

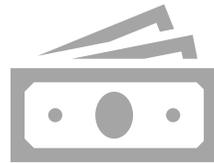
UCC/PPSA Across the Border

Richard J. Payne

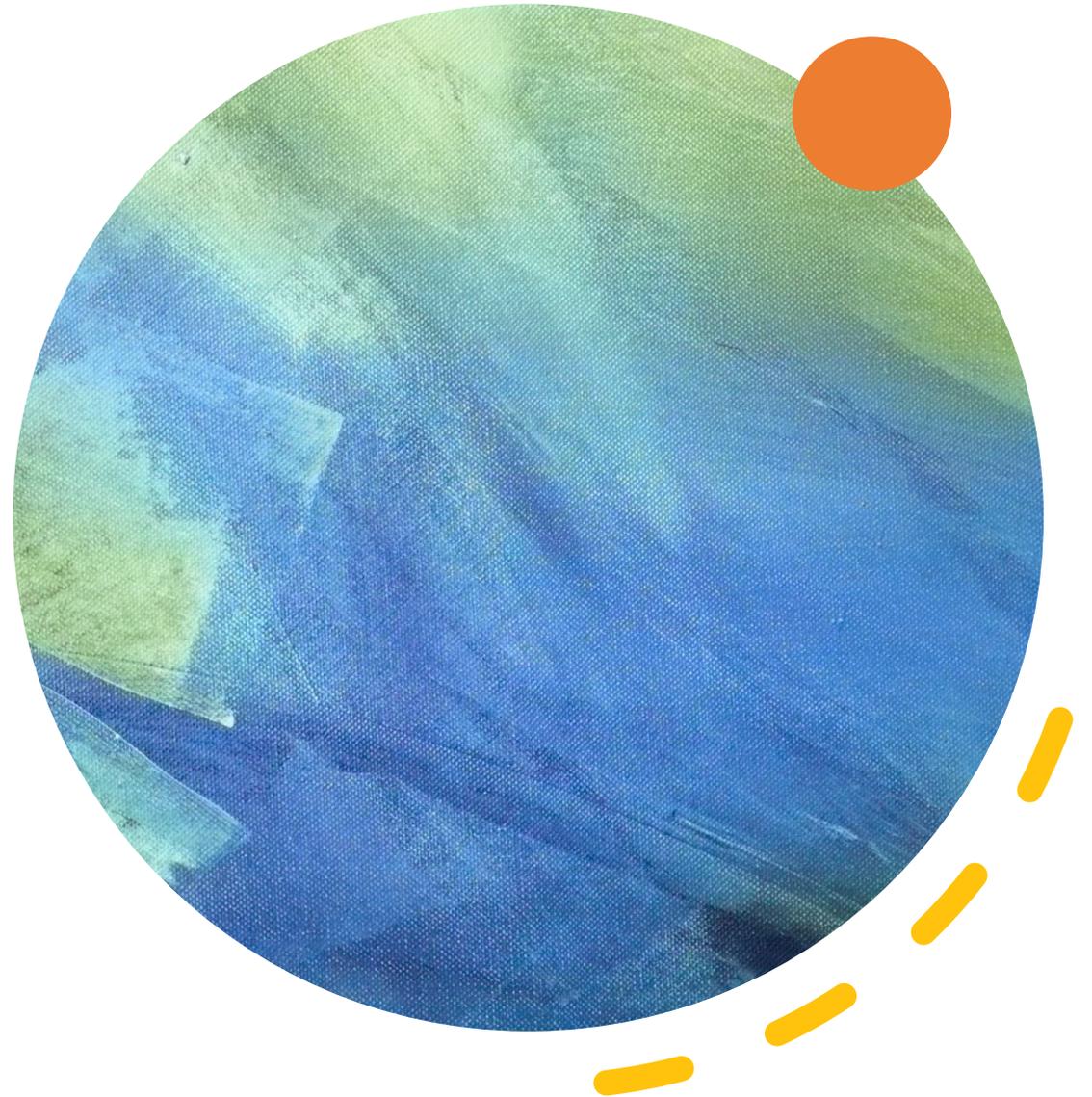
Introduction



Foundation of CLLA is the
Triadic System Agencies,
Attorneys and Lists.



A tool to help a commercial
creditor recover payment from
a commercial debtor



What About Security?

- What if the manufacturer had security?
 - If security had been taken and then registered under PPSA, the equipment would not have been a part of the bank's security
 - Bank would have to carve out those assets.
 - Bank would have to negotiate with the manufacturer
- PPSA is not required in many cases of ongoing supply.
- PPSA security lends itself more to the supply of certain large value items which are easily described and identifiable.

The Security Interest

- Creditor's requirements to file under the PPSA
 - Creditor must maintain a security interest in whatever they are supplying to the debtor.
 - Claim to a security interest must be sought and obtained at the time of the transaction.
- language can be incorporated into the Creditor's Card Application

The Security Interest Continued . . .



Note: entitlement to a security interest does not oblige the creditor to proceed with registration.



Provides creditor with flexibility to register in the appropriate case.



Security interest means the lender is taking the right to seize certain property of the lender in the event of non-payment.



Wording only needs to recite

Debtor assigns a security interest to the creditor in the item being supplied.
The creditor is entitled to make a public filing about the fact of such a security interest.

The Personal Property Act (“PPSA”)

- Personal Property Act (“PPSA”) is an Ontario Statute that sets out the framework for creating, registering and searching security interests throughout the province.
- Each Canadian province has its own version of the PPSA
- PPSA has rules which set out
 - How a security interest is created
 - Who takes priority over the property of the borrower when there are multiple security interests in effect.

Security for Costs

- In Canadian common law courts, usual rule in civil proceedings is that the successful party recovers its costs from the unsuccessful party at the end of trial and at the conclusion of interlocutory proceedings
- Situation arose that victorious defendants were finding it difficult, it not impossible to collect costs awarded to them to be paid by the plaintiff from outside the jurisdiction
- Rule enacted in connection with security for costs
 - Rule provides that a plaintiff that is not based in the jurisdiction is required to post security for costs with the court as a condition precedent of continuing with the litigation

Security for Costs Continued . . .

- Court does not impose this requirement automatically it is incumbent upon the solicitor for the defendant to bring forth the issue of security for costs.
- If the issue is not brought forth by the solicitor acting on behalf of the defendant, then it should be suggested by the solicitor acting on behalf of the plaintiff.
- If a motion is brought for security for cost, it will always be granted, and the amounts required by the courts to pay into court would be significant.

Security for Costs Continued . . .

Rule 56.01 of the *Rules of Civil Procedure*

56.01(1) The court, on motion by the defendant or respondent in a proceeding, may make such order for security for costs as is just where it appears that,

- (a) the plaintiff or applicant is ordinarily resident outside Ontario;
- (b) the plaintiff or applicant has another proceeding for the same relief pending in Ontario or elsewhere;
- (c) the defendant or respondent has an order against the plaintiff or applicant for costs in the same or another proceeding that remain unpaid in whole or in part;
- (d) the plaintiff or applicant is a corporation or a nominal plaintiff or applicant, and there is good reason to believe that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent;
- (e) there is a good reason to believe that the action or application is frivolous and vexatious and that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent;
or
- (f) a statute entitles the defendant or respondent to security for costs.

Security for Costs Continued . . .

- Amounts required for costs depend upon complexity of the litigation.
- Amount would be in tenths of thousands of dollars.
- Amount will be paid into court, and would remain in court until the conclusion of the litigation.
- If the plaintiff is successful, this amount will be returned to the plaintiff.
- If the defendant is successful, this amount would be utilized by the defendants to satisfy any cost award.

Security for Costs Continued . . .

- If the creditor has taken the time and effort to register PPSA Security against the property that it has supplied to the debtor
 - The creditor could argue that it does indeed have assets in the jurisdiction and therefore, it should not be required to post security for costs.

Registration Under the PPSA

- Registration process under the PPSA is not complicated but it requires care and accuracy.
- A Financing Statement is completed and filed with the Government by the lawyer acting on behalf of the creditor.
- Important fields to be completed in the Financing Statements are
 - Correct names for the Creditor and Debtor
 - Correct addresses
 - Sufficient description of the item being secured
 - Value of the item being secured
 - Location of item being secured
 - Duration of PPSA to remain in place

Registration Under the PPSA Continued . . .



Debtor information such as Full Name, Business Name, Address and Corporation Number must be completed



Next section requires the Secured Party's information



Following sections are concerned with Collateral Description and Registering Agent Information

If the Registering Agent differs from Secured Party, this section must be completed.



Lastly, form will require the name and signature of the Secured Party and the name and signature of the Agent.

Financial Statement Form

Ontario
Ministry of Consumer and Commercial Relations / Ministère de la Consommation et du Commerce

Form
Formulaire
1C

Account No. / N° de compte (if applicable) / N° de compte (si applicable) / Registration Account Code / Code du compte d'immatriculation

Registration No. (for office use only) / N° d'immatriculation (usage interne)

File No. / N° de dossier

Debtor / Débiteur

01 Debtor / Débiteur

02 Debtor / Débiteur

03 Debtor / Débiteur

04 Debtor / Débiteur

05 Debtor / Débiteur

06 Debtor / Débiteur

07 Debtor / Débiteur

08 Debtor / Débiteur

09 Debtor / Débiteur

10 Collateral / Biens grevés

11 Collateral / Biens grevés

12 Collateral / Biens grevés

13 Collateral / Biens grevés

14 Collateral / Biens grevés

15 Collateral / Biens grevés

16 Agent / Agent

17 Agent / Agent

Authorized Signature / Signature autorisée

1655110988 This form must not be reproduced for registration purposes. / Cette formule ne doit pas être reproduite aux fins d'immatriculation.

Central Office Copy / Exemplaire du bureau central

Naming the Debtor

- Many PPSA court decisions deal with problems arising from the use of the wrong debtor name, omission of middle initials and wrong birth date.
- Failure to use the correct debtor information on the correct lines of the Financing Statement may leave the secured party unperfected and subordinate to the debtor's bankruptcy trustee, other PPSA creditors and other third parties.
- PPSA database is searched by debtor name. Use of incorrect information in a registration will mislead the searching party.
 - For example a search against "James Brown" will not reveal a registration against "Jim Brown"

Naming the Debtor Continued...

There are various concerns depending on the nature of the business association.

- (a) Individuals
- (b) Sole Proprietors
- (c) Partnerships
- (d) Corporations
- (e) Bilingual Corporate Names (this is a concern in Canada)
- (f) Limited Partnership Name

Description of Collateral in Words

- On lines 13, 14 and 15 of the Form 1C Financing Statement
- Prior to the proclamation of the new *Act* many secured parties used word descriptions.
- Secured parties were entitled to make one registration for more than one security agreement where no “consumer goods” are involved.
- Led to the practice of “blanket filing” for agreements and have them perfected and relate in priority to a prior registration.

Description of Collateral in Words Continued . . .

- Revised PPSA passed in 1989
 - Where a word description was entered, the secured party would limit to the collateral as described in those words
 - If secured party forgets to describe something in words, then it will have a limited claim.

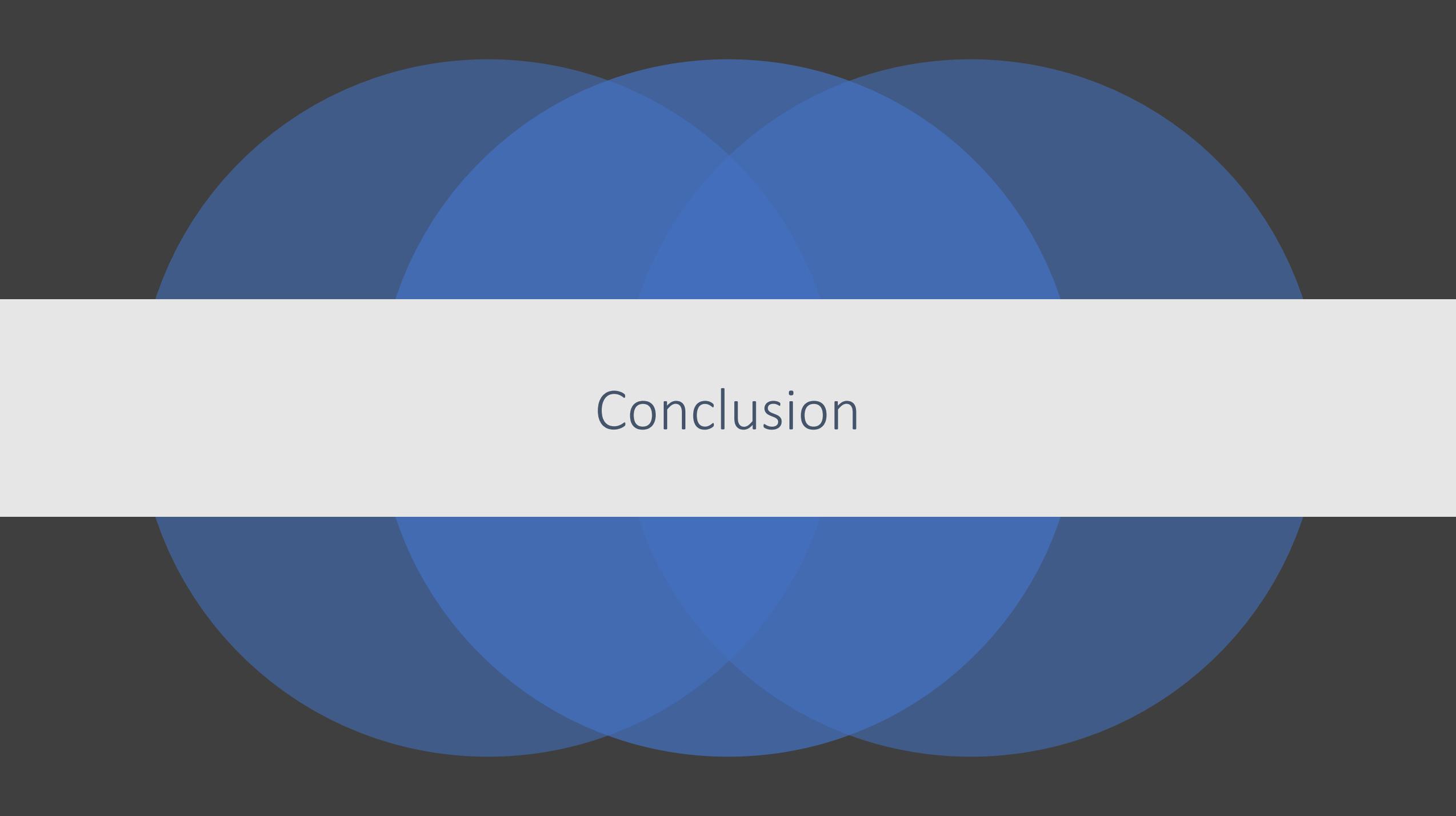
For example: a supplier provided the debtor with equipment and related accessories, it could put “x” in the box for equipment and be confident that it had perfected security interest in the machine, accessories and all proceedings thereof.

If they went on to state in lines 13, 14 and 15 “bearing serial no. xyz” they would be limited to just that specific machine. They would not be protected for the sorter, the spare parts, the manuals, the extra software and the upgraded components supplied next year.

- Led to general Ontario practice of not completing lines 13, 14 and 15

Description of the Collateral in Words Continued . . .

- Downside – secured party will get enquiries from time to time from third parties who wish to confirm what collateral is claimed by the supplier.
- Becomes a business decision for secured parties as to
 - Whether they will avoid potential limitations on their collateral claims and accept inconvenience of enquiries from time to time
 - Or, provide the public with the additional optional, and limiting, information.

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Conclusion