registry are that same must be uniform, easily accessible and be real-time registration system. Further, the expected impact of the PPSA should be reduced registration costs, reduced search costs and reduced red tape. It is felt that New Zealand has a very good system and Jamaica should examine their model closely. For example, one study showed that in pre-PPSA Australia the registration fee for a charge was AUS\$135.00 and these fees contrast sharply to the PPSA charge registration fee in New Zealand of NZ\$3.00 to register and NZ\$1.00 to search³⁰. Further, World Bank report in 1994 suggests that the cost of prohibitive and restrictive laws and registration systems for the use of personal property as security adversely impacts on GDP between 5-10% ³¹.
- C. One writer correctly observes that any PPSA legislation“*...must also be periodically amended so that it remains responsive to changing patterns of commercial practice, economies, markets and policies, and to deal with newly discovered deficiencies in its operation...*”³².One should also add amendments to other laws impacted upon by a PPSA regime. The Jamaican legislature is therefore required to be proactive and also react quickly to required legislative “improvements”. The legislative agenda of our government as well as our legislative drafting officers must always be mindful of this requirement (as has occurred in New Zealand and Canadian provinces on several occasions).

³⁰ The Costs and Benefits of Personal Property Security (PPS) Reform, The Australian Attorney General’s Department, July 6, 2006 – Access Economics.

³¹ World Bank Report, 1994 “ How Legal Restrictions on Collateral Limit Access to Credit in Bolivia” Report No. 13873-BO, Office of the Chief Economist (Latin America and the Caribbean Region).

³² Australia: The PPSA priority rules: lessons from abroad – Thynne & Macartney – Amanda Bull, 31st August, 2011, Page 3.

- D. Clients need to take proactive steps to avoid risks and challenges to their proprietary interest – for example, your clients need to be able to prove ownership of their goods in the event of a receivership of your clients Lessors business.³³
- E. You want to ensure proper terms are included in your client’s contracts to avoid clawback and that same are not deemed to be preferential payments 6 months prior to any insolvency/receivership.
- F. Your client may want to consider (in certain circumstances) to create a PPSA interest in your own property (in the sale of goods in an agreement with “retention of title” clauses) or in leased goods (as lessor or lessee) to avoid prior registrations.
- G. You may want to create terms of trade with your client taking into consideration the PPSA as well as creating business systems taking into account the application of PPSA Act to your business.
- H. Cross border lending, securities and sales – we need to ensure our clients transactional documents take into consideration transnational PPSA issues.
- I. Insolvency, winding up and receivership issues and the PPSA.
- J. Canadian, Australia, New Zealand and even USA (UCC) case law will now have more relevance in our jurisprudence and it is important for our Jamaican Attorneys-at-Law to become familiar with same.
- K. A modern secured transactions framework allows borrowers to pledge movable property as security for a loan in a manner that removes ambiguity regarding exactly what property has been pledged, to whom the property has been pledged, and gives the lender the right to repossess these assets speedily in the event of payment default. To function effectively;

i The costs involved in utilizing the system should be low If fees or stamp duties on

³³ http://www.youtube.com/watch?feature=player_detailpage&v=U09vE-F1nPM.

using a system of secured transactions are high, or legal fees are substantial they impose a tax on borrowing.;

- ii The rights and obligations of all parties to the transaction should be clear and the procedures unambiguous;
 - iii The procedures to be followed in the event of default should occur rapidly, with a minimum recourse to the courts.
 - iv Successful secured transactions reform requires that each stage be unambiguous in the law and that the transactions costs of using the system are low.
- L. The ability of borrowers to pledge property at low cost and for lenders to take collateral and in the event of default, repossess it requires a legal framework that provides for four essential elements.
- i **Creation.** The law must define the assets that are being pledged, so that a property right is created. It must permit clear and low cost methods for creating this “security interest” on the part of the lender.
 - ii **Priority.** The law must set logical and clear priorities among the different claims on pledged assets. It must set a time of registration of security interests, from which a right will prevail against other claimants to the same property. Further, since the collateral may be sold by the debtor, or otherwise disposed of, there must be rules that determine what rights do the buyers and other transferees acquire in the collateral. The rules should specify whose rights have priority over the rights of others, and under what circumstances. Secured transactions law clarifies these issues in the form of priority rules that specify the rights of borrowers, lenders, and third parties under a variety of commercial situations.
 - iii **Publicity.** The law must provide a practical, effective and sustainable system for publicizing rights so that other potential lenders can determine whether an asset has already been pledged to somebody else. Therefore a system is needed that publicizes such pledges. It allows the creditor to file a notice that specifies the

parties to the loan agreement and describes the collateral that has been pledged. Filing, therefore, need not take on any burdensome formalities and need not be subject to the scrutiny of a state agency. The notice establishes a priority right to collateral in the event of a dispute among creditors and other third parties, but the actual status of property rights to collateral are to be found only in the security agreement itself. The notice serves only two purposes. First, the notice warns prospective creditors and buyers of possible prior security interests in the debtor's property. Second, the date of the filing of the notice indicates the date by which competing claims to collateral are measured. The description of collateral in the notice may be general in nature, but must be sufficient to apprise prospective lenders and buyers of collateral of the possible status of the debtor's property. With modern technology, notice-filing offices are often operated electronically, which gives speedy internet access to information regarding the filing of security interests and provide fast, efficient, and accurate service to borrowers and lenders.

- iv **Enforcement.** The law must set out a workable system for enforcing lenders' rights, including the repossession and sale of the property in the event of default. The success of secured transactions law depends upon the creditor's ability to enforce speedily its rights. The creditor must have the right, upon default, to take possession or control of the collateral and to sell or otherwise dispose of the collateral in an economically efficient manner. In most circumstances, it should not be necessary to go to court to repossess and sell property in the event of loan default. There is no need for judicial intervention when a secured creditor disposes of collateral that is in the creditor's possession or control.³⁴

- M. The verdict of the actual financial impact of PPSA legislation is still out. It is clear costs have been reduced in many jurisdictions and the single registry made it easier to go to a "one-stop" register (Australia and New Zealand). In Romania (another country that introduced PPSA legislation in 2000) the World Bank and other statistics evince, in Romania, the significant reduction in interest rates (by as much as 20%), volume of

³⁴ Background Paper – The economic benefits from secured transaction reforms for Jamaica through implementing a Secured Transactions Act. Ministry of Industry Investment and Commerce – Jamaica

private bank credit rising by US\$4.8B between 2000-2003, PPSA security interest registration jumped from 65,000 in 2000 to 536,000 in 2006. The one caveat to these statistics is that one cannot state with certainty that these positive trends are due solely/primarily to the PPSA (although it is reasonable to conclude that PPSA legislation did play some role in increased access to affordable credit in Romania).

Conclusion

In drafting and preparing the Jamaican Personal Property Securities Legislation - while it no doubt can be useful to draw and rely on experiences and legislation from other jurisdiction we must ensure that the Jamaican legislation and jurisprudence is best suited towards our own experiences, expectations, development goals and economic reality.

Our draftsmen and legislators should be careful not to rush to implement legislation without first:-

- a. ensuring that Jamaica has the technical framework for an electronic registry,
- b. making sure that there really is a “market/appetite” by Jamaican borrowers, lenders and credit agencies for PPSA legislation. This will be achieved by a qualitative analysis of access to credit, the cost of debt, , and
- c. ensuring that the public are educated about the use, risks and opportunities as regards PPSA legislation.
- d. Determining the costs of creating the registry and the “migration” costs from other registries.

Are our legislators being “hasty” in seeking to pass PPSA legislation when we still require urgent and long outstanding insolvency reform legislation (note that most cases involving PPSA have to do with priorities and/or competing claim on a liquidation/receivership/insolvency)?

As regards public education the below link to videos produced in Australia regarding the challenges for PPSA implementation is of interest and I commit same for your viewing.

http://www.youtube.com/watch?feature=player_detailpage&v=U09vE-F1nPM.

<http://www.youtube.com/watch?v=pWRhikHxzN4>.

OVERVIEW OF THE PROPOSED SECURITY INTERESTS IN PERSONAL PROPERTY BILL, 2013

1. This section of the presentation aims to outline the provisions of the Security Interests in Personal Property Bill (the “SIPP”) and to highlight some of the ways in which the legislation proposes to address the issues which were seen as hindering this form of lending.
2. The SIPP repeals the Agricultural Loans Act, Bills of Sale Act, the Debenture Registration Act and certain parts of the Hire Purchase Act, as well as amends the Agricultural Credit Board Act, Companies Act, Farm Loans Act and the Workmen’s Compensation Act.
3. It is hoped that the SIPP will, *inter alia*,
 - ✓ allow for reduction in the cost of borrowing;
 - ✓ create greater clarity with the order of priority being determined based on clear and unambiguous rules based on first to file; and
 - ✓ facilitate the simplification of the process.
4. Indeed, the Memorandum of Objects and Reasons of SIPP states simply yet powerfully:

“A decision was taken to enact legislation to facilitate the creation of security interests in personal property, to provide for a simple registration process for the recognition of such interests, and to stipulate the rules which will govern the priority in which such interests are enforceable”.

Where “security interests” is defined as an interest created:

- (a) contractually over one or more items of personal property (whether specifically or generically described, present or future); and
- (b) securing the fulfillment of one or more present or future obligations.

and “personal property” includes goods, documents, financial instruments, accounts receivable, and intellectual property and other kinds of intangibles.

Further, “secured property” means personal property that is the subject of a security interest.

5. “Secured creditor” means the person in whose favour a security interest is created whether for that person’s own benefit or for the benefit of other persons. While the definition of a “debtor” is relatively broad and includes:

- ✓ A person who –
 1. owes payment or other performance of the obligation concerned; and
 2. owns or has rights in the secured property; or
- ✓ if the person who owes payment or other performance of the obligation concerned is not the same as the person who owns or has rights in the secured property-
 1. in any provision dealing with the obligation secured, the person who owes payment or other performance of the obligation;
 2. in any provision dealing with the secured property, the person who owns or has rights in the secured property; and
 3. in any case where the context permits, both the person who owes payment or other performance of the obligation concerned and the person who owns or has rights to the secured property,

and for that purpose, a person who owns or has rights to the secured property includes a transferee or successor of the interest of a person referred to above.

6. There is a duality in the approach of SIPP whereby substance has primacy over form regardless of the person who has title in the personal property. SIPP applies to every transaction that creates a security interest in personal property and applies to the following:

- ✓ pledges, trust indentures or trust receipts, equipment trusts, debentures, and floating charges;
- ✓ assignments, leases, and consignments, securing payment or the performance of any obligation;
- ✓ transfers of accounts receivable, whether or not to secure payment or the performance of any obligation;
- ✓ a lease of goods under a lease for a term or more than six months, whether or not to secure payment or the performance of any obligation;

- ✓ conditional sale agreements and agreements for the sale of goods on hire-purchase;
 - ✓ the interest in personal property of an execution creditor.
7. SIPP does not apply to, *inter alia*:
- ✓ the creation or transfer of an interest in real property (including a mortgage, charge or lease of real property) save for an interest in a fixture, an interest in crops and an assignment of a right to payment under a mortgage, charge or lease where the assignment does not convey or transfer the assignor's interest in the real property.
 - ✓ This means, therefore, that the registration of charges system under the Registration of Titles Act and the Conveyancing Act will not be impacted by SIPP.
 - ✓ However, in relation to the assignment of a right of payment under a mortgage, an individual would be required to conduct a search at both the National Land Agency and the Security Interests Registry to ascertain the rights that may exist under the mortgage.
 - ✓ Securities held in the central securities depository operated under the Bank of Jamaica Act;
 - ✓ Securities held in a central securities depository licensed under the Securities Act; and
 - ✓ The creation or transfer of an interest in present or future wages, salary, pay, commission or any other compensation for labour or personal services, other than fees for professional services.
 - ✓ This means, therefore, that an attorney-at-law who is owed fees for professional services rendered could create a security interest.

Creation and Perfection of Security Interests

8. The SIPP at Part II distinguishes between non-possessory security interests and possessory security interests with the former created only by a contract in writing.
9. As suggested in the Guide an oral agreement may suffice provided it is a possessory security interest (i.e. accompanied by a transfer of actual possession of the encumbered asset to the secured creditor). While the non-possessory interest may only be created by a contract in writing.

10. The security contract is defined as a contract which creates a security interest in personal property and may include an electronic document with such electronic signature as provided by the Electronic Transactions Act. The Electronic Transactions Act defines “electronic signature” as information that is:
 - ✓ contained in, attached to or logically associated with an electronic document; and
 - ✓ is used by a signatory to indicate his adoption of the content of the document, but does not include any signature produced by facsimile machine or by an electronic scanning device.
11. The electronic signature must sufficiently describe the secured property. For example, a description of the secured property is sufficient if it:
 - ✓ describes the secured property in a manner that enables the secured property to be identified;
 - ✓ consists of a statement that a security interest is taken in all of the debtor’s present and after-acquired property (i.e. personal property acquired by a debtor after the security contract is made); or
 - ✓ consists of a statement that a security interest is taken in all of the debtor’s present and after – acquired property except for specified items or kinds of personal property,

and where the security contract covers fixtures, the contract shall describe the real property to which the fixtures relate.
12. However, the SIPP diverges from the recommendations contained in the Guide in relation to the contents for the Security Contract. In particular, it is not required to state the maximum monetary amount for which the security may be enforced.
13. The security contract will be effective according to its terms, against any person who takes the secured property by sale, lease, discount, assignment, negotiation and the like and against execution creditors. Where execution creditor is defined at section 32 as a person entitled to take possession of personal property pursuant to a writ in aid or execution, charging order, order of attachment, a garnishee order, or other similar process issue by a Court for the recovery of debt and includes a trustee in bankruptcy or liquidator in relation to any such property.
14. Section 4 (4) of SIPP provides that a security interest will not be invalid or fraudulent against creditors and other third parties because:

- (a) the debtor has the right or ability to use, commingle, or dispose of all or part of the secured property, including returned or repossessed goods; to collect, compromise, enforce or otherwise deal with secured property; to accept the return of secured property or make repossessions; or to use, commingle or dispose of proceeds; or
 - (b) the secured creditor fails to require the debtor to account for proceeds or replace secured property.
15. A security interest attaches to secured property and is enforceable against the debtor and third parties as provided in SIPP when:
- (a) value is given;
 - (b) the debtor has rights in the secured property or power to transfer rights in the secured property to a secured creditor; and
 - (c) one of the following conditions is met:
 - (i) the debtor has signed a security contract that provides a description of the secured property;
 - (ii) the secured property is in the possession of the secured creditor and is of a type that may be perfected by possession; or
 - (iii) the secured property is in the control of the secured creditor and is of a type that may be perfected by control.
 - (d) Section 4 of SIPP goes further to indicate that unless otherwise agreed by the debtor and the secured creditor, the attachment of a security interest in:
 - (a) secured property gives the secured creditor the right to proceeds of the secured property even if the security contract is silent about proceeds;
 - (b) secured property is also attachment of a security interest in a supporting obligation for the secured property;
 - (c) a right to payment or performance secured by a security interest in personal property is also attachment of a security interest in the personal property;
 - (d) a right to payment or performance secured by a security interest in a mortgage in real property is also attachment of a security interest in the mortgage; and

- (e) a securities account is also attachment of a security interest in any rights or benefits derived from financial assets credited to the securities account.
- (e) Modifications and substitutions of the security contract made in good faith and pursuant to reasonable commercial standards are effective against the assignee unless the account debtor has otherwise agreed:-
 - a. this applies to the extent that an assigned right to payment arising under the contract has not been earned by performance; and
 - b. notwithstanding that there has been notice of the assignment to the account debtor.

However, this does not affect the validity of a term in an assignment agreement that provides that a modification or substitution is a breach of contract by the assignor.

Rights and obligations of the debtor and secured creditor in possession

16. Section 5 of SIPP outlines rights and obligations of the debtor and secured creditor in possession. The section provides that, in the case of a non-possessory security interest, the debtor shall, unless otherwise specified in the security contract, have the following rights and obligations in respect of the property:
 - (a) the right to use and dispose of the property, and any proceeds derived, in the ordinary course of the debtor's business;
 - (b) the obligation to discontinue the exercise of this right once the secured creditor notifies the debtor of the secured creditor's intention to enforce the security interest in accordance with SIPP;
 - (c) the obligation to do whatever is reasonably necessary to prevent damage to, or loss of, the property; and
 - (d) the obligation to allow the secured creditor to inspect the property to verify its quantity, quality and state of conservation.
17. Section 6 of SIPP outlines the rights and obligations of a secured creditor in possession. A secured creditor in possession of the secured property shall exercise reasonable care in the custody and preservation of the property; shall maintain the property in such a way that it remains identifiable, unless it is perishable; and may use the property only as agreed by the parties to the security contract.

18. Section 6 of the SIPP places on statutory footing the recommendations contained in Chapter VI of the Guide in relation to for example duty of care with respect to the encumbered asset.

Perfecting the Security

19. Of particular importance is the provision in section 7 of SIPP that a right conferred by a security interest shall be enforceable against third parties only when the security interest is perfected. A security interest will be perfected when the following conditions are met (regardless of the order in which the meeting of the conditions occurs):
- (a) the security interest has attached; and
 - (b) either:
 - the security interest is registered in accordance with SIPP; or
 - the secured creditor, or his agent specifically authorized for that purpose, has possession or control of the secured property.
20. Pursuant to section 7(4) of the SIPP, except as provided for elsewhere in the SIPP, a security interest perfected by registration under SIPP takes effect against third parties from the moment of its registration or possession or control, takes effect against third parties from the moment of delivery.
21. A security interest perfected by one method is continuously perfected if:
- ✓ the security interest is perfected in another way under the SIPP; and
 - ✓ there is no intervening period between the methods of perfection during which the security interest is unperfected under the Act.
22. Further, the secured creditor may choose by virtue of the terms of the security contract to authorize the debtor to dispose of the secured property free of encumbrance.
23. Albeit, the Guide provides that third party effectiveness will also be created by registration in a specialized asset specific registry. The SIPP does not provide for this registry rather it provides for registration of the notice in a general Register and possession of the asset.

A security interest in a relevant account and after-acquired property

24. A security interest in a relevant account may be perfected by control of the relevant account. A secured creditor has control of a relevant account (defined as a deposit account/securities account) if:

- (a) the secured creditor is the financial institution (defined as any licensed deposit-taking institution/licensed securities dealer/registered co-operative society duly authorized to accept deposits) with which the relevant account is maintained, even if the debtor retains the right to direct the disposition of funds or other assets from the relevant account;
 - (b) the debtor, secured creditor, and the financial institution with which the relevant account is maintained have agreed, in writing signed by those parties, that the financial institution will comply with instructions originated by the secured creditor directing disposition of the funds or other assets in the relevant account without further consent by the debtor; or
 - (c) the secured creditor becomes a customer, with respect to the relevant account, of the financial institution with which the relevant account is maintained.
25. A security interest in after-acquired property attaches without specific appropriation by the debtor save for where the:
- ✓ after-acquired property is consumer goods other than accessions or consumer goods which replace the security property described in the security contract; or
 - ✓ security interest in those consumer goods is not purchase money security interest.
26. However, a security interest in proceeds is continuously perfected by registration that:
- a. contains a description of the proceeds that would be sufficient to perfect a security interest in secured property of that kind; or
 - b. contains a description of the original security property, if –
 - a. the proceeds are of a kind within the description of the secured property;
 - b. the proceeds are cash proceeds;
 - c. the proceeds consist of a payment made in total or partial discharge or redemption of intangible property; or
 - d. the proceeds consist of a right to an insurance payment, or other payment as an indemnity or compensation, for loss or damage to the secured property or its proceeds.

Temporary Perfection for up to 15 working days

27. By virtue of section 10 (3) of the SIPP, a security interest in proceeds is temporarily perfected until the expiration of fifteen (15) working days after the original secured

property is converted to those proceeds if - (1) the security interest in the original secured property is perfected; and (2) the security interest in the proceeds is not continuously perfected as outlined above.

28. While a security interest in a financial instrument is temporarily perfected until the expiration of fifteen (15) working days after the secured creditor makes the financial instrument available to the debtor if - (1) the security interest was perfected by possession; and (2) the secured creditor gives possession of the instrument to the debtor for sale, exchange, presentation, collection, renewal, or registration of a transfer.
29. A security interest in a negotiable document of title, or in goods, held by a bailee, and not covered by a negotiable document of title, is temporarily perfected until the expiration of fifteen (15) working days after the secured creditor makes the title or goods (as the case may be) available to the debtor, if - (1) the security interest was perfected by possession; and (2) the secured creditor delivered the title or goods for the purpose of sale of exchange, or loading, unloading, storing, shipping, manufacturing, processing, packaging or otherwise dealing with goods in preparation for their sale or exchange.

The priority of security interests in crops and fixtures

30. Security interests in certain types of goods, for example, crops and fixtures receive special treatment under SIPP. For instance, a security interest in crops is a security interest in the crops, while they are in the form of seeds or other germinating material while they are growing and afterwards when they are cut, picked or separated from the soil. A perfected interest in crops is not extinguished or prejudicially affected by a subsequent sale, lease, mortgage, or other encumbrance, of or upon the land on which the crops are growing.
31. Of particular importance is a perfected security interest in crops growing on real property has priority over a conflicting interest of an owner, mortgagee or other person with an interest in real property if the debtor has a registered interest in, or is in possession of, the real property.
32. Where property is affixed to real property except for building materials incorporated into an improvement of real property. A security interest in such property which attaches before the property becomes a fixture has priority over the claim of any person who has an interest in the real property to which the property is affixed; whereas after the property becomes a fixture, the security interest has priority over the claim of a person who subsequently acquired an interest in the real property to which the property is affixed but not over any person who already has a perfected security interest in the fixtures and has not consented in writing to the security interest or disclaimed an interest in the fixture.

33. However, section 15 (3) of SIPP stipulates that a security interest in such property is subordinate to:
- ✓ the interest of a subsequent purchaser for value, or an interest in real property, who does not have knowledge of the security interest before it is perfected; or
 - ✓ a creditor with an encumbrance noted on the title or deed to real property before the security interest is registered to the extent that the creditor makes subsequent advances to the debtor, if the creditor makes the subsequent advances before the secured interest is registered.
34. Section 15(4) of the SIPP indicates that if a security creditor has an interest in a fixture that has priority claim over the claim of persons who have an interest in real property, the secured creditor may, unless otherwise agreed, remove the fixture from the real property if the secured creditor reimburses any encumbrancer or owner of the real property, other than the debtor, for the cost of repairing any physical injury to the value of the real property caused by the removal (other than any diminution in the value of the real property caused by the removal of the fixture or by the necessity of replacement)
35. This means, therefore, that the priority of security interests will interact with both registered and unregistered land.

When can a Buyer or a Lessee Take Free of the Security Interest?

36. Sections 16 – 21 of SIPP outline the circumstances in which the buyer or lessee will take free of the security interest. For example, in relation to an unperfected security interest a buyer or lessee of secured property who acquires the secured property for value takes the secured property free of any unperfected security interests in the property, except for any unperfected security interest created or provided for by a transaction to which that buyer or lessee is a party.
37. A buyer or lessee of goods from a seller or lessor acting in the ordinary course of the seller's or lessor's business takes the goods free of any security interest given by the seller or lessor, unless the buyer or lessee knows of the security interest.
38. Further, a buyer or lessee of goods acquired as consumer goods takes those goods free of any security interest if the value of the goods did not exceed \$10,000 at the time the security interest attaches or there is more than one security interest in the goods, at the time the security interest having first priority attaches.
39. Arguably, this assignment of a monetary value in order for a buyer or lessee of goods to take free any security interest may prove problematic as the SIPP does not require that the notice specify a maximum value.

40. As indicated elsewhere in the SIPP, special provision is made for motor vehicles and the circumstances in which a buyer or lessee of a motor vehicle may take free of any security interest perfected by registration.

Priority of Security Interests

41. Part V of the SIPP stipulates that in the event that SIPP does not provide an alternative method of determining priority between security interests in the same secured property the following will apply:
- ✓ a perfected security interest has priority over an unperfected security interest in the same property;
 - ✓ priority between unperfected security interests in the same secured property is ranked by the order in time at which the security interest attaches, with the earliest in time taking first priority;
 - ✓ priority between continuously perfected security interests in the same secured property is ranked by the order in time at which the security interests satisfy any of the following conditions (with the earliest in time taking first priority)-
 - the security interest is registered under the SIPP;
 - the secured creditor, or his agent duly authorized for that purpose takes possession of the secured property, other than possession resulted from seizure or repossession; or
 - the secured interest is temporarily perfected by virtue of any provision of the SIPP.
42. Nevertheless, the priority of security interests may be modified by written agreement between the secured creditors concerned unless registration of an amendment notice to reflect such an agreement is required. Section 51 of the SIPP goes further to stipulate that a registration notice may with the written authorization of the secured creditors concerned be amended by the registration of one or more amendment notices.
43. The SIPP goes into detail in relation to the priority of certain types of security interests such as purchase money security interests, relevant accounts, and goods that become accessions, processed or commingled goods.
44. Sections 28-32 of the SIPP speak to the priority against other types of interest in secured property as it relates to liens; a creditor who receives payment of a debt; holders of negotiable documents of title; assignees of accounts receivable; and execution creditors.

45. It is important to emphasize that SIPP outlines for the priority for various types of assets and not types of debts. Further, it is hoped that SIPP will allow for greater certainty: with the order of priority being determined based on clear and unambiguous rules based on first to file.

Transferred Property

46. One may well ask what are the rights of secured creditor in the event that the rights of the debtor in the secured property are transferred consensually or even by operation of law? Pursuant to section 27 (1) - the rights of the debtor in the secured property may be transferred, despite any provision in the security contract prohibiting the said transfer or declaring the transfer to be an act of default.

Enforcement Of Security Interests

47. Part VI of the SIPP is not applicable to a lease of goods under a lease for a term of more than six months, unless that transaction creates a purchase money security interest; the interest of an execution creditor; or a transaction in which a person pledges property to a pawnbroker.
48. The procedure upon default is outlined in section 34 as it relates to a debtor in default of secured property under a security contract, or a document of title. The rights, remedies and obligations that a secured creditor has against the debtor are outlined in the section.
- ✓ Namely, where a debtor is in default under a security contract, the secured creditor has against the debtor –
 - ✓ the rights, remedies and obligations provided in the security contract;
 - ✓ the rights, remedies and obligations provided by any other law, to the extent that they were not inconsistent with the SIPP;
 - ✓ the rights, remedies and obligations provided in relation to crops, fixtures, and accessions; and
 - ✓ where the secured creditor is in possession or control of the secured property, the rights, remedies and obligations provided in section 6.
 - ✓ On default under a security contract –
 - ✓ The secured creditor has, unless otherwise agreed between the parties, the right to take possession of the security property or otherwise enforce the security contract by any method permitted by law;

- ✓ If the security interest is perfected by registration and the secured property is of a kind that cannot be readily moved from the premises where the property is located or is of a kind for which adequate storage facilities are not readily available, the secured creditor may seize or repossess the secured property, without removing it from those premises, in any manner by which a writ in aid or execution may provide for seizure without removal; and
- ✓ Where the above paragraph applies the secured creditor may dispose of the secured property on the premises concerned by shall not cause the person in possession of the premises any greater inconvenience and cost than is necessarily incidental to the disposal.

49. Section 35 outlines the procedure for enforcement in relation to accounts receivable, financial instruments or intangibles, and is also applicable to secured property which is subject to assignment or licence. This relates to default under the terms of a security contract, and allows for a secured creditor to deduct reasonable expenses of collection from amounts collected from a debtor on an intangible or from a person obligated to make payment under a financial instrument; or money held as secured property.
50. Section 36 of the SIPP relates to disposition of secured property which has been seized or repossessed by a secured creditor after giving the notice which he is obliged to give under section 37 (outlined below). Such disposition may be by private sale; public sale, including public auction or closed tender; as a whole or in commercial units or parts; by lease, credit sale, licence; or any other commercially reasonable manner of disposition. The secured creditor, however, has a duty to act in good faith to obtain the best price reasonable obtainable when disposing of secured property.
51. Section 37 of the SIPP requires that seven (7) days prior to disposing of the secured property, a secured creditor should give notice of disposition, in a required format, to the following persons:
- (i) the debtor;
 - (ii) any other person who is known by the secured creditor to be an owner of the secured property;
 - (iii) any creditor or other person with a security interest in the secured property, whose interest is subordinate to that of the secured creditor, if applicable; and
 - (iv) any other person with an interest in the secured property, who has given a written notice to the secured creditor of that person's interest in the secured property prior to when notice of the disposition is given to the debtor.

52. Section 38 of the SIPP outlines the process regarding surplus or deficiency on disposition in relation to enforcement re accounts receivable, financial instruments or intangibles; disposition of secured property, or otherwise. The way and order in which such surplus should be paid out is outlined in the section, as well as the debtor's liability to the secured creditor as it relates to deficiency arising on any collection or disposition of secured property.
53. Further, based on section 38 of SIPP the onus appears, unless provided by law or by agreement, to be on the secured creditor to account for and pay the surplus out. In addition, the secured creditor will have to give a written accounting of the amount received from the disposition of the secured property or the amount collected under section 35 of SIPP. This may well mean that though the cost of borrowing may decrease that the cost of lending may increase.
54. Section 39 of the SIPP outlines the circumstances in which a secured creditor may propose to retain secured property in satisfaction of an obligation secured by it. Notice of such proposal should be given to the debtor and any other person who is known by the secured creditor to be an owner of the secured property; and any creditor and any other person with a security interest in the secured property, whose interest is subordinate to that of the secured creditor, if applicable; and any other person with an interest in the secured property who has given written notice to the secured creditor of that interest prior to the day on which the notice is given to the debtor.
55. After these persons are notified, they have fourteen working days after notice is given, to give to the secured creditor a notice of objection to the proposal. If such objection is given, the secured creditor shall proceed to dispose of the property as outlined in the Act. If no such objection is given within the stipulated time period, the secured creditor will be deemed to have irrevocably elected to take the secured property in satisfaction of the obligation secured by it.
56. The secured creditor may, under section 40, purchase the secured property or any part of it, if the purchase is at a public sale for a price that bears a reasonable relationship to the market value of the secured property.
57. Section 41 outlines a debtor's right to redeem secured property. Such a right may be exercised at any time before a secured creditor or a receiver has disposed of the secured property, or contracted for its disposition; or a secured creditor is deemed to have irrevocably elected to retain the secured property. This right may be exercised by any person who is entitled to receive a notice of the disposition, and may be done by tendering to the secured creditor fulfillment of the obligations secured by the secured property; and a sum equal to the reasonable expenses of seizing, repossessing, holding, repairing, processing, and preparing the secured property for disposition, if those

expenses have actually been incurred by the secured creditor, and any other reasonable expenses incurred by the secured creditor in enforcing the security contract.

58. The rights of purchasers of secured property which was disposed of by a secured creditor are also outlined. When such a purchaser takes possession of the secured property for value and in good faith, the purchaser acquires the secured property free from the interest of the debtor; any interest subordinate to that of the debtor; and any interest subordinate to that of the secured creditor. In addition, all obligations secured by these subordinate interests are deemed to be performed for the purposes of a termination notice.
59. Section 43 outlines the enforcement of parallel obligation secured by an interest in a mortgage, where the same obligation is secured by an interest in a mortgage in real property and a security interest in personal property. In such circumstances the secured creditor may proceed in respect of the personal property, or proceed in respect of both the interest in the mortgage and the personal property. The secured creditor may do so without limiting the rights of another secured creditor who has a security interest in the personal property.
60. Under section 44 a debtor, creditor of a debtor, secured creditor, person carrying out a writ in aid of execution, or a person claiming an interest in secured property, may make an application to the Court for an order, including a declaration of a right and an order for injunctive relief; an order giving directions to any person from compliance with this Part of the Act; an order staying the enforcement of any right conferred in this Part; and/or any order that is necessary to ensure protection of the interest of any person in the secured property.
61. Section 45 makes provision for the enforcement of security interests in accessions by a secured creditor who is entitled to take possession of any accessions. Such a secured creditor shall, at least ten working days in advance, give notice (in a form specified in the section) of his intention to remove the accessions to every person whom the secured creditor knows to have an interest in the goods to which the accessions are installed or affixed, or in the whole; and any person who has registered a security interest in the goods in or to which the accessions are installed or affixed, or in the whole, and concerning the same debtor.
62. A person, other than the debtor, under subsection 3, who has an interest in goods in or to which accessions are installed or affixed at the time when the accessions are installed or affixed, is entitled to be reimbursed by the secured creditor for any damage to the person's interest in the goods caused by the removal of the accessions. This obligation does not, however, include an obligation to reimburse for any reduction in the value of the property caused by the absence of the accessions or by the necessity of replacing the accessions.

63. Applications may be made to the Court by a secured creditor, or by a person entitled to be given notice for orders in relation to the removal of and payments in relation to the accessions.
64. Section 46 allows for the appointment of receivers which may be provided for in the security contract. In addition, an interested person may make an application to the Court to appoint a receiver; remove, replace or discharge a receiver; give directions on any matter relating to the duties of a receiver; approve the accounts and fix the remuneration of a receiver; make an order requiring a receiver, or a person by or on behalf of whom the receiver is appointed, to make good any default arising in connection with the receiver's custody, management or disposition of the secured property or any other property of the debtor or to relieve the person from any default or failure to comply with this Part; or exercise with respect to receivers appointed under a security contract the jurisdiction that it has over receivers appointed by the Court. The section further outlines the powers and duties of an appointed receiver.
65. The Duties of the Receiver under SIPP paradoxically appear to be greater than the duties of a receiver under the Companies Act. The duties of a receiver now include to open and maintain, in the receiver's name as receiver, one or more accounts, at a financial institution licensed to accept deposits, in which should be deposited all money that comes under the receiver's control as receiver.
66. Given the predominance of giving notice of various activities in SIPP, it is surprising that there is no provision for notice of the receiver's appointment to be noted on the Security Interests Registry yet section 55 of SIPP provides for notice of an execution creditor to be noted on the Register.
67. In addition, under the Companies Act the Receiver is required to deliver every six months receipts and payments of the receivership to the Registrar of Companies. While SIPP merely states that a debtor may demand in writing that the records kept by the Receiver be open for inspection. Arguably, this absence of a central place of documentation appears to be a central theme of SIPP whereby documentation is only provided to interested persons upon their request rather than the Register being the medium for this information.
68. The Companies Act also indicates that a body corporate may not be appointed a Receiver. SIPP does not have a similar provision and the Act specifically indicates at section 46 (11) that in the event of any conflict between the provisions of this Act and the Companies Act or any other law in respect of a receiver, the provisions of this Bill shall prevail.

69. Arguably, the SIPP's provisions in relation to receivers appear to the contrary to the Guide which indicates that in relation to enforcement there should be a close interrelationship between the secured transaction laws and the State's insolvency laws.

Registration

70. Section 47 of the SIPP establishes a Security Interests Registry which shall have a Registrar of Security Interests designated by the Minister of Industry, Investment and Commerce. This Registrar shall be responsible for ensuring that the Register is maintained in accordance with the Act, and for the performance of the functions assigned to the Registrar, which functions may be carried out by any member of staff of the Registry under the direction of the Registrar.
71. The form and content of the Register, which should be made available for public inspection, is prescribed in section 48. Perhaps most importantly, the Register shall be maintained in electronic form which provides for:
- ✓ the filing, in an electronic Register of Security Interests, of all registration notices, amendment notices, and termination notices, registered under the SIPP;
 - ✓ the assignment of a registration number (which shall be a unique identification number) to each such notice, together with a notation of the date and time of filing.
72. Further, the Registrar shall maintain the Register in a state of availability for public inspection, included the capability to view any registration notice filed in the Register by inputting a search of any of the following data:
- ✓ The name of the debtor;
 - ✓ The registration number of the registration notice, in the manner that associates the registration notice with all related amendment notices and termination notices;
 - ✓ In the case of a motor vehicle, the serial number of the motor vehicle; and
 - ✓ In the case of fixtures, the identification information relating to land, including in the case of registered land the volume and folium of the Register Book.
73. The Registrar shall maintain records or lapsed or terminated notices for a period of ten (10) years beyond the date of the lapse or termination.
74. Section 48 (6) of SIPP states expressly that registration of a notice in the Registry is not constructive notice or knowledge of its existence or contents to any person. This is

contrary to the previous principle that registration of a charge equates to notice to the world.

75. The Register should contain, among other things, registration notices. The form of such registration notices is prescribed by section 49. Namely registration notice must:
- ✓ Sufficiently identify the debtor, and state the debtor's business or residential address;
 - ✓ Sufficiently identify the secured creditor, and state the secured creditor's business or residential address; and
 - ✓ Describe the secured property covered by the notice.
76. Curiously, although a person may register a registration notice only if the debtor authorizes the registration such authorization need not be disclosed to the Registrar.
77. The SIPP does to some extent simplify the process: with one place to register and search. It is noted that section 49 (4) of SIPP provides that a registration notice may be registered before or after a security contract has been concluded and may relate to one or more security contracts but does not provide for the registration of the actual instrument creating the security interest. This is in keeping with the Guide which theorizes that the registry should record notices relating to existing or potential security rights and not documents.
78. The sufficiency of identification in a registration notice is prescribed in section 50, and the procedure for amending a registration notice is outlined in section 51. The effect of a defect, irregularity, omission, or error in the registration form is outlined in section 52. The duration of a registration notice is stated in section 53 and shall be effective for the duration of the period that the secured obligation remains outstanding, and the termination of the effectiveness of a registration notice, in the form of a termination notice, is prescribed by section 54. The termination notice must be filed by the secured creditor within twenty one (21) days after the satisfaction of the secured obligation.
79. The powers of the Registrar to refuse (section 56), restore or correct (section 57) a registration notice is outlined in this part of the SIPP. In addition, the Registrar may also provide certain information, outlined in section 58, for a prescribed fee to an individual who requests it. Specifically:
- ✓ Whether there is any registration notice that identifies a particular debtor or describes a motor vehicle by serial number and that has not terminated with respect to all secured creditors identified in the notice;

- ✓ The registration number, and date and time of the registration of the registration notice;
 - ✓ The name and address of each debtor and each secured creditor identified in the notice.
80. Section 58 (4) specifically provides that a certified report issued by a Registrar shall be admissible in evidence in any Court.

General

81. Section 59 of the SIPP outlines the duty of a secured creditor, in certain situations, to make certain information available which may be requested by the debtor, or an authorized representative of the debtor. However, such a secured creditor may make an application to the Court for an order exempting, in whole or in part, the secured creditor from complying with a request, or extending the time for compliance past the ten working days stipulated, if the Court is satisfied that in the circumstances it would be unreasonable for the secured creditor to comply with the request.
82. Section 60 outlines the form of service of the notices required and authorized by the Act.
83. Of particular note is section 65(1) of the SIPP which states that priority between interests of personal property created before the appointed day shall be determined by the laws applicable immediately prior to the appointed day. A security interests perfected under the SIPP will have priority over an interest or personal property created before the appointed day except:
- ✓ A creditor who immediately before the appointed day has an interest in the personal property of a debtor may register a registration notice of its interest at any time and
 1. If the notice is filed before the expiration of the transitional period, the interest shall
 - a. Have priority over a security interest created, registered or perfected under the SIPP;
 - b. Retain its priority in relation to other interests in personal property created before the appointed day and in respect of which a notice in accordance with this section is filed before the expiration of the period; and

- c. Have priority over an interest in personal property created before the appointed day and in respect of which a registration notice has not been filed before the expiration of the transitional period; and
2. If the notice is filed after the transitional period, the interest shall have priority over a secured interest created, registered, or perfected after the time of the filing.

Where transitional period means the period of one hundred and eighty (180) days beginning on the appointed day.

84. The Guide postulates at Chapter XI that there should be a demarcation of a transition period to avoid undermining existing relationships. While it is clear that the SIPP provides for such a transitional period, the issue arises whether 180 days is a sufficient time period in light of the circumstances and the parties involved.

Conclusion

85. It is true that the SIPP does propose to address several issues which were deemed to be hindering this form of lending. In this way it has incorporated several of the tenets of the Guide which may well decrease the cost of borrowing and simplify the process. However, the Guide recognizes that legislation cannot be done in isolation and postulates that in order to achieve a *pareto optimal* result methodologies such as “acquisition financing” which encompasses a broad range of transactions, must be implemented to enable an enterprise or consumer to acquire tangible assets on credit.

CONCERNS AND POSSIBLE SOLUTIONS

A lot, therefore, is expected to be achieved through the implementation of SIPP. The stakeholders, however, who have been monitoring this process with great interest, remain cautiously optimistic, at best. The goals and expectations are laudable, there remain, however, some concerns which it is hoped that the relevant persons will still make the time to address. We highlight a few in this aspect of the presentation for consideration.

1. **The Reduction in the cost of borrowing**

One of the principal goals originally touted by the proponents of the legislation was that it had significant potential to lead to the reduction in the cost of borrowing due in part to the removal of distinctions between types of charges: resulting in simplified drafting but also, and perhaps more importantly to those looking on, the removal of stamp duties payable in relation to those transactions.

(i) Removal of distinction between types of charges

Under the current laws of Jamaica, a floating charge is a type of security which can only be provided by a corporate entity. A floating charge, as we will recall, is a charge which attaches to the subject charged in the varying condition it happens to be in from time to time and essentially hovers over the relevant assets until it crystallizes, whether because the undertaking ceases to be a going concern or because the security holder for some other reason intervenes. The floating charge is, therefore, a very useful tool which lenders like to take as security for loans and which by its very nature would, therefore, be unavailable to many micro, small and medium sized entities which are probably not operating as corporate entities but as sole proprietors or partnerships.

SIPP, however, makes no distinction between types of secured creditors: any person in whose favour a security interest is created is a “secured creditor” and would be entitled to the protections and entitlements of the secured creditor. Given the definition also of “security interest” which means *“an interest created – (a) contractually over one or more items of personal property (whether specifically or generically described, present or future); and (b)*

securing the fulfillment of one or more present or future obligations. This means any person can effectively give any form of security.

In addition, Bills of Sale Act with its special drafting requirements will be repealed in its entirety and the provisions in the Hire Purchase Act including the sections requiring the inclusion of special language in vending agreements are repealed. The drafting process can, therefore, be simplified. A security contract is now simply any contract which “*creates a security interest in personal property, being a written contract in the case of a non-possessory security interest, but in the case of a possessory security interest need not be in writing*”.

Under the existing Companies Act, certain debts including outstanding wages, redundancy payments, NIS and NHT contributions, government taxes etc., are treated as preferred debts and are payable in priority to persons holding floating charges, which often covers all the assets of the entity.

Stakeholders had, therefore, suggested that careful consideration be given to whether there are any factors which ought to be given preferential treatment when looking at the order in which payment is to be made out of the assets, particularly in circumstances of insolvency.

To some extent, the latest version of SIPP has sought to address this concern. It now proposes only to delete in section 311(4)(b) of the Companies Act the word “debenture” and replace it with the words “*security interests under the Security Interests in Personal Property Act and arising*”.

So that this section would now read:

“The foregoing debts shall –... (b) in the case of a company registered in the Island, so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of security interests under the Security Interests in Personal Property Act and arising under any floating charge created by the company, and be paid

accordingly out of any property comprised in or subject to that charge.”

The government, therefore, appears to have determined that it is important to retain some protection in an insolvency scenario. This, however, means that the distinction between fixed and floating charges have, notwithstanding the widening of the definitions under SIPP, been retained and the need for careful drafting to avoid the effect of the creation of floating charges has not been avoided. To some extent, therefore, some of reduction in the cost of drafting may not be achieved.

In addition, the fix proposed only addresses the concern in relation to corporate entities, it does not resolve the concern as it relates to individuals. It is therefore suggested that if it is intended to safeguard the priority of the preferred debts over floating charges clear provision should be made that upon the commencement of an insolvency proceeding, issues regarding the order of priority should be subject to insolvency/bankruptcy legislation relevant to the particular person and that that legislation, which applies to both corporate and individual persons, preserve the priority of floating charges. It is important for the Ministry to ensure therefore that the proposals being put forward for SIPP are not in conflict with the proposals being considered for the Insolvency legislation and that these two important pieces of legislation be made to work together.

(ii) Removal of stamp duties

The Stamp Duties Act now provides that ad valorem stamp duty at a rate of \$3.00 (plus 25% surcharge) for every \$200 or fractional part of \$200 of the amount secured is payable in respect of any “mortgage other than real property”.

In addition, it provides that “in respect of a debenture, for every \$200 of such sum [secured] or fractional part thereof \$1.60 (plus the 25% surcharge)”.

Note in this regard that Debenture includes “a debenture which either creates a debtor acknowledges it although no charge or security on the real or personal property is thereby created”.

The stamp duty payable in relation to bills of sale which would typically be assessed under the first category “mortgage other than real property” and in respect of a debenture, typically assessed under the second category are generally viewed as significant deterrents. Many lenders failed to comply with the stamp duty requirement until such time as enforcement was necessary. A climate of non-compliance was therefore cultivated at best, assuming that the lenders were prepared to take the security in a form which they were unable to properly perfect.

The applicability of ad valorem duty on security documentation is viewed as prohibitive and in some instances a barrier to accessing credit (both from a cost and time perspective). This is readily evident where borrowers are using cash deposits maintained with the Lender Bank as collateral. To perfect the security arrangement the funds held on deposit are required to be hypothecated and the Hypothecation Agreement attracts ad valorem stamp duty.

One of the great selling features in the discussions regarding the introduction of SIPP was that these stamp duties which were viewed and operated as such a deterrent would be removed. This was expressly reflected in the earlier drafts of SIPP but is notably absent from the current draft of SIPP. It is our understanding that this is a specific policy decision that the country cannot afford to forego this revenue. This, however, in our view, is an important aspect of reducing the cost of borrowing sought to be encouraged. We believe it is also better to encourage a culture of compliance, rather than non-compliance, which in our view will, if the stamp duty requirement is retained, likely continue under the new regime. In any event, the cost of this stamp duty will be required by the lender to be paid by the borrower and so will continue to be an addition to the cost of borrowing. The introduction, on the other hand, of a small registration fee would be more palatable to all and would allow the capture of funds which are now largely avoided whenever possible. Additionally, since the registration fees will also apply to hire-purchase agreements which are now not subject to stamp duty and there is no incentive NOT to register under the SIPP, the net for revenue would have the potential to increase rather than diminish by the removal of the stamp duties.

Section 41(b)(i) of SIPP provides an example of the challenges which will be faced given the inclusion of the stamping requirement. That section allows a person entitled to receive notice of disposition to redeem the property by tendering to the secured creditor fulfillment of the

obligations secured by the secured property. As SIPP does not define “obligations secured” the secured creditor may arguably be limited to receiving only payment of the amount for which the security is stamped rather than the full amount of the outstanding secured obligations. For example, where the secured creditor holds security stamped to cover \$500,000 with outstanding obligations of \$600,000, will the difference of \$100,000 be secured upon redemption of the property, as would currently be the case? If not, the secured creditor could run the risk of being required to release its security upon the payment of the amount for which the security is stamped rather than the outstanding obligations.

We would therefore recommend, particularly given the recognition being given in SIPP to creation of a charge by possession, that there be no stamp duty payable in relation to security contracts under SIPP. This may be introduced by way of amendment to the Stamp Duties Act rather than in SIPP, if preferred. If stamping is to remain relevant to the creation of a security interest, we suggest, instead, that SIPP provide for fulfilment of the amounts owed by the debtor to the secured creditor (“outstanding obligations”) and (expressed in the security contract to be secured by the secured property). Further, consideration may also be given to the introduction of a flat nominal fee for the stamp duty.

2. Simplification of Registration

The Consultants who assisted with the proposed legislation noted that Jamaica’s laws required registration of personal property at a number of different places in order to preserve the validity and priority of the security interest. They, therefore, recommended that Jamaica could benefit by simplifying the process requiring registration in only one central location: the electronic register to be maintained under SIPP.

With the proposed repeal of SIPP’s of Sale Act, the requirement for registration of such charges at the Island Records Office, for example, is removed. Additionally, it amends section 93(3) of the Companies Act (the section listing all the registrable charges) to remove the requirement to register there all other charges save for “*charges on land or any interest therein but not to a charge for any rent or other periodical sum issuing out of land*” and deletes the subsections (6), (7) and (8) dealing with negotiable instruments and debentures.

Although this does in one respect simplify some of the requirements for registration, it is noted that no changes are proposed to the Trade Marks Act which makes provision for the registration of charges over trade marks. Additionally, it would seem that dual registration will continue to be required for assets such as ships and aircrafts, a matter which is of great concern to the shipping and civil aviation authorities who stress the importance of being able to maintain their registries and would not want to be forced to rely on a separate notice only register.

In addition, given that there will then be no one singular register that a lender can feel assured ought to contain all the particulars of charges given by a company, a prudent lender lending to a company may still see the need to search all the available registers.

The transitional provisions of SIPP, however, seek to make it unnecessary to do so where the lender does not propose to take security over real estate. It provides in section 65:

”65. - (1) Subject to the provisions of this section, priority as between interests in personal property created before the appointed day shall be determined by the laws applicable immediately prior to the appointed day.

(2) A security interest perfected under this Act shall have priority over an interest or personal property created before the appointed day, except as provided by subsection (3).

(3) A creditor who immediately before the appointed day has an interest in the personal property of a debtor may register a registration notice of its interest at any time, and –

(a) if the notice is filed before the expiration of the transitional period, the interest shall –

(i) have priority over a security interest created, registered or perfected under this Act;

(ii) retain its priority in relation to other interests in personal property

created before the appointed day and in respect of which a notice in accordance with this subsection is filed before the expiration of the transitional period; and

(iii) have priority over an interest in personal property created before the appointed day and in respect of which a registration notice has not been filed before the expiration of the transitional period; and

(b) if the notice is filed after the expiration of the transitional period, the interest shall have priority over a security interest created, registered or perfected after the time of the filing.

(4) In this section, “the transitional period” means the period of one hundred and eighty days beginning on the appointed day. “

Note, however, that unless a secured creditor registers under SIPP within the transitional period, subsequent charges could gain priority over them. The question, however, is who will assume the cost of making these filings? Will it be the lenders – if so, is it likely that these costs will, therefore, be passed on to the borrowers – what would be the implication of this? Is 180 days sufficient time to allow lenders to achieve this transition?

It is recommended therefore that for the purposes of the transition to the new register there should be no registration fee chargeable in relation to a secured creditor migrating from one register to the other within the transition period.

3. **Access and speed of availability to credit**

It is hoped that the detailed requirements under SIPP regarding determining priority of registered charges, coupled with the ease of registering under SIPP should have the benefit of increasing access to and speed of processing loan transactions.

(i) Electronic register

The concerns, however, are that this register is intended to be purely electronic. One wonders, however, whether there is sufficient penetration of the relevant technology to justify the use of a purely electronic platform. Will sufficient access be made available to the general public so as to ensure that persons are able to take advantage of the legislation? Will computers, for example, be made available at post offices across the island so as to ensure that there is sufficient penetration. Additionally, the issues often experienced with power outages and, therefore, possible loss of data is some concern. It will, therefore, be important to see the regulations introduced to see how they will address these concerns.

In any event, given these concerns, consideration should perhaps be given to whether it is appropriate for Jamaica to move directly to a purely electronic register. Should a dual system of both paper and electronic filings be permitted with a requirement for the notice once filed to be made available in a searchable electronic register? As we would have seen from the model legislation and from other jurisdictions, they have tended to move directly to a purely electronic register but some consideration needs to be given as to whether this is appropriate for us.

(ii) The Notice

The Notice, as compared with the registration process under the Companies Act or Bills of Sale Act has been simplified with the hope, therefore, that it can increase the speed of getting credit. It is not clear however how the requirements for stamping will operate with the allowance given for a secured creditor to register its notice even before the security contract is concluded. It is our recommendation however that the stamp duty in respect of security contracts should be removed.

There is a concern also that the time for the due diligence process may end up being lengthened in light of the provisions of SIPP.

Under the Companies Act, although section 7 provides generally that *“No person shall be affected by, or presumed to have notice or knowledge of, the contents of a document concerning a company by reason only that the document has been filed with the Registrar or is available for inspection at any office of the company”*, section 94(i)(a) provides that:

“Where a charge requiring registration under this Act is created then – (a) the registration of that charge in accordance with this Act shall constitute notice to the world of the existence of that charge”.

Section 48(6) of SIPP, however, provides”

“Registration of a notice in the registry is not constructive notice or knowledge of its existence or contents to any person.”

This provision in SIPP, therefore, means that a subsequent chargee cannot be deemed to have notice of any prohibition clauses contained in the charge based simply on the fact the clauses were contained in a charge registered under the Act or even of the fact that a prior charge existed as registration is not constructive notice of the existence of the fact that a registered notice in relation to the asset already exists.

In fact, SIPP makes no provision for a copy of the charge to be registered. The only information to be provided is the identity of the debtor the secured creditor and the secured property. It does not even require disclosure of the amount secured.

It would seem, however, that this could have the potential of lengthening the time required to finalize loans as the lenders who bother to carry out searches, will need to make contact with prior chargees in order to complete their due diligence and cannot simply rely on information available at a public register, as is now possible. Again, we note that the speed of being able to make the registration is the focus and therefore ensuring that the process is simple and quick is paramount. At the very least, however, the register, as it does in other jurisdictions, should require disclosure of the amount secured.

Although SIPP seems to acknowledge that this due diligence will become necessary and makes provision for secured creditors to make certain information available upon the request of a debtor within ten (10) working days after receiving the request. It is noteworthy, of course, that the secured creditor is only compelled to so do at the request of the debtor or an authorized representative of the debtor and is not required to do so if the secured creditor already provided the information to the debtor or authorized representative of the debtor. A debtor seeking credit from multiple sources could be disadvantaged: the new lender may be uncomfortable receiving this information from the debtor rather than the secured creditor and the secured creditor may not be obliged to have to provide this information (and may have no desire or incentive to do so so as to allow the further loan to be extended by its competitor). Note that this information is to be provided free of cost for the most part.

We would recommend that registration of the notice continues to be notice to the world and that provision be made to require the notices to at least the amount secured. Additionally,

4. We will also take you quickly through some specific suggestions for revisions required to particular clauses of SIPP which appear likely to present practical difficulties:

(i) Giving Notice Under SIPP – [Section 60]

The manner in which SIPP provides for notice to be given needs to be revised to take into account certain practical considerations in Jamaica. For organizations, the Act allows the notice to be given to a person with knowledge of the transaction, which could be challenging to apply and problematic in large organizations. It is suggested that for bodies corporate, the notice should be to the Company Secretary (since every body corporate would have one) or such other person as may have been notified in a filing with the Registry. Thus, certainty can be brought to the process. Also, notification by post deemed to have been given within the ordinary course of postal delivery is problematic as there is no evidence of ordinary posting and no time within which we may now consider delivery to be “ordinary”. It is suggested that any such provision should make reference to “registered post” and specify the date by which notice is deemed to have been given (e.g. 15 working days after posting).

(ii) Need for Express Consent

Taking of collateral should require the debtor to have given express consent (in writing or in a manner consistent with the Electronic Transaction Act). The idea presently in SIPP of possession solely equaling collateral rights attach, appears quite troublesome and inappropriate (in Jamaican context).

(iii) Ministerial discretion to add to and subtract from the scope of the Act. Section 3(3)

- a. The Minister, by order, may change the application of the Act.
- b. In addition, the Minister, by regulation, may change the application of the Act by prescribing what sorts of leases are subject to the Act, or are exempt from the Act.
- c. In considering the application of this section, we may consider shipping containers full of collateral passing through Jamaican ports, providing jobs for Jamaicans and revenue to the treasury. With such a provision, the shipping agent in London or New York or Miami might consider it necessary to hire legal services in Kingston on a day to day basis to determine whether any ministerial orders or regulations will interfere with its property rights as the goods pass through the port.
- d. There is limited precedent for the provision on leasing, though we know of no precedent for Section (3). As to the leasing, the provision is in place in a small number of jurisdictions where regulations are adopted only with broad public participation and total industry consensus. If leasing is to be included in the scope, we would suggest that such a process be followed before the development of any regulations in relation to it. Similarly, it is suggested that Section 61(h) gives a power that is too wide and vague. This sort of change, that could affect the security interest, should be done by amendment to the Act, not by regulations.

(iv) Definitions. The following definitions in SIPP require further attention:

- a. The definition of **debtor** does not include a lessee, a seller of accounts, or a consignee.
- b. The definition of **secured creditor** does not include a lessor, a buyer of accounts, or a consignor.
- c. **“Goods”** remains undefined. In some instances where “goods” are referred to, inventory appears to be the better word to use, while in other sections, goods may need to be referred to.
- d. The sections/clauses referring to **security dealers and security accounts** appear to warrant review to see if other financial institution types should be incorporated.
- e. It may be appropriate to define what is meant by the **“ordinary course of business”**, particularly with the debtor being able to dispose of property subject to non-possessory security interests in the ordinary course of business. A retailer selling goods from its inventory would be fine, but there could be argument around whether a sale of some of its furniture would be in the “ordinary course of business”.

(v) “Buyer in ordinary course of business” (the BICOB rule)

- a. Buyers of collateral are supposed to have limited protection from security interests in a key rule called the “buyer in ordinary course of business rule.” Except in the case of a buyer of a motor vehicle, for which a specific system of registration by serial number is provided in SIPP, a buyer who should qualify for protection from a security interest should be protected even if the buyer knows of the security interest, unless the buyer knows that the purchase violates the rights of the secured party against the debtor.
- b. A simple example is the purchase of goods from a shop where the shop’s stock in trade, or inventory, is subject to a security interest (formerly, a

floating charge). Even if the buyer knows that the inventory is subject to a charge, the buyer takes the goods free of the charge because the buyer buys the goods in the ordinary course of the seller's business, which is to sell the goods.

(vi) Security interests in deposit accounts

- a. Jamaican courts observe the rule (also observed in some other jurisdictions in the Commonwealth, including Australia) that a financial institution may not take a security interest in a deposit account maintained for a customer of the institution.
- b. The basis of the rule is that the account is a liability of the bank, and therefore, as property of the bank, the bank cannot take a security interest in its own property. This errant rule correctly identifies the liability as property of the bank, but ignores the fact that the account also represents the account holder's right to payment, which is the personal property of the account holder. It is the account holder who gives the security interest in the right to payment to the bank.
- c. SIPP is reasonably clear that debtors may give security interests in deposit accounts to secured parties that maintain the accounts. This is implicit in the interpretation section (Section 2) and explicit in (a) the rules on perfection of security interests in deposit accounts by control (Section 8), and (b) the priority rules on deposit accounts (Section 24).
- d. Nonetheless, concern has been raised that SIPP does not adequately resolve the conflict between the intent of the rules and the court holdings (and perhaps the position of the Bank of Jamaica).
- e. The MIIC discussion Bill made explicit in the interpretations section that SIPP applies to security interests in deposit accounts even where the account is maintained by the institution that takes the security interest. Australian law also deals with the issue explicitly in Section 12(4). It is recommended that there should be clear provision that such additional

security interest can be created, but that it should be subsequent in priority to any security interest of the bank, unless otherwise agreed in writing by the bank.

- f. Section 24 should also contain a provision similar to section 22(3) allowing secured creditor to agree priorities other than those specified in section 24.

(vii) Fixtures [Section 15]

Concerns have been expressed (by some members) that the provisions with respect to fixtures are potentially problematic for purchasers and purchasers' mortgagees. Given the ability to create the security interest using a description, there could be challenges with verification of the existence, or otherwise, of a security interest. Fundamentally, the idea of separating security over the fixture from security over the real property is inconsistent with the idea that the fixture becomes part of the real property. The consequence is that the fixture is a part of the property for other purposes but not for the purpose of security. This is a confusing approach. It is suggested that fixtures should instead be treated for all purposes as part of the real property. Also, to have purchasers' mortgagees having to check (separate registers) for charges on both personalty and realty will add unwarranted complexity and delay to real property transactions.

(viii) Disposition of Secured Property [Sections 36-38]

SIPP may be seen as introducing some ambiguity in the now unambiguous position that a secured creditor has no obligation to delay or act hastily in disposing of secured property. To address this concern, it is suggested that the third line of section 36(4) be amended to refer to the best price reasonably attainable “at the time when”, rather than merely “when”, as in common use “when” can mean either “at the time when” or “while”; and Section 36(6) should be revised. As worded, it suggests that the time of disposition is not a sufficient basis of challenging the secured creditor’s actions on its own, but could be a factor when taken together with others. This should not be the case, as the secured

creditor should have no obligation to the debtor in respect of the timing of disposal. That timing is driven primarily by the needs of the secured creditor who may, in order to meet its own needs to have the debt repaid – in the context of the debtor’s default, have to dispose of the security at a time that is not optimal.

In **Section 36(5)(c)**, it is recommended that “dealers in” be changed to “sellers of”, as there might not be “dealers” in the particular type of property of which there is to be disposal.

In **Section 37**, there should be no requirement for a receiver to give notice of disposal of secured property. This is because notice already has to be given of the receiver’s appointment, and the purpose of a receiver is to collect (including through disposal of assets) funds sufficient to cover the secured obligation together with expenses associated with the receivership. An additional notice is inefficient and an unnecessary delay.

In **Section 38(1)(a)**, the reference to a “subordinate” security interest should be deleted, as it assumes that the secured creditor in first position will be disposing, which is not always the case.

(ix) OTHER CONCERNS

Section 5(d): The debtor’s obligation to allow the secured creditor to inspect should be strengthened by a right given to the secured creditor to forcibly enter if the debtor fails to permit entry within a specified period.

Section 7(5)(a): It is suggested that perfection of a security interest over property by taking possession or control be taken as at the moment of “the creditor taking possession or control”, rather than “delivery”, as this property (such as money in a relevant account) for which “delivery” is not an applicable or appropriate concept.

Section 10(1)(a): "Implied" should be deleted, as it can give rise to uncertainty as to the circumstances in which the secured creditor may be considered to have implicitly authorised the dealing with the secured property.

Section 10(3): The provision excepting “sellers” of motor vehicles “in the

ordinary course of business” from the requirement in relation to serial numbers is too wide. (Refer to our earlier comment on the “ordinary course of business”.) Perhaps what is intended is to refer to licensed motor vehicle dealers, in which case that language should be used instead of “sellers”. Otherwise, it could arguably refer (for example) to a company with a fleet of motor vehicles that sells them when they get old. The expectation, instead, should be for charges on the vehicles in such a fleet to have been individually created using the serial numbers.

Section 22(2)(b): Reference to “control” should be added, given that SIPP contemplates perfection of a security interest by possession or control.

Section 23(2)(a): Insert a comma before the word “at” in the third line.

Section 29(3): In defining “payment initiated by the debtor”, it is difficult to be exhaustive about the payment methods. It is therefore suggested that “means” be replaced by “includes”.

Section 32(2)(c)(ii): This provision, effectively giving a security interest and priority at the time an order of the Court is made at the instance of a judgment creditor should be revisited. When creating a security interest, another secured creditor has no way of knowing that an order was made unless it is served on that secured creditor or registered under SIPP. A Court Order being obtained is not a matter that is publicly accessible to a secured creditor through any reasonable process of searching. As such, it is suggested that the charge of the execution creditor should not be considered created and having the consequent priority until it is registered. Such an approach will also strongly encourage someone who gets a charging order to register quickly and protect the completeness of the registry created by SIPP.

Section 34(1)(c): It is suggested that the references to Parts of the Act be replaced with a reference to “this Act”, as in the previous sub-paragraph.

Section 39 (Retention of secured property by secured creditor): As drafted, the section allows the secured creditor to retain the secured creditor only in exchange for the entire outstanding debt (section 39(1)). However, it is suggested that there

should also be a procedure for the creditor to take the property in partial satisfaction, if its market value is insufficient. Thus, if a buyer cannot be found, there is a manner of proceeding if the market value is insufficient. The creditor would be unsecured for the balance. This could be done using an application to the Court to certify that it is partial satisfaction and (independent of the secured creditor) accept the valuation of the property. Further, in section 39(2), it appears that the secured creditor could come under an obligation to dispose of the secured property, by reason of the word “shall” being used in the seventh line. Perhaps “may” should be used instead.

Section 40 (Purchase of secured property by secured creditor): It is suggested that the words after “public sale” should be deleted. It is to be assumed that a public sale will yield a price reasonably close to the market value. The section should not suggest, for this and possibly other purposes in challenging a disposal, that there might be some other price that could be considered the market value.

Section 46 (Receivers): It is suggested that the words “or Court order” be added after “security contract” in the last line of section 46(3)(a), consistent with the provision for appointment of receivers by Court order. In section 46(7), there is provision for debtors and directors of debtors that are companies to receive a “free” copy of the financial statement or final account. However, a copy can never practically be free. If the receiver has to provide it, he at least has to incur the cost of copying, which is an expense of the receiver payable from the disposal of secured property (if sufficient) or by the debtor. The provision could create confusion in this regard, as ultimately the debtor may very much be responsible for the cost. If, based on this provision, the debtor challenges this position, who then is to bear it? The argument might be that it should be borne by the receiver personally or the secured creditor, which is clearly inappropriate given the debtor’s default.

Section 48 (Register): It is suggested that sub-section (3) include reference to the public inspection of the register being available for free, so a reader of the legislation does not need to check elsewhere to deduce this. In sub-section (6) it is

suggested that the words “Subject to the provisions of this Act,” be added as the opening words.

Section 53 (Duration): The requirement for filing a termination notice, as detailed in sub-section (2), should be specified to be unless otherwise agreed with the debtor, as the debtor may be wishing to seek another obligation and to use the same security without having to do a further registration (the original contract may have provided for this).

Part VII generally should include the right to challenge in Court by way of Fixed Date Claim Form any decision of the Registrar. That way it will be clear that an application for Judicial Review is not required, which would slow the process.

Section 59: Sub-section (5) seems odd. If the secured creditor complies with the Act’s requirement in respect of provision of information, the secured creditor absorbs the cost; if the secured creditor does not comply, it passes on the cost to the person requesting the information. In any event, as earlier observed in respect of section 46, there is always a cost to providing information (by a creditor or receiver), so it should not be specified to be available for free – worse at the request of the debtor who would also have the information. If the debtor wishes the information to be provided to someone for free, the debtor should, and can, provide it himself/herself.

Section 62 (Conflict of Laws): The 60-day period for perfection of a security interest in respect of goods brought into the island is too long. The consequence would be that persons may deal with the property in the meantime unaware of the security interest, and that persons who are aware of its recent entrance to the island may be hesitant to take any kind of interest in the goods (including by purchase).

Section 64 (Review of the Act) seems unusual. What is to be the consequence if the Act is not reviewed? It is suggested that this type of statement of intent not be included in the legislation itself.

Section 65 (Transitional): For security interests taken before the Act that would

now be registered, the Act should provide that the registration fee should be waived in the light of that previous perfection of the security under the law then existing.

As a general matter, given the wholesale applicability and the important nature of this Bill that the language should be user friendly. Currently structured it would not be readily understood by the borrowing public and may require assistance of Counsel in its interpretation. To the extent possible the language of SIPP could be modified to make it user friendly.

Key Practical Difficulties and Recommendations

We will now introduce some Key Practical Difficulties with the current Draft and proffer some specific suggestions for consideration and revisions: *I would wish to acknowledge the comments of the Public Policy and Legislative Committee of the Jamaica Bankers Association with respect to some of these difficulties about to be discussed.*

1. Requirement for Security Contract for non-possessory security interest

1.1. There appears to be greater clarity around whether or not a security contract is required for a possessory security interest to be created by a debtor. The ambiguity or lack of clarity emerges from the creation of a possessory security interest and a non-possessory security interest and the corresponding definitions.

1.2. **Section 4(1) of the Bill** provides that *“a non-possessory security interest may only be created by contract in writing between the parties in accordance with subsection (2).*

1.3. **Section 4 (2)** of the Bill provides that:

“The security contract shall sufficiently describe the secured property, and for the purposes of this subsection, a description of secured property in a security contract is sufficient if it-

(a) describes the secured property in a manner that enables the secured property to be identified;

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

(c) consists of a statement that a security interest is taken in all of the debtor’s present and after

acquired property except for specified items or kinds of personal property.

and where the security contract covers fixtures, the contract shall describe the real property to which the fixtures relate.”

- 1.4. The definition of non-possessory security interest is to be found in the definition of “*possessory security interest*” which means a security interest under which the terms of the security contract requires the debtor to give possession or control of the secured property to the secured creditor in order to secure the performance of the obligation concerned and “*non-possessory security interest*” shall be construed accordingly.”
- 1.5. Based on this definition, a possessory security interest is created by a security contract requiring the debtor to give possession or control of the secured property. If construed accordingly, a “*non-possessory security interest*” would not appear to require a security contract.
- 1.6. “A *security contract*” under the Bill means “*a contract which creates a security interest in personal property, being a written contract in the case of a non - possessory security interest, but in the case of a possessory security interest need not be in writing.*”
- 1.7. There observation to be made from the foregoing is that there appears to the need for greater clarity of the definition of “*possessory security interest*” and the definition of “*security contract*” The definition of possessory security appears to require a written security contract while the definition of security contract stipulates that it need not be in writing. Could this be interpreted to mean that the security contract could be oral or could it be taken to mean that no security contract is required for possessory security interests?

- 1.8. The issue is highlighted further at Section 8(2)(b) of the Bill which requires there to be an agreement in writing between the debtor, the secured creditor and the financial institution which maintains the relevant account, for a secured creditor to be deemed to be in control of the relevant account.
- 1.9. In the event that an oral contract can be made the secured creditor will run the risk of being challenged on whether or not the secured creditor required the debtor to give possession or control of the property. In this regard, the definitions requires strengthening to afford greater protection to the secured creditor against the risk of challenge by a debtor who has surrendered control of personal property to the secured creditor and to minimize the costs of legal action on the part of the secured creditor to declare interest in the personal property.

2. Stamp Duty impact on the requirement of security contracts for non-possessory security interest

- 2.1. The Stamp Duty Act requires documents creating an interest or charge in an asset in favour of a lender to assessed for ad valorem stamp duty. The security contract would be required to be stamped if it is intended to be relied upon in Court (and if not stamped at the date of its making will attract 100% penalty) by a lender. By creating a requirement for one type of security interest to be in writing relative to the other, the Act creates the following potential issues:-
 - (a) One type of security interest created under the Act will be more costly relative to the other as one would be dutiable under the Stamp Duty Act and the other would not as the security interest is created by possession or control and not in writing.
 - (b) This has the potential of sustaining the non-compliance culture which currently exists; and
 - (c) will continue make the cost of borrowing prohibitive;

- (d) competition among Lenders (secured creditors) on a price basis as the secured credit which is both the Lender and the financial institution maintaining the account takes control of the security interest without need for a writing whereas the Lender which is not the financial institution which maintains the relevant account, has to enter into a written agreement with the debtor and the financial institution in order to be deemed to have control of the account.

3. **Absence of Requirement for Debtor to provide express consent for possessory security interests**

- 3.1. Pursuant to Sections 4(1) and 4(2) of the Bill, a non-possessory security interest may only be created by a written contract. The requirements for that written contract are that: (i) the property is described, (ii) includes statements that a security interest is taken in all of the debtor's present and after acquired property or is taken in all of the debtor's present and after acquired property except for specified items or kinds of personal property and (iii) where the security contract covers fixtures it describes the real property to which the fixtures relate.
- 3.2. You would also have noted from the previous discussion that a security contract creating a security interest in a possessory security interest need not be in writing but requires the debtor to give the secured creditor possession or control. Absence from these requirements is the need for the debtor to provide express consent to encumber the asset as security for a debt. The absence of this requirement will also expose the secured creditor to risk of challenge that express permission was granted.
- 3.3. It is recommended that the debtor's express written consent or in accordance with the provisions of the Electronic Transaction Act as to take a security interest solely on a requirement for possession or control will be fraught with difficulties for the debtor, particularly upon a default.

4. The Level of Debt absent from the Notice

- 4.1. There is no requirement for the Registration Notice which is being filed in the Electronic Registry to contain any indication of the level of debt which is secured by the security interest created and for which Notice is being given. Section 49 requires the Registration Notice to contain the identity of the debtor, the state of the debtor's business or residential address, identify the secured creditor and the creditor's business or residential address and in relation to fixtures, a description of the real property. Further, there is no requirement for the security contract to be filed with the Registry unlike the current framework which requires the Mortgage Instrument, Bills of Sale and Debentures to be filed with the Titles Office, the Island Records Office and the Companies Office.
- 4.2. The absence of information on the level of current indebtedness will no doubt impact the credit adjudication process and time as the potential lender will be prompted to verify with either the Credit Bureaus or the or directly with the secured creditor (for which a notice has been filed) the level of the current indebtedness and repayment history. Without this information it will be difficult for the potential lender to accurately assess whether the security being offered, particularly if the security is being shared as between existing and potential lender, has sufficient value to accommodate/secure additional debt.
- 4.3. This is particular important given that pursuant to Section 22(2)(d) of the Bill, "in the case of a security interest which provides for future advances, the security interest has subject to section 32(4), the same priority in respect of all advances, including future advances.
- 4.4. There exists therefore the potential for debtors to overextend themselves as they avail themselves of greater access to credit. Reliance of the Credit Bureau would also not be full proof as a check and balance given that not all credit providers are required to credit information providers under the Credit Reporting Act.

4.5. It is therefore recommended that consideration be given to including the level of debt in the Registered Notice.

5. **Giving Notice Under SIPP**

5.1. Currently section 60 of the Bill which provides for Service of Notices Notice to be given provides for notice to be given needs to be revised to take into account certain practical considerations in Jamaica.

5.2. For organizations, the Act allows the notice to be given to a person with knowledge of the transaction, which could be challenging to apply and problematic in large organizations. It is suggested that for bodies corporate, the notice should be to the Company Secretary (as the Company Act stipulates that each body shall appoint a Company Secretary) or such other person as may have been notified in a filing with the Registry.

5.3. The Bill also stipulates, by the same section, that notification by post is deemed to have been given within the ordinary course of postal delivery. Given that there is no evidence of ordinary posting and no time within which we may now consider delivery to be “ordinary”, It is suggested that any such provision should make reference to “registered post” and specify the date by which notice is deemed to have been given (e.g. 15 working days after posting).

6. **Security Interests in Deposit Accounts**

6.1. Jamaican courts observe the rule (also observed in some other jurisdictions in the Commonwealth, including Australia) that a financial institution may not take a security interest in a deposit account maintained for a customer of the institution.

6.2. The basis of the rule is that the account is a liability of the bank, and therefore, as property of the bank, the bank cannot take a security interest in its own property. This errant rule correctly identifies the liability as property of the bank, but ignores the fact that the account also represents the account holder’s right to

payment, which is the personal property of the account holder. It is the account holder who gives the security interest in the right to payment to the bank.

- 6.3. SIPP is reasonably clear that debtors may give security interests in deposit accounts to secured parties that maintain the accounts. This is implicit in the interpretation section (Section 2) and explicit in (a) the rules on perfection of security interests in deposit accounts by control (Section 8), and (b) the priority rules on deposit accounts (Section 24).
- 6.4. Nonetheless, concern has been raised that SIPP does not adequately resolve the conflict between the intent of the rules and the court holdings (and perhaps the position of the Bank of Jamaica).
- 6.5. The MIIC discussion Bill made explicit in the interpretations section that SIPP applies to security interests in deposit accounts even where the account is maintained by the institution that takes the security interest. Australian law also deals with the issue explicitly in Section 12(4). It is recommended that there should be clear provision that such additional security interest can be created, but that it should be subsequent in priority to any security interest of the bank, unless otherwise agreed in writing by the bank.
- 6.6. Section 24 should also contain a provision similar to section 22(3) allowing secured creditor to agree priorities other than those specified in section 24 given that a security interest can be created over the same account by different lenders, one of which may maintain the relevant account.

7. Security Interests being created over Fixtures [Section 15]

- 7.1. The provisions with respect to fixtures are potentially problematic for purchasers and purchasers' mortgagees. Given the ability to create the security interest using a description, there could be challenges with verification of the existence, or otherwise, of a security interest.

- 7.2. The idea of separating security over the fixture from security over the real property is inconsistent with the idea that the fixture becomes part of the real property. The consequence is that the fixture is a part of the property for other purposes but not for the purpose of security. This is a confusing approach. It is suggested that fixtures should instead be treated for all purposes as part of the real property. Further the fact of separate registers for the charge of the real property and the personalty will give rise to increased costs of borrowing and delay in the credit adjudication process.
- 7.3. The difficulty also arises where there are several lenders one taking a security interest over the real property and the other over the fixtures over the same property. The difficulty is evident upon the commencement of enforcement proceedings.
- 7.4. As a practical matter, currently the Mortgage Instruments used by some financial institutions creates in favour of the Lender a charge over the property, fixtures and crops. The effect of the provisions of the Bill will warrant new Mortgage Instruments or separate Mortgage Instruments depending on whether a charge over both the realty or personalty or just one is being granted.

8. Disposition of Secured Property [Sections 36-38]

- 8.1. SIPP may be seen as introducing some ambiguity in the now unambiguous position that a secured creditor has no obligation to delay or act hastily in disposing of secured property. To address this concern, it is suggested that the third line of section 36(4) be amended to refer to the best price reasonably attainable “at the time when”, rather than merely “when”, as in common use “when” can mean either “at the time when” or “while”; and Section 36(6) should be revised.
- 8.2. As worded, it suggests that the time of disposition is not a sufficient basis of challenging the secured creditor’s actions on its own, but could be a factor when taken together with others. This should not be the case, as the secured creditor

should have no obligation to the debtor in respect of the timing of disposal. That timing is driven primarily by the needs of the secured creditor who may, in order to meet its own needs to have the debt repaid – in the context of the debtor’s default, have to dispose of the security at a time that is not optimal.

9. **Definitions.**

The following definitions in SIPP require further attention:

- 9.1. The definition of **debtor** does not include a lessee, a seller of accounts, or a consignee.
- 9.2. The definition of **secured creditor** does not include a lessor, a buyer of accounts, or a consignor.
- 9.3. **“Goods”** remains undefined. In some instances where “goods” are referred to, inventory appears to be the better word to use, while in other sections, goods may need to be referred to.
- 9.4. The sections/clauses referring to **security dealers and security accounts** appear to warrant review to see if other financial institution types should be incorporated.
- 9.5. It may be appropriate to define what is meant by the **“ordinary course of business”**, particularly with the debtor being able to dispose of property subject to non-possessory security interests in the ordinary course of business. A retailer selling goods from its inventory would be fine, but there could be argument around whether a sale of some of its furniture would be in the “ordinary course of business”.
- 9.6. There is no definition of **material adverse effect** which appears in section 4(7) of the Bill.

10. Other Practical Concerns

- 10.1. Section 5(d) of the Bill: The debtor's obligation to allow the secured creditor to inspect should be strengthened by a right given to the secured creditor to forcibly enter if the debtor fails to permit entry within a specified period.
- 10.2. Section 10(3): The provision excepting "sellers" of motor vehicles "in the ordinary course of business" from the requirement in relation to serial numbers is too wide. (Refer to our earlier comment on the "ordinary course of business".) Perhaps what is intended is to refer to licensed motor vehicle dealers, in which case that language should be used instead of "sellers". Otherwise, it could arguably refer (for example) to a company with a fleet of motor vehicles that sells them when they get old. The expectation, instead, should be for charges on the vehicles in such a fleet to have been individually created using the serial numbers.
- 10.3. Section 32(2)(c)(ii): This provision, effectively giving a security interest and priority at the time an order of the Court is made at the instance of a judgment creditor should be revisited. When creating a security interest, another secured creditor has no way of knowing that an order was made unless it is served on that secured creditor or registered under SIPP. A Court Order being obtained is not a matter that is publicly accessible to a secured creditor through any reasonable process of searching. As such, it is suggested that the charge of the execution creditor should not be considered created and having the consequent priority until it is registered. Such an approach will also strongly encourage someone who gets a charging order to register quickly and protect the completeness of the registry created by SIPP.
- 10.4. Section 39 (Retention of secured property by secured creditor): As drafted, the section allows the secured creditor to retain the secured creditor only in exchange for the entire outstanding debt (section 39(1)). However, it is suggested that there should also be a procedure for the creditor to take the property in partial satisfaction, if its market value is insufficient. Thus, if a buyer cannot be found,

there is a manner of proceeding if the market value is insufficient. The creditor would be unsecured for the balance. This could be done using an application to the Court to certify that it is partial satisfaction and (independent of the secured creditor) accept the valuation of the property. Further, in section 39(2), it appears that the secured creditor could come under an obligation to dispose of the secured property, by reason of the word “shall” being used in the seventh line. Perhaps "may" should be used instead.

Conclusion

As the discussions continue, we hope that we will be able to chart our way through all the concerns and not simply rush to pass the legislation to satisfy external forces.

The certainty that the proposed register will offer for dealings with assets other than land, when coupled with the protections which already exist for dealings with registered land, make it possible that this intervention has the potential result in making it at least a little easier for MSMEs to offer collateral for loans which banks and other financiers are more willing to accept.

We need, however, at the same time to be careful to ensure that we are not promoting “*commerce*” at the detriment of stakeholders.

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APPENDIX

THE SECURITY INTERESTS IN PERSONAL PROPERTY BILL, 2013

**A BILL
ENTITLED**

AN ACT to Provide for the creation and registration of security interests in personal property, and for connected matters.

BE IT ENACTED by The Queen's Most Excellent Majesty, by and with the advice and consent of the Senate and House of Representatives of Jamaica, and by the authority of the same, as follows:-

Short title
and com-
mencement.

1. This Act may be cited as the Security Interests in Personal Property Act, 2013, and shall come into operation on a day to be appointed by the Minister by notice published in the *Gazette* (hereinafter referred to as the appointed day).

PART I. Preliminary

Interpreta-
tion.

2. - (1) In this Act -

“accessions” means goods that are installed in, or affixed to, other goods, and the term “the whole” used in relation thereto means the accessions together with the goods in or to which they are installed or affixed;

“account debtor” means a person who is obligated under an account receivable;

“accounts receivable” means monetary obligations not evidenced by a financial instrument, whether or not those obligations are earned by performance;

“advance” -

(a) means the payment of money, the provision of credit, or the giving of value; and

(b) includes any liability of the debtor to pay interest, credit costs, and other charges or

costs payable by the secured creditor in connection with the advance or the enforcement of the security interest securing the advance;

"after-acquired property" means personal property acquired by a debtor after the security contract is made;

"agency or department of government" includes -

- (a) a Ministry;
- (b) a statutory body or authority;
- (c) any company, registered under the Companies Act, in which the Government or an agency of Government, by the holding of shares, is in a position to direct the policy of that company; and
- (d) an Executive Agency designated as such pursuant to the Executive Agencies Act;

"amendment notice" means a notice under section 51 (2);

"an organization" means any entity, other than an individual, that has in law the capacity to contract;

"consumer goods" means goods that are used or acquired for use primarily for personal, family or household purposes;

"Court" means a Resident Magistrate's Court or the Supreme Court;

"debtor" means -

- (a) the person who -
 - (i) owes payment or other performance of the obligation concerned; and

(ii) owns or has rights in the
secured property; or

(b) if the person who owes payment or other
performance of the obligation concerned
is not the same as the person who owns or
has rights in the secured property -

(i) in any provision dealing with
the obligation secured, the
person who owes payment or other
performance of the obligation;

(ii) in any provision dealing with
the secured property, the person
who owns or has rights in the
secured property; and

(iii) in any case where the context
permits, both the person who
owes payment or other
performance of the obligation
concerned and the person who
owns or has rights in the
secured property,

and for that purpose, a person who owns or has
rights in the secured property includes a
transferee or successor of the interest of a
person referred to in paragraph (a) (i);

"electronic" and "electronic document" have the
meanings assigned to them by section 2 of the
Electronic Transactions Act;

"execution creditor" has the meaning assigned to it
by section 32;

"financial asset" means -

(a) a financial instrument;

- (b) any personal property that is held by a securities dealer for another person in a securities account if the securities dealer has expressly agreed with the other person that the property is to be treated as a financial asset under this Act; or
- (c) a credit balance in a securities account, unless the person maintaining the account has expressly agreed with the person for whom the account is maintained that the credit balance is not to be treated as a financial asset under this Act;

"financial instruments" means -

- (a) debentures, shares, stocks or bonds;
- (b) other securities, including -
 - (i) rights or options in respect of securities;
 - (ii) certificates of interest or participation in any profit sharing agreement;
 - (iii) collateral trust certificates, pre-organization certificates or subscriptions, transferable shares, investment contracts, voting trust certificates and certificates of deposit for securities; and
 - (iv) futures contracts; or
- (c) negotiable instruments;

"fixture" means property to which section 15 applies;

"intangibles" means personal property other than goods, documents of title, or financial

instruments, and includes a licence;

"inventory" means goods that are -

- (a) held by a person for sale or lease, or that have been leased by that person as lessor;
- (b) to be provided or have been provided under a contract for services;
- (c) raw materials or work in progress; or
- (d) materials used or consumed in a business;

"lease for a term of more than six months" -

(a) includes a lease -

- (i) for an indefinite term that is determinable by one or both of the parties not later than six months after the day of its execution;
- (ii) a lease initially for a term of six months or less than six months, where -
 - (A) the lessee, with the consent of the lessor, retains uninterrupted or substantially uninterrupted possession of the leased goods for a period of more than six months after the day on which the lessee, with the consent of the lessor, first acquired possession of the goods, so, however, that the lease does not become a

lease for a term of more than six months until the lessee's possession extends for more than six months; or

- (B) the lease provides that it is automatically renewable at the option of one of the parties or by agreement of the parties, and the total duration of the terms for which the lease is so renewable (including the original term) exceeds six months;

(b) does not include -

- (i) a lease by a lessor who is not regularly engaged in the business of leasing goods;
- (ii) a lease of household furnishings or appliances as part of a lease of land, where those furnishings or appliances are incidental to the use or enjoyment of the land; or
- (iii) a lease of goods which are prescribed for the purposes of this sub-paragraph, regardless of the length of the lease;

"negotiable instrument" means -

- (a) bills of exchange or promissory notes;

(b) a letter of credit, if the letter of credit states that it must be presented on claiming payment; or

(c) any other writing that evidences a right to payment of money and is of a kind that, in the ordinary course of business, is transferred by delivery with any necessary endorsement or assignment;

"personal property" includes goods, documents, financial instruments, accounts receivable, and intellectual property and other kinds of intangibles;

"possessory security interest" means a security interest which under the terms of the security contract requires the debtor to give possession or control of the secured property to the secured creditor in order to secure the performance of the obligation concerned, and "non-possessory security interest" shall be construed accordingly;

"proceeds" -

(a) means identifiable or traceable personal property -

(i) that is derived directly or indirectly from a dealing with secured property or the proceeds of secured property; and

(ii) in which the debtor acquires an interest;

(b) includes -

(i) a right to an insurance payment

or other payment as indemnity
or compensation for loss or
damage to the secured property
or its proceeds;

(ii) a payment made in total or
partial discharge or redemption
of a financial instrument or an
intangible;

(c) does not include animals merely because
they are the offspring of animals that
are secured property,

and the term "original secured property" used in
relation thereto means the secured property from
which the proceeds are derived;

"purchase money security interest" means -

(a) a security interest taken in secured
property, other than financial
instruments, by a seller to the extent
that it secures the obligation to pay all
or part of the purchase price of the
secured property;

(b) a security interest taken in secured
property, other than financial
instruments, by a person who gives value
for the purpose of enabling the debtor to
acquire rights in the secured property,
to the extent that the value is applied
to acquire those rights;

(c) the interest of a lessor of goods under a
lease that creates a security interest
for a term of more than six months; or

(d) the interest of a consignor of goods, who

delivers the goods to a consignee under a commercial consignment,

but does not include a transaction of sale and lease back to the seller;

"purchaser", for the purposes of sections 15, 30, 42, 48 and 56, means a person who takes secured property by sale, lease, discount, assignment, negotiation, mortgage, pledge, lien, issue, reissue, gift or any other consensual transaction that creates an interest in personal property;

"Register" means the electronic register referred to in section 48(1);

"registered" means registered in the Security Interests Registry (and "registration" shall be construed accordingly);

"registration notice" means a notice in accordance with section 49;

"Registrar" means the Registrar of Security Interests designated under section 47;

"Registry" means the Security Interests Registry established under section 47;

"secured creditor" means the person in whose favour a security interest is created, whether for that person's own benefit or for the benefit of other persons;

"secured property" means the personal property that is the subject of a security interest;

"securities account" means, subject to section 3, an account, held in the books of a duly licensed securities dealer, to which a financial asset is or may be credited in accordance with an agreement under which the person maintaining the

account holds or manages the financial asset on behalf of the person for whom the account is maintained;

"security contract" means a contract which creates a security interest in personal property, being a written contract in the case of a non-possessory security interest, but in the case of a possessory security interest need not be in writing;

"security interest" means an interest created -

- (a) contractually over one or more items of personal property (whether specifically or generically described, present or future); and
- (b) securing the fulfilment of one or more present or future obligations;

"termination notice" means a notice under section 54(2);

"value" means consideration that is sufficient to support a simple contract, and includes an antecedent debt or liability;

"working days" excludes Saturdays, Sundays and public general holidays.

(2) For the purposes of this Act -

- (a) an individual knows or has knowledge of a fact in relation to a particular transaction when that person has actual knowledge of the fact or receives a notice stating the fact;
- (b) an organization (other than an agency or department of government) knows or has knowledge of a fact in relation to a particular transaction when -

- (i) an individual within the organization, having responsibility for matters to which the transaction relates, has actual knowledge of the fact;
 - (ii) the organization receives a notice stating the fact; or
 - (iii) the fact is communicated to the organization in such a way that it would have been brought to the attention of the individual having responsibility for the matters to which the transaction relates if the organization had exercised reasonable care;
- (c) an agency or department of government knows or has knowledge of a fact in relation to a particular transaction when that fact has been brought to the attention of an employee, of the agency or department, having responsibility for the matters to which the fact relates, in circumstances in which a reasonable person would take cognisance of it.

(3) For the purposes of subsection (2) -

- (a) a person receives a notice when the notice is given to the person in accordance with section 60 (service of notices);
- (b) an organization exercises reasonable care if it takes reasonable steps to ensure that significant information is brought to the attention of the individual, within the organization, having responsibility for matters to which a particular

transaction relates;

- (c) nothing in paragraph (b) requires an individual acting on behalf of the organization to communicate information unless the communication is part of that individual's regular duties or unless the individual has reason to know of the transaction and that the transaction would be materially affected by the information.

(4) Unless otherwise provided in this Act, the determination of whether goods are consumer goods, inventory or equipment is to be made as of the time when the security interest in the goods attaches.

Application.

3. - (1) For the avoidance of doubt, this Act applies to every transaction that in substance creates a security interest in personal property (without regard to the form of the transaction or the person who has title in the personal property) and, without limiting the generality of the foregoing, applies to -

- (a) pledges, trust indentures or trust receipts, equipment trusts, debentures, and floating charges;
- (b) assignments, leases, and consignments, securing payment or the performance of any obligation;
- (c) transfers of accounts receivable, whether or not to secure payment or the performance of any obligation;
- (d) a lease of goods under a lease for a term of more than six months, whether or not to secure payment or the performance of any obligation;
- (e) conditional sale agreements and agreements for the sale of goods on hire-purchase;
- (f) the interest in personal property of an

execution creditor.

- (2) This Act does not apply to -
- (a) a lien given by any law, except as provided in section 28;
 - (b) a deemed trust arising under any enactment;
 - (c) a transfer of an interest or claim in or under any policy of insurance or a superannuation fund, except the transfer of a right to money or other value that is payable as indemnity or compensation for loss of, or damage to, secured property;
 - (d) the creation or transfer of an interest in real property (including a mortgage, charge or lease of real property), other than -
 - (i) an interest in a fixture, as provided in section 15;
 - (ii) an interest in crops, as provided in section 14; or
 - (iii) an assignment of a right to payment under a mortgage, charge or lease, where the assignment does not convey or transfer the assignor's interest in the real property;
 - (e) an assignment for the general benefit of creditors;
 - (f) an assignment of accounts receivable made solely to facilitate the collection of accounts receivable for the assignor;
 - (g) an assignment of an unearned right to payment under a contract to an assignee who is to perform the assignor's obligations under the contract;

- (h) securities held in the central securities depository operated under the Bank of Jamaica Act;
- (i) securities held in a central securities depository licensed under the Securities Act;
- (j) mortgages of ships and maritime liens;
- (k) except as otherwise provided in this Act, the creation or transfer of an interest in present or future wages, salary, pay, commission or any other compensation for labour or personal services, other than fees for professional services.

(3) The Minister may, by order subject to affirmative resolution and published in the *Gazette*, amend this section so as to include in, or exclude from, subsection (1) or (2) any interest in personal property specified in the order.

**PART II. Creation and Perfection of
Security Interests**

Creation of security interests.

4. - (1) A non-possessory security interest may only be created by contract in writing, between the parties, in accordance with subsection (2).

(2) The security contract shall sufficiently describe the secured property, and for the purposes of this subsection, a description of secured property in a security contract is sufficient if it -

- (a) describes the secured property in a manner that enables the secured property to be identified;
- (b) consists of a statement that a security interest is taken in all of the debtor's present and after-acquired property; or
- (c) consists of a statement that a security interest is taken in all of the debtor's present and

after-acquired property except for specified items or kinds of personal property, and where the security contract covers fixtures, the contract shall describe the real property to which the fixtures relate.

(3) Except as otherwise provided by this Act or any other law, a security contract is effective -

- (a) according to its terms;
- (b) against any person who takes the secured property by sale, lease, discount, assignment, negotiation, mortgage, pledge, lien, issue, reissue, gift or any other consensual transaction that creates an interest in personal property; and
- (c) against execution creditors.

(4) A security interest is not invalid or fraudulent against creditors and other third parties because -

- (a) the debtor has the right or ability -
 - (i) to use, commingle, or dispose of all or part of the secured property, including returned or repossessed goods;
 - (ii) to collect, compromise, enforce, or otherwise deal with secured property;
 - (iii) to accept the return of secured property or make repossessions; or
 - (iv) to use, commingle, or dispose of proceeds; or
- (b) the secured creditor fails to require the debtor to account for proceeds or replace secured property.

(5) A security interest attaches to secured property and is enforceable against the debtor and third parties as provided in this Act when -

- (a) value is given;
- (b) the debtor has rights in the secured property or power to transfer rights in the secured property to a secured creditor; and
- (c) one of the following conditions is met -
 - (i) the debtor has signed a security contract that provides a description of the secured property;
 - (ii) the secured property is in the possession of the secured creditor and is of a type that may be perfected by possession; or
 - (iii) the secured property is in the control of the secured creditor and is of a type that may be perfected by control.

(6) Unless otherwise agreed by the debtor and the secured creditor, the attachment of a security interest in -

- (a) secured property gives the secured creditor the right to proceeds of the secured property even if the security contract is silent about proceeds;
- (b) secured property is also attachment of a security interest in a supporting obligation for the secured property;
- (c) a right to payment or performance secured by a security interest in personal property is also attachment of a security interest in the

personal property;

(d) a right to payment or performance secured by a security interest in a mortgage in real property is also attachment of a security interest in the mortgage;

(e) a securities account is also attachment of a security interest in any rights or benefits derived from financial assets credited to the securities account.

(7) A modification of, or substitution for, a security contract made in good faith and in accordance with reasonable commercial standards and without material adverse effect on the assignee's rights under the contract or the assignor's ability to perform the contract is effective against the assignee unless the account debtor has otherwise agreed.

(8) Subsection (7) applies -

(a) to the extent that an assigned right to payment arising under the contract has not been earned by performance; and

(b) notwithstanding that there has been notice of the assignment to the account debtor.

(9) Where a security contract has been modified or substituted in the manner described in subsection (7), the assignee obtains rights that correspond to the rights of the assignor under the modified or substituted contract.

(10) Nothing in subsections (7) to (9) affects the validity of a term in an assignment agreement that provides that a modification or substitution is a breach of contract by the assignor.

(11) For the purposes of subsection (1), "writing"

includes an electronic document, and a requirement for a written signature in relation to any such electronic document shall mean an electronic signature within the meaning of section 2 of the Electronic Transactions Act.

Rights and obligations of debtor who retains possession.

5. In the case of a non-possessory security interest, the debtor shall, unless otherwise specified in the security contract, have the following rights and obligations in respect of the property -

- (a) the right to use and dispose of the property, and any proceeds derived therefrom, in the ordinary course of the debtor's business;
- (b) the obligation to discontinue the exercise of the right referred to in paragraph (a) once the secured creditor notifies the debtor of the secured creditor's intention to enforce the security interest in accordance with this Act;
- (c) the obligation to do whatever is reasonably necessary to prevent damage to, or loss of, the property; and
- (d) the obligation to allow the secured creditor to inspect the property to verify its quantity, quality and state of conservation.

Rights and obligations of secured creditor in possession.

6. A secured creditor in possession of the secured property -

- (a) shall exercise reasonable care in the custody and preservation of the property;
- (b) shall maintain the property in such a way that it remains identifiable, unless it is perishable; and
- (c) may use the property only as agreed by the parties to the security contract.

Effect of perfecting a security

7. - (1) A right conferred by a security interest shall

interest. be enforceable against third parties only when the security interest is perfected.

(2) A security interest is perfected when the conditions set out in subsection (3) are met, regardless of the order in which the meeting of the conditions occurs.

(3) The conditions referred to in subsection (2) are that -

(a) the security interest has attached; and

(b) either -

(i) the security interest is registered in accordance with this Act; or

(ii) the secured creditor, or his agent specifically authorised for that purpose, has possession or control of the secured property.

(4) Except as otherwise provided in this Act, a security interest perfected by -

(a) registration under this Act takes effect against third parties from the moment of its registration; or

(b) possession or control, takes effect against third parties from the moment of delivery.

(5) A security interest perfected by one method under this Act is continuously perfected under this Act if -

(a) the security interest is perfected in another way under this Act; and

(b) there is no intervening period between the methods of perfection during which the security interest is unperfected under this Act.

(6) The secured creditor may, in accordance with

the terms of the security contract, authorise the debtor to dispose of the secured property free of encumbrance.

Perfection of security interests in relevant accounts.

8. - (1) A security interest in a relevant account, may be perfected by control of the relevant account.

(2) For the purposes of this Act, a secured creditor has control of a relevant account if -

- (a) the secured creditor is the financial institution with which the relevant account is maintained, even if the debtor retains the right to direct the disposition of funds or other assets from the relevant account;
- (b) the debtor, secured creditor, and the financial institution with which the relevant account is maintained have agreed, in writing signed by those parties, that the financial institution will comply with instructions originated by the secured creditor directing disposition of the funds or other assets in the relevant account without further consent by the debtor; or
- (c) the secured creditor becomes a customer, with respect to the relevant account, of the financial institution with which the relevant account is maintained.

(3) In this section -

“financial institution” means any -

- (a) licensed deposit-taking institution;
- (b) licensed securities dealer; or
- (c) registered co-operative society duly authorised to accept deposits;

“relevant account” means a deposit account

or a securities account.

**PART III. *Special Provisions for Security
Interests in Particular
Kinds of Personal Property***

After-acquired
property.

9. - (1) A security contract may create a security interest in after-acquired property.

(2) A security interest in after-acquired property attaches without specific appropriation by the debtor.

(3) Subsection (2) does not apply where -

- (a) the after-acquired property is consumer goods, other than accessions or consumer goods which replace the secured property described in the security contract; or
- (b) the after-acquired property is consumer goods and the security interest in those consumer goods is not a purchase money security interest.

Dealings and
proceeds.

10. - (1) Except as otherwise provided in this Act, a security interest in secured property that is dealt with -

- (a) continues in the secured property, unless the secured creditor expressly or impliedly authorised the dealing; and
- (b) where the dealing gives rise to proceeds, extends to the proceeds.

(2) A security interest in proceeds is continuously perfected by registration that -

- (a) contains a description of the proceeds that would be sufficient to perfect a security interest in secured property of that kind; or
- (b) contains a description of the original secured property, if -

- (i) the proceeds are of a kind that are within the description of the secured

property;

- (ii) the proceeds are cash proceeds;
- (iii) the proceeds consist of a payment made in total or partial discharge or redemption of intangible property;
- (iv) the proceeds consist of a right to an insurance payment, or any other payment as an indemnity or compensation, for loss or damage to the secured property or its proceeds.

(3) A security interest in proceeds is temporarily perfected until the expiration of fifteen working days after the original secured property is converted to those proceeds, if -

- (a) the security interest in the original secured property is perfected; and
- (b) the security interest in the proceeds is not continuously perfected under subsection (2).

Financial instruments returned to secured debtor.

11. A security interest in a financial instrument is temporarily perfected until the expiration of fifteen working days after the secured creditor makes the financial instrument available to the debtor, if -

- (a) the security interest was perfected by possession; and
- (b) the secured creditor gives possession of the instrument to the debtor for sale, exchange, presentation, collection, renewal, or registration of a transfer.

Negotiable document of title or goods returned to debtor.

12. A security interest in a negotiable document of title, or in goods held by a bailee and not covered by a negotiable document of title, is temporarily perfected until the expiration of fifteen working days after the

secured creditor makes the title or goods (as the case may be) available to the debtor, if -

- (a) the security interest was perfected by possession; and
- (b) the secured creditor delivered the title or goods for the purpose of sale or exchange, or loading, unloading, storing, shipping, manufacturing, processing, packaging or otherwise dealing with the goods in preparation for their sale or exchange.

Goods held by bailee.

13. A security interest in goods in the possession of a bailee is perfected when the security interest attaches and -

- (a) a registration notice in respect of the security interest in the goods is registered;
- (b) the bailee issued a negotiable document of title to the goods and the security interest in the negotiable document of title to the goods is perfected; or
- (c) the bailee, being a person who is not the debtor -

- (i) issues a document of title in the name of the secured creditor; or

- (ii) holds the goods on behalf of the secured creditor under section 7(3) (b) (ii).

Crops.

14. - (1) Except as otherwise provided in this Act, a security interest in crops is a security interest in the crops while they are in the form of seeds or other germinating material, while they are growing, and afterwards when they are cut, picked, or separated from the soil.

(2) For the purposes of determining whether a security interest exists in crops that are cut, picked, or separated from the soil, it is immaterial whether the crops are stored on the land where the crops were grown or on any other land or premises.

(3) A perfected security interest in crops is not extinguished or prejudicially affected by a subsequent sale, lease, mortgage, or other encumbrance, of or upon the land on which the crops are growing.

(4) A perfected security interest in crops growing on real property has priority over a conflicting interest of an owner, mortgagee or other person with an interest in the real property if the debtor has a registered interest in, or is in possession of, the real property.

(5) If a secured creditor has an interest in crops that has priority over the claim of persons having an interest in the real property, the secured creditor may, unless otherwise agreed, remove the crops from the real property if the secured creditor reimburses any encumbrancer or owner (as the case may require) of the real property, other than the debtor, for the cost of repairing any physical injury to the value of the real property caused by the removal (other than any diminution in the value of the real property caused by the removal of the crops or by the necessity for replacement).

(6) A person entitled to reimbursement under subsection (5) may refuse permission to remove the crops until the secured creditor has given adequate security for the reimbursement.

Fixtures.

15. - (1) This section applies to property which is

affixed to real property, other than building materials incorporated into an improvement of real property.

(2) A security interest in the property, which attached -

- (a) before the property became a fixture, has priority over the claim of any person who has an interest in the real property to which the property is affixed;
- (b) after the property became a fixture, has priority over the claim of any person who subsequently acquired an interest in the real property to which the property is affixed, but not over any person who already has a perfected security interest in the fixture and has not consented in writing to the security interest or disclaimed an interest in the fixture.

(3) A security interest mentioned in subsection (1) is subordinate to the interest of -

- (a) a subsequent purchaser for value, of an interest in the real property, who does not have knowledge of the security interest before it is perfected; or
- (b) a creditor with an encumbrance noted on the title or deed to the real property before the security interest is registered under this Act, to the extent that the creditor makes subsequent advances to the debtor, if the creditor makes the subsequent advances before the security interest is registered.

(4) If a secured creditor has an interest in a fixture that has priority over the claim of persons having an interest in the real property, the secured

creditor may, unless otherwise agreed, remove the fixture from the real property if the secured creditor reimburses any encumbrancer or owner (as the case may require) of the real property, other than the debtor, for the cost of repairing any physical injury to the value of the real property caused by the removal (other than any diminution in the value of the real property caused by the removal of the fixture or by the necessity for replacement).

(5) A person entitled to reimbursement under subsection (4) may refuse permission to remove the fixture until the secured creditor has given adequate security for the reimbursement.

(6) A secured creditor who has the right to remove a fixture from real property shall serve on each person having an interest in the real property, a notice in writing setting out -

- (a) the name and address of the secured creditor;
- (b) a description of the fixture to be removed, sufficient to enable the fixture to be identified;
- (c) the amount required to satisfy the obligation secured by the security interest of the secured creditor;
- (d) a description of the real property to which the fixture is affixed, sufficient to enable the real property to be identified; and
- (e) a statement of the secured creditor's intention to remove the fixture unless the amount referred to in paragraph (c) is paid on or before a specified date that is not less than ten days after service of the notice.

(7) A person having an interest in real property that is subordinate to a security interest in a fixture affixed to the real property may, before the fixture is removed by the secured creditor in accordance with subsection (4), retain the fixture upon payment to the secured creditor of the amount owing in respect of the security interest.

**PART IV. Circumstances in Which Buyer
or Lessee Takes Free of
Security Interest**

Unperfected
security
interests.

16. A buyer or lessee of secured property who acquires the secured property for value takes the secured property free of any unperfected security interests in the property, except for any unperfected security interest created or provided for by a transaction to which that buyer or lessee is a party.

Buyer
or lessee
in the
ordinary
course of
business.

17. A buyer or lessee of goods from a seller or lessor acting in the ordinary course of the seller or lessor's business takes the goods free of any security interest given by the seller or lessor, or that arises under section 10(1) (continuity of security interests in proceeds), unless the buyer or lessee (as the case may be) knows of the security interest.

Consumer
goods not
exceeding
certain
value.

18. - (1) A buyer or lessee of goods acquired as consumer goods takes those goods free of any security interest if the total value of the goods did not exceed ten thousand dollars at the time the security interest attaches, or, if there is more than one security interest in the goods, at the time the security interest having first priority attaches.

(2) The Minister may, by order published in the **Gazette**, alter the amount specified in subsection (1).

Motor
vehicles.

19. - (1) A buyer or lessee of a motor vehicle takes

the motor vehicle free of any security interest perfected by registration, if -

- (a) the buyer bought, or the lessee leased, the motor vehicle without knowledge of the security interest; and
- (b) the motor vehicle was not correctly described by serial number in the registration of the registration notice in respect of the security interest pursuant to section 49.

(2) In this Act, "serial number" with reference to a motor vehicle means the identification number inscribed on the motor vehicle and used for the purposes of motor vehicle registration.

(3) This section does not apply to motor vehicles held as inventory by a seller of motor vehicles and sold in the ordinary course of business.

Temporarily perfected security interests.

20. A buyer or lessee of goods takes the goods free of any security interest temporarily perfected under section 10(3) (temporary perfection of proceeds) or 12 (temporary perfection of negotiable document of title or goods returned to debtor), if -

- (a) the buyer or lessee (as the case may be) gave new value for the interest acquired; and
- (b) the buyer bought, or the lessee leased, the goods without knowledge of the security interest.

Money or financial instruments.

21. - (1) The holder of money, or a transferee of a financial instrument who in the ordinary course of the transferor's business takes possession of the instrument (complete with any necessary endorsements of the instrument), takes the money or instrument (as the case may be) free of any security interest, if the holder or transferee -

- (a) acquired the money or the instrument without knowledge of the security interest; or
- (b) is a holder or transferee for value, whether or not the holder or transferee knew of the security interest at the time the holder or transferee acquired the money or the instrument.

(2) For the purposes of subsection (1), the transferee of a financial instrument who acquired it under a transaction entered into in the ordinary course of the transferor's business has knowledge only if the transferee acquired the instrument with knowledge that the transaction is a breach of the security contract concerned.

PART V. *Priority of Security Interests*

Priority as between security interests.

22. - (1) If this Act provides no other way of determining priority between security interests in the same secured property -

- (a) a perfected security interest has priority over an unperfected security interest in the same property;
- (b) priority between unperfected security interests in the same secured property is ranked by the order in time at which the security interest attaches, with the earliest in time taking first priority;
- (c) priority between continuously perfected security interests in the same secured property is ranked by the order in time at which the security interests satisfy any of the following conditions (with the earliest in time taking first priority) -
 - (i) the security interest is registered

under this Act;

(ii) the secured creditor, or his agent duly authorised for that purpose, takes possession of the secured property, other than possession resulting from seizure or repossession; or

(iii) the security interest is temporarily perfected by virtue of any provision of this Act.

(2) For the purposes of subsection (1) -

(a) a continuously perfected security interest shall be treated at all times as perfected by the method by which it was originally perfected;

(b) the time of registration, possession or perfection of a security interest in original secured property is also the time of registration, possession or perfection (as the case may require) of its proceeds;

(c) a security interest that is transferred has the same priority as it had at the time of the transfer; and

(d) in the case of a security interest which provides for future advances, the security interest has, subject to the section 32(4), the same priority in respect of all advances, including future advances.

(3) Notwithstanding subsection (1), the priority of security interests may be modified by written agreement between the secured creditors concerned, unless such modification is prohibited by any law, and the registration of an amendment notice to reflect any

such agreement is not required.

Purchase
money
security
interests.

23. - (1) A purchase money security interest in -

- (a) secured property, other than intangibles, inventory, accounts receivable and relevant accounts (as defined in section 8); or
- (b) the proceeds of secured property covered by paragraph (a),

has priority over a non-purchase money security interest in the same secured property given by the same debtor if the purchase money security interest in the inventory or its proceeds is perfected not later than fifteen working days after the time the debtor, or another person at the request of the debtor, obtains possession of the secured property.

(2) Subject to section 10, a purchase money security interest in inventory or its proceeds has priority over a non-purchase money security interest in the same inventory, given by the same debtor, if -

- (a) the purchase money security interest in the inventory is perfected at the time the debtor, or another person at the request of the debtor, obtains possession of the secured property (whichever is earlier);
- (b) the secured creditor gives a notice to any other secured creditor who has, before the time of registration of the purchase money security interest, registered a registration notice containing a description that includes inventory of the same items or kind; and
- (c) the notice mentioned in paragraph (b) -
 - (i) states that the person giving the notice expects to acquire a purchase money

security interest in inventory of the debtor and describes the inventory by item or kind; and

- (ii) is given before the debtor, or another person at the request of the debtor, obtains possession of the secured property (whichever is earlier).

(3) Where secured property consists of intangibles or the proceeds of intangibles, a purchase money security interest in the secured property or its proceeds has priority over a non-purchase money security interest in the same secured property given by the same debtor if the purchase money security interest is perfected not later than fifteen working days after the day on which the security interest attaches.

(4) Notwithstanding subsections (1), (2) and (3), a security interest in accounts receivable -

- (a) as original secured property and not as the proceeds thereof; and

- (b) that is given for new value,

has priority over a purchase money security interest in the accounts receivable as proceeds of inventory if a registration notice covering the security interest in the accounts receivable is registered before the purchase money security interest is perfected or a registration notice covering the purchase money security interest is registered.

(5) A purchase money security interest in goods or their proceeds taken by a seller, lessor or consignor of the goods, has priority over any other purchase money security interest in the same secured property given by the same debtor if the first mentioned purchase money

security interest is perfected -

- (a) in the case of inventory, at the time the debtor, or another person at his request, obtained possession of the secured property; or
- (b) in the case of secured property, other than inventory, not later than fifteen working days after the day on which the debtor, or another person at his request, obtained possession of the secured property.

(6) In a transaction other than a transaction relating to consumer goods, a purchase money security interest remains a purchase money security interest even if -

- (a) the secured property also secures an obligation that is not a purchase money obligation;
- (b) secured property that is not purchase money secured property also secures the purchase money obligation; or
- (c) the purchase money obligation has been renewed, refinanced, consolidated, or restructured.

Relevant accounts.

24. - (1) The security interest of a secured creditor in a relevant account which that secured creditor has control of, has priority over a security interest, in that relevant account, of a secured creditor that does not have control of the relevant account.

(2) Except as otherwise provided in subsections (3) and (4), security interests in relevant accounts perfected by control rank according to priority in time of obtaining control.

(3) Except as otherwise provided in subsection (4), a security interest in a relevant account held by the financial institution with which the relevant

account is maintained has priority over a security interest in the relevant account held by another secured creditor.

(4) A security interest in a relevant account, which is perfected by control, has priority over a security interest in the relevant account held by the financial institution with which the relevant account is maintained.

(5) In this section, "financial institution" and "relevant account" have the meanings assigned to them, respectively, by section 8.

Accessions.

25. - (1) A security interest in goods that become accessions continues in the accessions.

(2) Except as otherwise provided in this Act, a security interest in goods that attaches at the time when the goods become accessions has priority over a claim to the goods as accessions made by a person with an interest in the whole.

(3) The interest of any of the following persons has priority over a security interest in goods that is attached at the time when the goods become accessions -

- (a) a person who, for value, acquires an interest in the whole after the goods become accessions, but before the security interest in the accession is perfected;
- (b) an assignee, for value, of a person with an interest in the whole at the time when the goods become accessions, but before the security interest in the accessions is perfected;
- (c) a person with a perfected security interest in the whole who makes an advance, under the security contract relating to that security

interest, after the goods become accessions but before the security interest in the accessions is perfected, but only to the extent of the advance;

- (d) a person with a perfected security interest in the whole who, after the goods become accessions but before the security interest in the accessions is perfected, acquires the right to retain the whole in satisfaction of the obligation secured.

(4) A security interest in goods, that attaches after the goods become accessions, is subordinate to the interest of -

- (a) a person who has an interest in personal property to which the goods become accessions and who -
- (i) has not consented to the security interest in the accessions;
 - (ii) has not disclaimed an interest in the accessions;
 - (iii) has not entered into an agreement under which another person is entitled to remove the accessions; and
 - (iv) is otherwise entitled to prevent the debtor from removing the accessions;
- or
- (b) a person who acquires an interest in the whole after the goods become accessions but before the security interest in the accessions is perfected.

Processed or commingled goods.

26. - (1) A security interest in goods that subsequently become part of a product or mass continues in the product or mass if the goods are so manufactured, processed, assembled or commingled that their identity

is lost in the product or mass.

(2) For the purposes of this section and section 22(1) -

- (a) perfection of a security interest in goods that subsequently become part of a product or mass shall be treated as perfection of the security interest in the product or mass;
- (b) any priority that a security interest continuing in the product or mass has over another security interest in the product or mass is limited to the value of the goods on the day on which they became part of the product or mass;
- (c) a perfected security interest continuing in the product or mass has priority over an unperfected security interest continuing in the same product or mass;
- (d) if more than one perfected security interest continues in the same product or mass, each perfected security interest is entitled to share in the product or mass according to the ratio that the obligation secured by the perfected security interest bears to the sum of the obligations secured by all perfected security interests in the same product or mass;
- (e) if more than one unperfected security interest continues in the same product or mass, each unperfected security interest is entitled to share in the product or mass according to the ratio that the obligation secured by the unperfected security interest bears to the sum of the obligations secured by all unperfected security interests in the same product or mass;

(f) the obligation secured by a security interest does not exceed the value of the goods on the day on which the goods become part of the product or mass.

(3) Notwithstanding paragraphs (c) to (f) of subsection (2), a perfected purchase money security interest in goods that continues in the product or mass has priority over -

- (a) a non-purchase money security interest in the goods that continues in the product or mass; and
- (b) a non-purchase money security interest in the product or mass given by the same debtor.

Transferred property.

27. - (1) The rights of a debtor in secured property may be transferred consensually, or by operation of law, notwithstanding a provision in the security contract prohibiting transfer or declaring a transfer to be an act of default of the contract.

(2) A transfer of rights in secured property by the debtor shall not prejudice the rights of the secured creditor, arising under the security contract or otherwise, including the right to treat a prohibited transfer as an act of default.

(3) If a debtor transfers an interest in secured property that, at the time of the transfer, is subject to a perfected security interest, that security interest has priority over any other security interest granted by the transferee, except to the extent that the security interest granted by the transferee secures advances made or contracted for -

- (a) after the expiration of fifteen working days from the date that the secured creditor who holds the security interest in the transferred secured

property had knowledge of the information required to amend the registration notice concerned to reflect the transferee as the debtor; and

- (b) before the secured creditor referred to in paragraph (a) took possession of the secured property or amended the registration notice concerned to reflect the transferee as the debtor.

(4) Subsection (3) shall not apply in any circumstances under this Act where the transferee acquires the debtor's interest free of the security interest of the secured creditor.

(5) Notwithstanding subsections (3) and (4), if a security interest is perfected by registration and the debtor transfers all or part of his interest in the secured property with the prior consent of the secured creditor, the security interest in the transferred property is subordinate to -

- (a) an interest, other than a security interest in the transferred property, arising during the period commencing on the expiration of the fifteenth day after the transfer and ending at the time the secured creditor amended the registration notice concerned to reflect the transferee as the new debtor or took possession of the property;
- (b) a perfected security interest in the transferred property that is registered or perfected during the period referred to in paragraph (a); and
- (c) a perfected security interest, in the transferred property, that is registered or perfected after

the transfer and before the expiration of the fifteenth day after the transfer, if before the expiration of the fifteenth day -

(i) the registration notice in respect of the security interest first referred to in this subsection is not amended to reflect the transferee of the interest in the secured property as the debtor; or

(ii) the secured creditor does not take possession of the property.

(6) Notwithstanding subsections (3) and (4), subsection (7) applies where a security interest is perfected by registration and the secured creditor has knowledge of -

(a) information required to amend the registration notice concerned to reflect the transferee as the debtor, in any case where all or part of the transferor's interest in the secured property is transferred; or

(b) the new name of the debtor, if there has been a change in the debtor's name.

(7) The security interest in the transferred property, where subsection (6)(a) applies, or, where subsection (6)(b) applies, in the secured property, is subordinate to -

(a) an interest, other than a security interest in that property, arising during the period commencing on the expiration of the fifteenth day after the secured creditor has the knowledge referred to in subsection (6) and ending at the time the secured creditor amends the registration

notice concerned to reflect the transferee as the debtor, or reflect the new name of the debtor (as the case requires), or takes possession of the property;

- (b) a perfected security interest in the secured property that is registered or perfected after the secured creditor has the knowledge referred to in subsection (6) and before the expiration of the fifteenth day referred to in paragraph (a), if, before the expiration of the fifteenth day -

- (i) the registration notice in respect of the security interest first referred to in this subsection is not amended to reflect the transferee as the debtor or to disclose the new name of the debtor (as the case requires); or
- (ii) the secured creditor does not take possession of the property.

(8) If the debtor's interest in part or all of the secured property is transferred by him without the consent of the secured creditor and there are one or more subsequent transfers of the secured property without the consent of the secured creditor before the secured creditor acquires knowledge of the name of the most recent transferee, the secured creditor -

- (a) is deemed to have complied with subsection (7) if the secured creditor amends the registration notice concerned not later than fifteen days after acquiring knowledge of the name of the most recent transferee of the secured property and all other information required to effect registration

of the security interest; and

- (b) need not effect or amend the registration of the security interest to reflect any intermediate transferee.

(9) For the purposes of this section, "transfer" includes a sale, the creation of a security interest, and a transfer under proceedings to enforce the judgment of any court.

***Priority Against Other Types of Interest
in Secured Property***

Liens.

28. A lien arising out of materials or services provided in respect of goods that are subject to a security interest in the same goods has priority over that security interest if -

- (a) the materials or services relating to the lien were provided in the ordinary course of business;
- (b) the lien has not arisen under an enactment that provides that the lien does not have the priority; and
- (c) the person who provided the materials or services did not, at the time of providing the materials or services, know that the security contract concerned contained a provision prohibiting the creation of a lien by the debtor.

Creditor who receives payment of a debt.

29. - (1) A person who receives payment of a debt owed to him by a debtor, through a payment initiated by the debtor, has priority over a security interest in -

- (a) the funds paid;
- (b) any intangible that was the source of the payment; and
- (c) any negotiable instrument used to effect the payment.

(2) Subsection (1) applies whether or not the

person had knowledge of the security interest at the time of the payment.

(3) For the purposes of subsection (1), "payment initiated by the debtor" means a payment made by the debtor through the use of -

- (a) a negotiable instrument;
- (b) an electronic funds transfer; or
- (c) a debit, a transfer order, an authorisation, or a similar written payment mechanism executed by the debtor when the payment was made.

30. - Holders of negotiable documents of title.

(1) The interest of a holder of a negotiable document of title, or a purchaser of a negotiable instrument, has priority over a perfected security interest in the document of title or the instrument (as the case may be) if the holder or purchaser -

- (a) gave value for the document of title or the instrument;
- (b) acquired the document of title or the instrument without knowledge of the security interest; and
- (c) in the case of a purchaser of a negotiable instrument, took possession of the instrument.

(2) For the purposes of subsection (1), the holder of a negotiable document of title who acquired it under a transaction entered into in the ordinary course of the transferor's business has knowledge only if the holder acquired the interest with knowledge that the transaction is a breach of the security contract concerned.

(3) For the purposes of this section, "negotiable document of title" means a writing issued or addressed to a bailee -

- (a) that covers goods in the bailee's possession that

are identified or are fungible portions of an identified mass; and

- (b) in which it is stated that the goods identified in it will be delivered to a named person, or to the transferee of that person, or to bearer or to the order of a named person.

Assignees of accounts receivable.

31. - (1) The rights of an assignee of an account receivable are subject to -

- (a) the terms of the contract between the account debtor and the assignor and any defence or claim arising from the contract; and
- (b) any other defence or claim of the account debtor against the assignor (including a defence by way of a right of set-off) that accrues before the account debtor acquires knowledge of the assignment.

(2) Subsection (1) does not apply if the account debtor on an account receivable has made an enforceable agreement not to assert defences to claims arising out of the contract.

(3) In this section -

"assignee" includes a secured creditor and a receiver.

Execution creditors.

32. - (1) The interest of an execution creditor in any secured property has priority over any security interest in the same property, if the security interest is not perfected at the time of execution.

(2) In this Act -

- (a) "execution creditor" means a person entitled to take possession of personal property pursuant to a writ in aid of execution, charging order, order of attachment, a garnishee order, or other similar process issued by a court for the

recovery of debt; and includes a trustee in bankruptcy or liquidator in relation to any such property;

(b) for the avoidance of doubt, an execution creditor does not include a landlord who exercises a right of distress; and

(c) "time of execution" means -

(i) if the secured property is seized by an execution creditor or on an execution creditor's behalf, the time of seizure; or

(ii) in any other case, the time when a charging order or a garnishee order is made.

(3) Notwithstanding subsection (1), a purchase money security interest has priority over the interest of an execution creditor in -

(a) secured property, other than intangibles, if the purchase money security interest is perfected not later than seven days after the day on which -

(i) the debtor obtains possession of the secured property; or

(ii) another person, at the request of the debtor, obtains possession of the secured property;

whichever is earlier; or

(b) an intangible, if the purchase-money security interest is perfected not later than seven days from the day on which the security interest attaches.

(4) A perfected security interest has priority over the interest of an execution creditor only to the

extent of advances made -

- (a) before the secured creditor acquired knowledge of the interest of the execution creditor; or
- (b) before a notice of the interest of the execution creditor is registered under section 55.

PART VI. Enforcement of Security Interests

Application of Part.

33. - (1) This Part does not apply to -

- (a) a transaction described in section 3(1)(d), unless that transaction creates a purchase money security interest;
- (b) the interest of an execution creditor; or
- (c) a transaction in which a person pledges property to a pawnbroker.

(2) The exercise of a right or remedy under this Part shall be without prejudice to any other rights or remedies available under this Part, this Act, or any other law.

(3) A security interest is not subsumed by another security interest merely because a secured creditor has obtained a judgment against the debtor.

Procedure upon default.

34. - (1) Where a debtor is in default under a security contract, the secured creditor has against the debtor -

- (a) the rights, remedies and obligations provided in the security contract;
- (b) the rights, remedies and obligations provided by any other law, to the extent that that they are not inconsistent with this Act;
- (c) the rights, remedies and obligations provided in this Part and sections 14 (crops), 15 (fixtures) and 25 (accessions); and
- (d) where the secured creditor is in possession or control of the secured property, the rights,

remedies and obligations provided in section 6.

(2) On default under a security contract -

- (a) the secured creditor has, unless otherwise agreed between the parties, the right to take possession of the secured property or otherwise enforce the security contract by any method permitted by law;
- (b) if the security interest is perfected by registration and the secured property is of a kind that cannot be readily moved from the premises where the property is located or is of a kind for which adequate storage facilities are not readily available, the secured creditor may seize or repossess the secured property, without removing it from those premises, in any manner by which a writ in aid of execution may provide for seizure without removal; and
- (c) where paragraph (b) applies, the secured creditor may dispose of secured property on the premises concerned, but shall not cause the person in possession of the premises any greater inconvenience and cost than is necessarily incidental to the disposal.

(3) Subsection (2) applies subject to the provisions of this section, section 14(5) and (6) (crops), section 15(4) to (7) (fixtures), section 25(accessions), and any rule of law requiring prior notice.

(4) Where the secured property concerned is a document of title, the secured creditor may -

- (a) proceed under this Part either as to the document of title or as to the property covered by it; and
- (b) any method of enforcement that is available with

respect to the document of title is also available, with any necessary modification, with respect to the property covered by it.

Enforcement
re accounts
receivable,
financial
instruments or
intangibles.

35. - (1) In the event of default under the terms of a security contract, a secured creditor may in the case of secured property which is an intangible or a financial instrument -

- (a) notify the debtor (or any other person obligated to make payment under the financial instrument) to make payment or otherwise render performance to the secured creditor, whether or not the secured creditor was making collections on the secured property before the notification; and
- (b) subject to section 36 (disposition of secured property), take control of any proceeds to which the secured creditor is entitled; and
- (c) apply any money, accounts receivable, or security in the form of a debt obligation, taken as secured property, to the satisfaction of the obligation secured by the security interest.

(2) A secured creditor may deduct reasonable expenses of collection from any -

- (a) amounts collected from a debtor on an intangible or from a person obligated to make payment under a financial instrument; or
- (b) money held as secured property.

(3) Notice under this section to an account debtor is not a condition for -

- (a) the attachment or perfection of a security interest in accounts receivable;
- (b) the assignment or transfer of accounts receivable; or

(c) the enforcement of a security interest in accounts receivable, except as provided in this section.

(4) Where secured property that is an intangible is assigned, the account debtor may make payments under the security contract to the assignor -

(a) before the account debtor receives a notice that -

(i) states that the amount payable or to become payable under the security contract has been assigned and that payment is to be made to the assignee; and

(ii) identifies the contract under which the amount payable is payable, or is to become payable; or

(b) after -

(i) the account debtor requests the assignee to furnish proof of the assignment; and

(ii) the assignee fails to furnish proof within fourteen days after the date of the request.

(5) Payment by an account debtor to an assignee under a notice mentioned in subsection (4) (a) discharges the obligation of the account debtor to the extent of the payment.

(6) Where the secured property is a licence, the secured creditor may seize the secured property by giving notice to the debtor, or to the grantor of the licence or any successor to the interest in the licence.

Disposition
of secured
property.

36. - (1) After seizing or repossessing secured

property as permitted by this Part, a secured creditor may, after giving notice as required by section 37 -

- (a) dispose of the property in its existing condition or after repairing, processing or preparing the secured property for disposition; and
- (b) apply the proceeds of the disposition consecutively to -

- (i) the reasonable expenses of seizing, repossessing, holding, repairing, processing or preparing for disposition and disposing of the secured property and any other reasonable expenses incurred by the secured creditor in enforcing the security interest; and

- (ii) the satisfaction of the obligations secured by the security interest of the party making the disposition;

and any surplus arising from the disposition shall be dealt with in accordance with section 38 (surplus or deficiency on disposition).

(2) The disposition of secured property pursuant to subsection (1) may be -

- (a) by private sale;
- (b) by public sale, including public auction or closed tender;
- (c) as a whole or in commercial units or parts;
- (d) by lease, credit sale, licence; or
- (e) any other commercially reasonable manner of disposition.

(3) A secured creditor may delay disposition of secured property in whole or in part.

(4) A secured creditor has a duty to act in good faith to obtain the best price reasonably obtainable when disposing of secured property pursuant to this Part, and that duty shall be deemed to have been discharged where the disposition of secured property is made in a commercially reasonable manner as provided in subsection (5).

(5) A disposition of secured property is made in a commercially reasonable manner if the disposition is made -

- (a) in the usual manner in any recognized market;
- (b) at the price current in any recognized market at the time of the disposition; or
- (c) otherwise in conformity with reasonable commercial practices among dealers in the type of property that is the subject of the disposition.

(6) For the purposes of subsection (5), the fact that a greater amount could have been obtained by a disposition at a different time or by a different method from that selected by the secured creditor is not of itself sufficient to preclude the secured creditor from establishing that the disposition was made in a commercially reasonable manner.

(7) A disposition shall be deemed to be commercially reasonable if it has been approved in a judicial proceeding or by an assignee for the benefit of creditors.

Obligation to give notice of disposition.

37. - (1) Not less than seven days prior to disposing of secured property pursuant to this Part, the secured creditor shall deliver a notice of the disposition to -

- (a) the debtor;
- (b) any other person who is known by the secured

creditor to be an owner of the secured property;
and

(c) any creditor or other person with a security interest in the secured property, whose interest is subordinate to that of the secured creditor, if -

(i) prior to the day on which the notice of the disposition is given to the debtor, that creditor or other person has registered a registration notice identifying the debtor or, if the secured property is a motor vehicle, identifying the motor vehicle by serial number; or

(ii) the security interest of that creditor or other person is perfected by possession at the time when the secured creditor seized or repossessed the secured property; and

(d) any other person with an interest in the secured property, who has given a written notice to the secured creditor of that person's interest in the secured property prior to the date on which the notice of the disposition is given to the debtor.

(2) A notice under subsection (1), where given by a secured creditor, shall contain -

- (a) a description of the secured property;
- (b) the amount required to satisfy the obligation secured by the security interest;
- (c) the amount of applicable expenses or, where the amount of the expenses has not been determined, a reasonable estimate; and

(d) in the case of disposition by sale by public auction -

- (i) the date, time and place of such sale;
- (ii) where the sale is to proceed by way of closed tenders, the place to which closed tenders may be delivered, the date after which closed tenders will not be accepted; and
- (iii) the date after which any private disposition of the secured property may be made.

(3) A notice under subsection (1), where given by a receiver, shall contain -

- (a) a description of the secured property;
- (b) a statement that, unless the secured property is redeemed, it will be disposed of; and
- (c) in the case of disposition by sale by public auction -

- (i) the date, time and place of such sale;
- (ii) where the sale is to proceed by way of closed tenders, the place to which closed tenders may be delivered, the date after which closed tenders will not be accepted; and
- (iii) the date after which any private disposition of the secured property may be made.

(4) A notice under this section is not required where -

- (a) the secured property is perishable;
- (b) the secured creditor believes on reasonable grounds that the secured property will decline

substantially in value if it is not disposed of immediately after default;

- (c) the cost of care and storage of the secured property is disproportionately large in relation to its value;
- (d) the secured property is of a type that is to be disposed of by sale in an organized market that handles large volumes of transactions between many different sellers and many different buyers;
- (e) the secured property is money authorized or adopted by a foreign government as part of its currency;
- (f) after default, each person entitled to receive a notice of disposition consents in writing to the disposition of the secured property without compliance with the notice requirements of this section; or
- (g) for any other reason, the Court on an application made to it without notice is satisfied that a notice under this section is not required.

(5) Notwithstanding any other provision of this Part, where the secured property is a licence, the secured property may be disposed of only in accordance with the terms and conditions that applied at the time that the secured creditor took control of the licence.

Surplus or
deficiency on
disposition.

38. - (1) Where a secured creditor has dealt with the secured property under section 35 (enforcement re accounts receivable, financial instruments or intangibles) or has disposed of it in accordance with section 36 (disposition of secured property) or otherwise, any surplus arising from the dealing or disposition shall, unless otherwise provided by law or

by agreement of all interested parties, be accounted for and paid out consecutively as follows -

- (a) firstly, in satisfaction of the obligations due to each person (in order of their priority ranking) who has a subordinate security interest in the secured property and -
 - (i) who, before the distribution of the surplus, registers a registration notice identifying the debtor or, if the secured property is a motor vehicle, identifying the motor vehicle by serial number; or
 - (ii) whose interest was perfected by possession at the time when the secured property was seized;
- (b) secondly, to any other person with an interest in the surplus, if that person has given a written notice of that interest to the secured creditor prior to the distribution; and
- (c) thirdly, to the debtor or any other person who is known by the secured creditor to be an owner of the secured property,

but the priority of the claim of any person mentioned in paragraph (a), (b) or (c) is not prejudiced by payment to anyone under this section.

(2) The secured creditor concerned shall give a written accounting of -

- (a) the amount received from the disposition of the secured property or the amount collected under section 35 (enforcement re accounts receivable, financial instruments or intangibles), as the case may require;

- (b) the manner in which the secured property was disposed of;
- (c) the amount applied to expenses as provided by section 6 (rights and obligation of secured creditor in possession), 35 (enforcement re accounts receivable, financial instruments or intangibles), and 36 (disposition of secured property);
- (d) the distribution of the amount received from the disposition or collection; and
- (e) the amount of any surplus,

to any person mentioned in subsection (1) within thirty days after receipt of a written request by that person for an accounting.

(3) Where there is any question as to who is entitled to receive payment under subsection (1), the secured creditor may pay the surplus into the Court, and the surplus shall not be paid out except on an order made on an application under section 44 (application to Court) by a person claiming an entitlement to it.

(4) Except as otherwise agreed by the parties or as otherwise provided by this Act or any other law, the debtor is liable to pay to the secured creditor the amount of any deficiency arising on any collection or disposition of secured property under this Part.

Retention
of secured
property by
secured
creditor.

39. - (1) A secured creditor who is entitled to exercise any right or remedy under section 34 may propose to take the secured property in satisfaction of the obligation secured by it and shall give notice of the proposal to -

- (a) the debtor and any other person who is known by the secured creditor to be an owner of the

secured property;

- (b) any creditor and any other person with a security interest in the secured property, whose interest is subordinate to that of the secured creditor, and -

(i) who, prior to the day on which notice is given to the debtor, has registered a registration notice identifying the debtor or, if the secured property is a motor vehicle, identifying the motor vehicle by serial number; or

(ii) whose security interest is perfected by possession when the secured creditor seized or repossessed the secured property; and

- (c) any other person with an interest in the secured property who has given written notice to the secured creditor of that interest prior to the day on which the notice is given to the debtor.

(2) Subject to subsection (3), if before the expiration of fourteen working days after notice is given under subsection (1) a person entitled to receive a notice under subsection (1) gives to the secured creditor notice of objection to the secured creditor's proposal under subsection (1), the secured creditor shall proceed to dispose of the secured property in accordance with section 37.

(3) If no notice of objection is given under subsection (2), the secured creditor -

- (a) is, at the expiration of the period mentioned in subsection (2), deemed to have irrevocably elected to take the secured property in

satisfaction of the obligation secured by it, in accordance with the terms of the proposal; and

(b) may hold or dispose of the secured property free from all rights and interests of the debtor and from the rights and interests of any person entitled to receive, and who has been given, notice under -

(i) subsection (1)(b); or

(ii) subsection (1)(c) if the person's interest is subordinate to that of the secured creditor.

(4) If a secured creditor has the right to retain secured property under subsection (3), all secured obligations are deemed to have been performed for the purposes of section 54 (termination notices).

(5) A secured creditor may request that any person who gives a notice of objection under subsection (2), other than the debtor, furnish proof of that person's interest and, unless the person furnishes proof not later than fourteen days after the secured creditor's request, the secured creditor may proceed as if no objection were received from the person.

(6) On application by a secured creditor, the Court may determine that an objection to the proposal of a secured creditor is ineffective on the ground that -

(a) the person made the objection for a purpose other than the protection of an interest in the secured property or proceeds of a disposition of the secured property; or

(b) the market value of the secured property is less than the total amount owing to the secured creditor and the costs of disposition.

Purchase of secured property by secured creditor.

40. The secured creditor may purchase the secured property or any part of it, if the purchase is at a public sale for a price that bears a reasonable relationship to the market value of the secured property, or part thereof (as the case may be).

Debtor's right to redeem secured property.

41. At any time before -

- (a) a secured creditor or a receiver has disposed of secured property, or contracted for its disposition, pursuant to this Part; or
- (b) a secured creditor is deemed to have irrevocably elected to retain secured property, by virtue of section 39,

any person who is entitled to receive a notice of the disposition under section 37 (obligation to give notice of disposition) may, unless that person otherwise agrees in writing after default, redeem the secured property by tendering to the secured creditor -

- (i) fulfilment of the obligations secured by the secured property; and
- (ii) a sum equal to the reasonable expenses of seizing, repossessing, holding, repairing, processing and preparing the secured property for disposition, if those expenses have actually been incurred by the secured creditor, and any other reasonable expenses incurred by the secured creditor in enforcing the security contract.

Rights of purchasers of secured property.

42. Where a secured creditor disposes of secured property to a purchaser who takes possession of the secured property for value and in good faith -

- (a) the purchaser acquires the secured property free from -

- (i) the interest of the debtor;
- (ii) any interest subordinate to that of the debtor; and
- (iii) any interest subordinate to that of the secured creditor,

whether or not the requirements of this Part have been complied with by the secured creditor; and

- (b) all obligations secured by the subordinate interests mentioned in paragraph (a) are deemed to be performed for the purposes of a termination notice.

Enforcement of parallel obligation secured by an interest in a mortgage.

43. - (1) Subject to any other law to the contrary, where the same obligation is secured by an interest in a mortgage in real property and a security interest in personal property, the secured creditor may -

- (a) without limiting the secured creditor's rights, remedies and obligations, proceed under this Part in respect of the personal property; or
- (b) proceed under this Part in respect of both the interest in the mortgage and the personal property.

(2) Nothing in subsection (1)(b) shall be construed as limiting the rights of another secured creditor who has a security interest in personal property that is taken before or after the security interest mentioned in subsection (1), and that other secured creditor -

- (a) has standing in proceedings taken in accordance with subsection (1)(b); and
- (b) may apply to the Court for the conduct of a judicially supervised sale for the purposes of subsection (1)(b), and the Court may grant the

application.

(3) For the purpose of distributing the amount received from the sale of real property and personal property under this section in any case where the purchase price is not allocated to the real property and the personal property separately, the amount of the total price that is attributable to the sale of the personal property is the proportion of the total price that the market value of the personal property at the time of the sale bears to the sum of the market values of the real property and the personal property at the time of the sale.

Application
to Court.

44. On the application of a debtor, a creditor of a debtor, a secured creditor, a person carrying out a writ in aid of execution, or a person claiming an interest in secured property, the Court may make any one or more of the following orders -

- (a) an order, including a declaration of a right and an order for injunctive relief, that is necessary to ensure compliance with this Part or section 6 (rights and obligations of secured creditor in possession), 14 (crops), 15 (fixtures), or 25 (accessions);
- (b) an order giving directions to any person regarding the exercise of any right or the discharge of any obligation under this Part or section 6, 14, 15, or 25;
- (c) an order relieving a person from compliance with any requirement of this Part or section 6, 14, 15, or 25;
- (d) an order staying the enforcement of any right conferred by this Part or section 6, 14, 15, or

25; or

- (e) any order that is necessary to ensure protection of the interest of any person in the secured property.

Enforcement
of security
interests in
accessions.

45. - (1) A secured creditor who is entitled to take possession of any accessions under section 25 shall -

- (a) before removing the accessions, and subject to subsection (9), give not less than ten working days notice of his intention to remove the accessions to -

- (i) every person whom the secured creditor knows to have an interest in the goods to which the accessions are installed or affixed, or in the whole; and

- (ii) any person who has registered a security interest in the goods in or to which the accessions are installed or affixed, or in the whole, and concerning the same debtor;

- (b) in taking possession of the accessions, remove the accessions from the whole in a manner that causes no greater damage to the other goods, or that puts the person in the possession of the whole to no greater inconvenience, than is necessarily incidental to the removal of the accessions.

(2) Every notice under subsection (1)(a) shall contain -

- (a) the name and address of the secured creditor;
- (b) a description of the accessions to be removed;
- (c) a description of the goods in or to which the accessions are installed or affixed;

- (d) the amount due to the secured creditor and a good faith estimate of the value of the accessions if the accessions were removed from the goods in or to which they are installed or affixed; and
- (e) a statement of the secured creditor's intention to remove the accessions unless the lesser of the amount secured or the value of the accessions is paid on or before a date specified in the notice, being not less than ten working days from the date on which the notice is given.

(3) A person, other than the debtor, who has an interest in goods in or to which accessions are installed or affixed at the time when the accessions are installed or affixed, is entitled to be reimbursed by the secured creditor for any damage to the person's interest in the goods caused by the removal of the accessions.

(4) An obligation to reimburse under subsection (3) does not include an obligation to reimburse for any reduction in the value of the property caused by the absence of the accessions or by the necessity of replacing the accessions.

(5) A person entitled to reimbursement under subsection (3) may give the secured creditor notice in writing refusing permission to remove the accessions until the secured creditor concerned gives adequate security for the reimbursement, and the secured creditor shall not be entitled to remove the accessions until permission is given by the person or an order is made under subsection (6) (d).

(6) On an application made by a secured creditor, the Court may make an order -

- (a) determining who is entitled to reimbursement under subsection (3);
- (b) determining the amount and kind of security to be provided by the secured creditor under subsection (5);
- (c) prescribing a depository for the security referred to in subsection (5); or
- (d) dispensing with the need for permission of any or all persons entitled to reimbursement under subsection (5).

(7) On an application made by a person entitled to be given notice under subsection (1)(a), the Court may make an order -

- (a) postponing the removal of the accessions; or
- (b) determining the amount payable to the secured creditor under subsection (8).

(8) A person, other than the debtor, who has an interest in the whole that under this Act is subordinate to a security interest in the accessions, may retain the accessions on payment to the secured creditor having the security interest that takes priority over all other security interests in the accessions, the lesser of -

- (a) the amount due to the secured creditor; or
- (b) the value of the accessions if the accessions were removed from the goods in or to which they are installed or affixed.

(9) The requirement to give notice under subsection (1)(a) shall not apply if -

- (a) the secured creditor believes on reasonable grounds that the secured property will decline substantially in value if it is not disposed of immediately after default;

- (b) the cost of care and storage of the secured property is disproportionately large in relation to its value; or
- (c) for any other reason the Court, on an application made without notice, is satisfied that notice under subsection (1)(a) is not required.

Receivers.

46. - (1) A security contract may provide for the appointment of a receiver and, except as provided in this Act or any other law, for the rights and duties of a receiver.

(2) On application by an interested person, the Court may -

- (a) appoint a receiver, notwithstanding the absence in the security contract of any provision for the appointment of a receiver;
- (b) remove, replace or discharge a receiver, whether appointed by a court or under a security contract;
- (c) give directions on any matter relating to the duties of a receiver;
- (d) notwithstanding anything contained in a security contract, approve the accounts and fix the remuneration of a receiver;
- (e) notwithstanding anything contained in a security contract, make an order requiring a receiver, or a person by or on behalf of whom the receiver is appointed, to make good any default arising in connection with the receiver's custody, management or disposition of the secured property or any other property of the debtor or to relieve the person from any default or failure to comply with this Part;

(f) exercise with respect to receivers appointed under a security contract the jurisdiction that it has over receivers appointed by the Court.

(3) A receiver appointed under subsection (1) or (2) shall -

- (a) take custody and control of the secured property in accordance with the security contract or order of the Court under which the receiver is appointed (as the case may be), but shall not carry on the business of the debtor unless the security contract so permits;
- (b) where the debtor is a company, forthwith notify the company's directors of the appointment and discharge of the receiver; and
- (c) open and maintain, in the receiver's name as receiver, one or more accounts, at a financial institution licensed to accept deposits, in which shall be deposited all money that comes under the receiver's control as receiver;
- (d) keep records, in accordance with accepted accounting practices, of all receipts, expenditures and transactions that involve secured property or other property of the debtor;
- (e) prepare, at least once in every six-month period after the date of the appointment, financial statements of the receivership;
- (f) indicate on every business letter, invoice, contract or similar document used or executed in connection with the receivership that the receiver is acting as a receiver; and
- (g) on completion of the receiver's duties, prepare a final account of the receivership in the

prescribed form and send a copy of the final account to the debtor and, where the debtor is a company, to the directors of the company.

(4) The debtor and, where the debtor is a company, the directors of the company or their authorized representative may, by a demand in writing delivered to the receiver, require the receiver to make available for inspection the records mentioned in subsection (3)(d) during regular business hours at the place of business of the receiver in Jamaica.

(5) The debtor and, where the debtor is a company, the directors of the company, a person carrying out a writ in aid of execution, a person claiming an interest in any secured property in the custody or control of the receiver, or the authorized representative of any of them, may, by a demand in writing delivered to the receiver, require the receiver to provide copies of the financial statements mentioned in subsection (3)(e) or the final account mentioned in subsection (3)(g) or to make them available for inspection during regular business hours at the place of business of the receiver in Jamaica.

(6) The receiver shall comply with a demand made under subsection (4) or (5) not later than fourteen days after receiving the demand.

(7) A receiver may require the payment in advance of a fee in the prescribed amount for each demand made under subsection (4) or (5) to the receiver, but the debtor, any person carrying out a writ in aid of execution, and, the directors of a debtor who is a company, are entitled to inspect or to receive a copy of the financial statements and final account without

charge.

(8) The powers mentioned in subsection (2) and in section 44 (application to Court) are in addition to any other powers the court may exercise in its jurisdiction over receivers.

(9) Unless the Court orders otherwise, a receiver is required to comply with sections 36 (disposition of secured property) and 38 (surplus or deficiency on disposition) only where the receiver disposes of secured property other than in the course of operating the business of a debtor.

(10) For the purposes of this Part, the term "secured creditor" applies to a receiver acting under this Part, except in the case of sections 39 (retention of secured property by secured creditor), 40 (purchase of secured property by secured creditor), 41(b) (election to retain secured property) and 43 (enforcement of parallel obligation secured by an interest in a mortgage).

(11) In the event of any conflict between the provisions of this Act and the Companies Act or any other law, in respect of a receiver, the provisions of this Act shall prevail.

PART VII. Registration

Registry. 47. - (1) There is hereby established a Security Interests Registry.

(2) There shall be a Registrar of Security Interests, who shall be designated as such by the Minister.

(3) The Registrar shall be responsible for ensuring that the Register is maintained in accordance with this Act, and for the performance of the functions

assigned to the Registrar by this Act or any other law, which functions may be carried out by any member of staff of the Registry under the direction of the Registrar.

Register.

48. - (1) The Register for the purposes of this Act shall be maintained in electronic form that provides for -

- (a) the filing, in an electronic Register of Security Interests, of all registration notices, amendment notices, and termination notices, registered under this Part; and
- (b) the assignment of a registration number (which shall be a unique identification number) to each such notice, together with a notation of the date and time of the filing.

(2) A notice mentioned in subsection (1) is registered at the time that a registration number, date and time is assigned to it in the Register, and the Registrar shall thereupon cause to be created a printable written statement bearing that information.

(3) The Registrar shall maintain the Register in a state of availability for public inspection, including the capability to view any registration notice filed in the Register by inputting a search of any of the following data -

- (a) the name of the debtor;
- (b) the registration number of the registration notice, in a manner that associates the registration notice with all related amendment notices and termination notices;
- (c) in the case of a motor vehicle, the serial number of the motor vehicle, if a serial number was

provided in the notice in a field prescribed by the Registrar; or

- (d) in the case of fixtures, the identification information relating to the land, including in the case of registered land the volume and *folium* of the Register Book in which the certificate of title is entered under the Registration of Titles Act.

(4) Where the registration of a notice is affected by the failure of the Registrar to observe any requirement mentioned in subsection (1), (2) or (3), the notice remains effective except against a purchaser of secured property covered by the notice, who gives value in reasonable reliance upon the information available from the Register.

(5) The Registrar shall maintain records of lapsed or terminated registration notices (including all associated amendment, continuation and termination notices) for a period of ten years beyond the date of the lapse or termination, as the case may be.

(6) Registration of a notice in the registry is not constructive notice or knowledge of its existence or contents to any person.

(7) For the purposes of this Part, "registration number" means the number assigned in accordance with subsection (1) (b).

Registration notices.

49. - (1) A registration notice filed for the purposes of this Part shall -

- (a) sufficiently identify the debtor, and state the debtor's business or residential address;
- (b) sufficiently identify the secured creditor, and state the secured creditor's business or

residential address; and

- (c) describe the secured property covered by the notice.

(2) For the purposes of subsection (1)(c), a registration notice that covers fixtures shall describe the real property where the fixtures are located.

(3) A registration notice may relate to one or more security contracts and may identify more than one debtor or more than one secured creditor.

(4) A registration notice may be registered before or after a security contract has been concluded and before or after the security interest has attached.

(5) A person may register a registration notice under this section only if the debtor concerned authorizes the registration.

(6) For the purposes of subsection (5), authorization by the debtor -

- (a) need not be contained in the registration notice;
- (b) need not be disclosed to the Registrar;
- (c) may be given after registration of the registration notice; and

(d) in any case where the debtor signs a security contract, shall be deemed to have been given to the filing of a registration notice covering -

- (i) the secured property described in the security contract; and
- (ii) the proceeds of the secured property (whether or not the security contract expressly covers proceeds).

(7) The failure of a person who registers a registration notice in the capacity of agent of a secured creditor to indicate that capacity in the

notice, shall not affect the validity of the notice.

(8) A registration notice remains effective with respect to secured property that is sold, exchanged, leased, licensed, or otherwise dealt with, and in which the security interest continues, even if the secured creditor knows of the sale, exchange, lease, license or other dealing.

(9) The registration of an amendment notice or termination notice under this Part by a secured creditor does not affect the rights of any other secured creditor identified in the registration notice concerned.

Sufficiency of
identifica-
tion.

50. - (1) A person or entity is sufficiently identified in a notice for the purposes of this Part if -

- (a) in the case of an individual who is a citizen of Jamaica, the notice states the name of the individual;
- (b) in the case of an individual who is not a citizen of Jamaica, the notice states the name of the individual as stated in the individual's passport;
- (c) in the case of an entity established by the Constitution of Jamaica or under any other enactment, the notice states the name of the entity as provided by the Constitution or other enactment;
- (d) in the case of a company incorporated under the Companies Act, the notice states the name of the company as stated in its certificate of incorporation, being the most recent certificate as amended to reflect any change of name;
- (e) in the case of a company not domiciled in Jamaica, the name of the company as depicted in

the appropriate registry where the company is domiciled.

(2) A notice that sufficiently identifies a person or entity under subsection (1) is not rendered ineffective by the presence or absence of a trade name or other name of that person or entity.

(3) A notice that provides the trade name of a person or entity but does not comply with subsection (1) does not sufficiently identify that person or entity.

Amendment notices.

51. - (1) Subject to subsection (3), a registration notice may, with written authorization signed by any of the secured creditors concerned, be amended by the registration of one or more amendment notices in accordance with this section.

(2) An amendment notice for the purposes of subsection (1) shall -

- (a) identify the registration notice concerned by registration number and state that it is an amendment to that registration notice;
- (b) identify the secured creditor who authorizes the amendment; and
- (c) provide all of the information required for a registration notice, by completely restating the registration notice in a manner that reflects the amendment.

(3) Written authorization signed by the debtor concerned is required -

- (a) to add secured property to a registration notice; or
- (b) to add the name of that debtor to a registration notice already registered under this Part.

(4) For the purposes of subsection (3),

authorization by the debtor -

- (a) need not be contained in the amendment notice;
- (b) need not be disclosed to the Registrar; and
- (c) may be given after the registration of the amendment;
- (d) in any case where the debtor signs a security contract that adds secured property to a security interest, shall be deemed to have been given to the registration of an amendment notice covering -

- (i) the secured property described in the security contract; and

- (ii) the proceeds of the secured property (whether or not the security contract expressly covers proceeds); and

- (e) shall be deemed to have been given to the registration of an amendment notice that identifies that debtor, in any case where that debtor signs a security contract in respect of property covered by a registration notice already registered under this Part and identifying another debtor.

(5) An amendment notice that -

- (a) adds secured property to a registration notice is effective, as to the secured property added; or
- (b) adds a debtor to a registration notice is effective, as to the debtor added,

only from the date of registration of the amendment notice.

(6) An amendment notice that purports to delete the identification of -

- (a) all the secured creditors, without providing

sufficient identification of one or more additional secured creditors; or

(b) all the debtors, without providing sufficient identification of one or more additional debtors, shall be void and of no effect.

(7) The registration of an amendment notice shall not have the effect of extending the duration of a registration notice.

Effect of defects, irregularities, etc.

52. - (1) The validity of the registration of a notice under this Part is not affected by any defect, irregularity, omission, or error, in the registration form unless the defect, irregularity, omission or error is materially misleading.

(2) Without limiting the circumstances in which a registration is invalid under subsection (1), the registration of a notice is invalid if there is a materially misleading defect, irregularity, omission or error in -

(a) the name of any of the debtors identified in the notice, other than a debtor who does not own or have rights in the secured property; or

(b) the serial number of the secured property described in the notice, if the secured property is a motor vehicle.

(3) Within twenty-one days after the date on which a secured creditor has knowledge of any change in circumstances which would render a registration notice materially misleading, the secured creditor shall file an amendment notice in respect of the change, and where the secured creditor fails to do so, the registration notice becomes invalid upon the expiration of the aforementioned twenty-one days.

(4) Except as provided in subsection (3), a registration notice that is not materially misleading at the time of registration remains effective if after the notice is registered a change of circumstances renders the registration notice materially misleading.

(5) For the purposes of this section, in order to establish that a defect, irregularity, omission, or error is materially misleading, it is not necessary to prove that any person was actually misled by it.

Duration.

53. - (1) A registration notice, unless terminated under any provision of this Act, shall be effective for the duration of the period that the secured obligation remains outstanding.

(2) Within twenty-one days after the satisfaction of the secured obligation, the secured creditor concerned shall file a termination notice in accordance with section 54.

(3) A secured creditor who fails to comply with subsection (2) shall be liable to compensate any person who suffers loss as a result of the failure.

Termination notices.

54. - (1) The effectiveness of a registration notice may be terminated by the registration of a termination notice in accordance with this section.

(2) A termination notice shall -

- (a) identify, by registration number, the registration notice concerned;
- (b) identify the secured creditor, identified in the notice, who authorizes the registration of the termination notice; and
- (c) state that the registration notice is no longer effective with respect to the interest of the secured creditor who authorizes the registration

of the termination notice.

(3) A termination notice registered in accordance with this part terminates the effectiveness of a registration notice with respect to a secured creditor identified pursuant to subsection (2)(b) only if that secured creditor authorizes, in writing signed by that secured creditor, the registration of the termination notice.

Notice of
interest of
execution
creditor.

55. - (1) The Court may, upon the application of an execution creditor -

- (a) at the time when judgment is entered for the execution creditor or any time thereafter, in the case of a judgment for the payment of money; or
- (b) at the time of the filing of a bankruptcy petition or a petition for winding-up (as the case may be), by the execution creditor,

direct that a notice under this section be entered in the Register.

(2) A notice under this section shall -

- (a) identify the execution creditor concerned;
- (b) identify the person owing payment or performance of an obligation to the execution creditor; and
- (c) describe the property against which the execution creditor claims, or may claim, a right.

Refusal of
registration.

56. - (1) The Registrar may refuse registration of a notice under this Part if -

- (a) in the case of a registration notice, the notice does not identify a debtor;
- (b) in the case of an amendment notice, the notice does not identify a debtor, does not provide the registration number of the registration notice concerned, or purports to amend a registration

notice that has been terminated;

- (c) in the case of a termination notice, the notice does not provide the registration number of the registration notice concerned, or the notice purports to terminate a registration notice that has been terminated with respect to each secured creditor identified in the notice; or
- (d) the applicable registration fee has not been paid in full.

(2) Where registration of a notice is refused other than on any of the grounds specified in subsection (1), the notice is effective except as against a purchaser of secured property that gives value in reasonable reliance on the absence of the notice in the Register.

(3) Where registration of a notice is refused in any case, the Registrar shall forthwith communicate the fact of, and reason for, the refusal to the person who submitted the notice for registration.

Cancellation of clerical errors, etc.

57. - (1) The Registrar shall restore a registration if it appears to the Registrar that, due to a clerical error made by the Registrar, the registration has been incorrectly cancelled or removed.

(2) A registration restored under subsection (1) shall be regarded as having continued in force throughout the period during which it was incorrectly cancelled or removed (as the case may be), as if it had not been so cancelled or removed.

(3) The Registrar may, with the consent of the secured creditor, correct any clerical error or omission made by the Registrar in a registration.

Provision of information by Registrar.

58. - (1) The Registrar shall provide, upon payment of

the prescribed fee, the following information to any person upon the request of that person -

- (a) whether there is any registration notice that identifies a particular debtor, or describes a motor vehicle by serial number, and that has not terminated with respect to all secured creditors identified in the notice;
- (b) the registration number, and the date and time of registration, of the registration notice;
- (c) the name and address of each debtor and each secured creditor identified in the notice; and
- (d) all of the information contained in the notice.

(2) Subject to subsection (3), the Registrar may determine the form in which the information mentioned in subsection (1) is provided.

(3) If requested to do so, and upon payment of the prescribed fee, the Registrar shall issue a certified search report, or such other report certified by the Registrar, as may be reasonably required.

(4) A certified report issued by the Registrar under subsection (3) shall be admissible in evidence in any court without further evidence of its authenticity.

(5) The Registrar may provide information about some or all registration notices to interested persons from time to time, on terms determined by the Registrar, which terms may include payment by such persons of a reasonable fee for the provision of the information.

(6) Nothing in this section precludes any right of inspection free of cost under section 48(3).

PART VIII. General

Duty of secured creditor to make certain

59. - (1) The debtor, or an authorised representative of the debtor, may request that the secured creditor

information available.

give, or make available, to any specified person, at an address specified by the person making the request, any of the following -

- (a) a copy of the security contract that creates or provides for a security interest held by the secured creditor in the personal property of the debtor;
- (b) a statement in writing of the amount of the indebtedness and of the terms of payment of the indebtedness;
- (c) a written approval, or correction, of an itemised list of personal property indicating which items are secured property, unless the security interest is over all of the personal property of the debtor;
- (d) a written approval or correction of the amount of indebtedness and of the terms of payment of the indebtedness.

(2) Subsection (1) shall not apply if the information requested under that subsection is required to be, or has already been, made available under any other law to the person who made the request.

(3) A secured creditor who is required to comply with a request made under subsection (1) shall comply with the request within ten working days after receiving the request.

(4) The Court may, on application by a secured creditor, make an order exempting, in whole or in part, the secured creditor from complying with a request made under subsection (1), or extending the time for compliance, if the Court is satisfied that in the circumstances it would be unreasonable for the secured

creditor to comply with the request.

(5) A secured creditor who is requested to provide information-

- (a) under subsection (1), shall supply the information free of cost; or
- (b) under subsection (8), may, charge the person who made the request a fee to cover the reasonable costs of providing the information.

(6) The Court may, on application by any person who makes a request under subsection (1), make an order requiring the secured creditor to comply with the request if, without reasonable excuse, the secured creditor fails to comply with the request.

(7) Where a request is made under subsection (1) and the person to whom the request was made no longer has an interest in the obligation or the secured property, that person shall send or make available to the person who made the request the name and address of the immediate successor to the interest concerned and the latest successor to the interest, if known.

(8) Where a person to whom this subsection applies makes a written request to the secured creditor for the provision of any information mentioned in subsection (1), and the secured creditor does not provide the information in writing within ten working days after receiving the request -

- (a) the person may apply to the Court, with notice to the secured creditor, for an order requiring the secured creditor to supply the information;
- (b) and the Court may make such order as it thinks fit as to the provision of the information.

(9) Subsection (8) applies to a person who -

- (a) is judgment creditor of a debtor; or
- (b) has a security interest in personal property of the debtor.

Services of notices, etc.

60. - (1) This section shall not apply to -

- (a) notices or other documents served or given in any court proceedings; or
- (b) notices or other documents served or given in accordance with another procedure specified in the security contract for serving or giving the notice or document concerned.

(2) Any notice or other document required or authorised by this Act to be served or given to any person (hereinafter in this section called the intended recipient) shall be in writing and is sufficiently served or given if -

- (a) it is delivered to the intended recipient or the agent of the intended recipient;
- (b) it is left at the usual or last known place of abode or business of the intended recipient, or the agent of the intended recipient, or at an address specified for that purpose in the security contract;
- (c) it is sent by post addressed to the intended recipient, or the agent of the intended recipient, by name at the place of abode or business or address referred to in paragraph (b); or
- (d) it is given by facsimile, electronic mail, or other similar electronic means of communication.

(3) For the purposes of subsection (2), where an intended recipient is deceased, notice to that person may be served on or given to that person's personal

representatives.

(4) Notwithstanding subsections (2) and (3), a court may in any case make an order directing the manner in which any notice or other document is to be served or given, or dispensing with the service or giving of the notice or other document.

(5) Where any notice or other document is sent to an intended recipient by post pursuant to this Act, the notice or other document is deemed to have been delivered to the intended recipient at the time when the notice or other document would in the ordinary course of post be delivered, and, in proving the delivery, it is sufficient to prove that the notice or other document was properly addressed and posted.

(6) For the purposes of this Act, a notice or other document served or given by facsimile is, in the absence of proof to the contrary, to be regarded as having been served or given if the facsimile machine used to send it generated a record of the transmission of the notice or other document (as the case may be) to the facsimile machine used by the intended recipient, and the date of the record is deemed to be the date of receipt of the notice or other document.

(7) A notice or other document given by electronic mail or other similar means of communication is, in the absence of proof to the contrary, to be regarded as having been given under this section if -

(a) the computer system used to transmit the notice or other document (as the case may be) -

(i) receives an acknowledgement or receipt of the transmission, generated by the electronic mail address of the intended

recipient; or

- (ii) has not generated a record that the transmission has failed; or

- (b) the person who gives the notice or document proves that the notice or document was transmitted by computer system to the electronic mail address provided by the intended recipient.

Regulations.

61. The Minister may make regulations for the purpose of giving effect to the provisions of this Act and, without limiting the generality of the foregoing, such regulations may -

- (a) make provision as to the staff and maintenance of the Security Interests Registry and the operation of the Register;
- (b) prescribe the form of registration notices, amendment notices and termination notices, and of all other notices or forms required under this Act to be filed in, or issued by, the Registry;
- (c) prescribe the matters in respect of which fees are payable under this Act, the amount of those fees, and the modes of payment thereof;
- (d) prescribe the data required to be submitted as to -
 - (i) the description of secured property;
 - (ii) the manner of submission for registration of registration notices, amendment notices and termination notices;
- (e) prescribe the form of search results and the method of their disclosure;
- (f) the form of any notice required to be given to any person under this Act;

- (g) specifying the kinds of goods the leases of which are not within the scope of this Act;
- (h) make provisions for the protection of consumers in respect of any specified category of personal property capable of being subject to a security interest.

Conflict of laws.

62. (1) Except as otherwise provided by this section, the validity, perfection and effect of perfection or non-perfection of a security interest is governed by the laws of Jamaica if -

- (a) at the time the security interest attaches, the secured property concerned is situated in Jamaica;
- (b) at the time the security interest attaches, the secured property concerned is situated outside Jamaica, but the security contract contemplates that the secured property will be moved to Jamaica;
- (c) the security contract provides that the laws of Jamaica shall apply; or
- (d) in any other case, the laws of Jamaica apply.

(2) In respect of goods brought into Jamaica, a security interest perfected under the law of the jurisdiction in which the goods are situated at the time the security interest attaches but before the goods are brought into Jamaica retains its priority ranking in relation to other security interests in the goods, wherever perfected, if the security interest is perfected in Jamaica in accordance with section 7 -

- (a) within sixty days after the goods are brought into Jamaica;
- (b) within fifteen days after the secured creditor

has knowledge that the goods have been brought into Jamaica; or

- (c) before the date on which registration ceases under the law of the jurisdiction in which the goods are situated at the time the security interest attaches,

whichever is the earliest, but the security interest shall not have priority over the interest of a buyer in the ordinary course of business who acquires the goods without knowledge of the security interest.

(3) Nothing in subsection (2) shall be construed as preventing the perfection of a security interest after the expiration of any time period specified in that subsection.

(4) Where a security contract creating a security interest in goods provides for the goods to be kept in another jurisdiction and, within thirty days after the security interest attaches, the goods are removed to that other jurisdiction for purposes other than transportation through the other jurisdiction, the validity, perfection and effect of perfection or non-perfection of the security interest shall be governed by the law of the other jurisdiction.

Act binds the Crown.

63. This Act binds the Crown.

Review of Act.

64. This Act shall be reviewed by a committee of both Houses of Parliament no later than five years from the appointed day.

Transitional.

65. - (1) Subject to the provisions of this section, priority as between interests in personal property created before the appointed day shall be determined by the laws applicable immediately prior to the appointed day.

(2) A security interest perfected under this Act shall have priority over an interest or personal property created before the appointed day, except as provided by subsection (3).

(3) A creditor who immediately before the appointed day has an interest in the personal property of a debtor may register a registration notice of its interest at any time, and -

(a) if the notice is filed before the expiration of the transitional period, the interest shall -

(i) have priority over a security interest created, registered or perfected under this Act;

(ii) retain its priority in relation to other interests in personal property created before the appointed day and in respect of which a notice in accordance with this subsection is filed before the expiration of the transitional period; and

(iii) have priority over an interest in personal property created before the appointed day and in respect of which a registration notice has not been filed before the expiration of the transitional period; and

(b) if the notice is filed after the expiration of the transitional period, the interest shall have priority over a security interest created, registered or perfected after the time of the filing.

(4) In this section, "the transitional period"

means the period of one hundred and eighty days beginning on the appointed day.

Repeals and consequential amendments. Schedule.

66. - (1) The following Acts are hereby repealed -

- (a) the Agricultural Loans Act;
- (b) the Bills of Sale Act;
- (c) the Debenture Registration Act.

(2) The provisions of the Acts specified in Column 1 of the Schedule are amended in the manner set out with respect thereto in Column 2 of the Schedule.

SCHEDULE

(Section 66)

Consequential Amendments

Column 1	Column 2
_____	_____
Provision	Amendment
_____	_____
1. The Agricultural Credit Board Act	<p>1. - (1) In section 26, delete paragraph (b) and substitute therefor the following -</p> <p style="padding-left: 40px;">“(b) by a security interest created in accordance with the Security Interests in Personal Property Act;”.</p> <p>(2) In section 27 -</p> <p>(a) in subsection (1), delete the words “charge on” and substitute therefor the words “security interest in”;</p> <p>(b) in subsection (2), delete the word “charge” wherever it appears and substitute therefor in each case the words “security interest”;</p> <p>(c) delete subsection (3) and substitute therefor the following -</p> <p style="padding-left: 40px;">“(3) In this section, security interest means a security interest within the meaning of the Security Interests in Personal Property Act.”.</p>

(3) In section 28 -

(a) delete the words -

(i) "a charge created
under section 27
or";

(ii) "charge or",

wherever they appear;

(b) delete subsection (3).

(4) Sections 29 to 32 are
hereby repealed.

(5) In section 33, delete
the words -

(a) charge created under
section 27 or by";

(b) "charge or",

wherever they appear.

2. The Companies
Act

2. - (1) In section 2, insert next
after the definition of "rules"
the following definition -

"security interest" has the
meaning assigned to it
under the Security
Interests in Personal
Property Act;".

(2) In section 93 -

(a) delete subsection (3) and
substitute therefor the
following -

" (3) This section
applies to a charge on
land (wherever situated)
or any interest therein,
but not to a charge for
any rent or other
periodical sum issuing
out of land.";

(b) delete subsections (6),
(7) and (8).

(3) Section 94 is hereby
repealed.

(4) In section 95 -

(a) in subsection (1), delete
the words "of the issues of
debentures of a series
requiring registration
under section 93" and

substitute therefor the words "to which section 93 applies";

- (b) in subsection (3), delete the words "or of the issues of debentures of a series requiring registration as aforesaid,".

(5) In section 97, delete subsection (1) and substitute therefor the following -

" (1) The Registrar shall keep, with respect to each company a register, in the prescribed form, of all the charges to which section 93 applies and shall, on payment of the prescribed fee, enter in the register with respect to such charges the following particulars -

- (a) if the charge is a charge created by the company, the date of its creation, and if the charge was a charge existing on property acquired by the company, the date of the acquisition of the property;
- (b) the amount secured by the charge;
- (c) short particulars of the property charged; and
- (d) the persons entitled to the charge."

(6) Delete section 98.

(7) In section 99 -

- (a) delete the words "or undertaking" wherever they appear;
- (b) delete the words ", as the case may be,".

(8) In section 102(1) -

- (a) delete the semi-colon appearing after the words "the company" and substitute therefor a full-stop;

(b) delete the proviso.

(9) In section 123(2), delete the words "charges which are required to be registered under this Act" and substitute therefor the words "which are required to be registered under this Act and all security interests registered under the Security Interests in Personal Property Act".

(10) In section 311(4) (b), delete the words "debentures" and substitute therefor the words "security interests under the Security Interests in Personal Property Act and arising".

(11) In section 313 -

(a) in subsection (1), insert next after the word "charged" the words "(including a security interest in personal property)";

(b) in subsection (2), insert next after the word "charge" the words "(including a security interest in personal property)".

(12) In section 320(b), insert next after the words "charge on" the words "(including a security interest in personal property)".

(13) In section 342, delete the words "the debenture holders or other".

(14) In section 345(1), delete the words "debentures of the company secured by a floating charge" and substitute therefor the words "security interest registered under the Security Interests in Personal Property Act".

3. The Farm Loans Act

3. - (1) Delete section 7 and substitute therefor the following -

"Guaran- 7. A farm loan shall
teed not be a guaranteed
farm farm loan unless it is
loan. granted upon -

(a) the security
of a charge on

land in which
an estate in
fee simple is
owned by the
borrower; or

- (b) the creation
of a security
interest in
personal
property in
accordance
with the
Security
Interests in
Personal
Property
Act.".

(2) In section 8 -

- (a) in subsection (1), delete the words "subsection (2) of section 7" and substitute therefor the words "section 7(a)";
- (b) in subsection (3), delete the words ", or crops growing on land,";
- (c) in subsection (5), delete the words "property, real or personal" and substitute therefor the words "real property".

(3) In section 9 -

- (a) in subsection (1), delete the words "property or crops" and substitute therefor the words "real property";
- (b) in subsection (2), delete the words "property or crop" and substitute therefor the words "real property".

(4) Section 10 is hereby repealed.

(5) In section 11, delete the words "subsection (1)".

(6) In section 16(1), insert next after the figure "7" the figure "(a)".

4. The Hire
Purchase Act

4. Parts III and IV of the Act
are hereby repealed.

5. The Workmen's
Compensation

5. - (1) In section 21(1), delete
the words "debentures secured by a

Act floating charge, of any property comprised in or subject to the charge" and substitute therefor the words "a security interest registered under the Security Interests in Personal Property Act, of any property comprised in or subject to the security interest".

(2) In subsection (3)(ii) of section 21, delete the words "any debentures of a company secured by a floating charge, or possession is taken by or on behalf of those debenture holders of any property comprised in or subject to the charge" and substitute therefor the words "a registered security interest arising under a floating charge, or possession is taken of any property subject to the security interest by or on behalf of such holders".

MEMORANDUM OF OBJECTS AND REASONS

A decision has been taken to enact legislation to facilitate the creation of security interests in personal property, to provide for a simple registration process for the recognition of such interests, and to stipulate the rules which will govern the priority in which such interests are enforceable.

A security interest is defined as an interest created -

- (a) contractually over one or more items of personal property (whether specifically or generically described, present or future); and
- (b) securing the fulfilment of one or more present or future obligations.

This Bill seeks to give effect to that decision.

