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# **Presentation on Legal System for Secured Transactions**

**(With Focus on Canadian Legal System for  
Secured Transactions)**

**Zambia, November 2016**



- With thanks to Christopher Mapani, Assistant Registrar (Commercial), Patents and Companies Registry Agency of Zambia
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# Objectives of this presentation

- Why we need effective secured transaction legislation
  - What is the end purpose of this kind of legislation
- Best practices for secured transactions
- The Canadian experience
- Overview of the Movable Property Security Interest Act
- Where from here



# Secured Transactions System and Economic Growth

- Access to credit is one of the major challenges in many countries, including Zambia
- Secured transactions enhance access to secured credit and reduces the cost of credit
  - Lower interest rates for borrowers
- Access to secured credit provides a key source of capital for economic growth



# Objectives of Secured Transactions Law

Some of the key objectives of secured transaction laws:

- Promotes the rule of law and economic growth (broad objective)
- Protects individual investment > *contributes to creating investor friendly environment and increasing the probability for investment in a country*
- Enhances certainty and transparency
- Specifies rights and obligations of creditors and debtors



# Secured Transactions Law: Best Practices

- Secured Transactions Law is complex
- Various Model Laws (UNCITRAL, EBRD and OAS) and national laws
- Next slides will cover some generally accepted best practices



# Secured Transactions Law: Best Practices

## Some Generally Accepted Best Practices:

### A. Well Defined Scope of the Law

- It should be broad enough to cover virtually all interests in personal property
  - *Ref. s. 3 MPSIA of Zambia and s. 3 of PPSA of Alberta, Canada*



# Secured Transactions Law: Best Practices

## B. Effective System for Creating Security Interest

- Any agreement signed by debtor and creditor identifying the collateral and the security obligation should be sufficient to create a security interest
- Minimum formal requirements for creating security interests
  - *Ref. Part III MPSIA of Zambia and Part 2 of PPSA of Alberta, Canada*

## C. Well Defined and Transparent Perfection Rules

- Only properly perfected security interest will have priority against third parties
  - *Ref. Part IV of MPSIA of Zambia and Part 3 of PPSA of Alberta, Canada*





# Secured Transactions Law: Best Practices, Cont'd

## D. Well Functioning Registry System and Access to Information

- Centralized and web-based system > *accessible to general public*
- Even the best secured transactions law would be completely ineffective without a functioning registry
  - Should require minimal information for registration such as debtor's identity, creditor's identity, description of the collateral
    - *Ref. Part 2 of MPSIA of Zambia and Part 4 of PPSA of Alberta, Canada*



# Secured Transactions Law: Best Practices, Cont'd

## E. Clear Priority Rules

- Establishing priority is a key in the event of default and eventual realization
- Secured creditors should be able to **predict** their priority against other creditors
  - *Ref. Part V of MPSIA of Zambia and Part 3 of PPSA of Alberta, Canada*



# Secured Transactions Law: Best Practices, Cont'd

## F. Effective, Speedy, Inexpensive and Fair Enforcement System

For example:

- Realization process should be efficient and cost effective
  - Appropriate rights of redemption and reinstatement for debtors
  - Discretionary power for courts to provide relief, give directions, and issue orders
- *Ref. Part VI of MPSIA of Zambia and Part 5 of PPSA of Alberta, Canada*



# Secured Transactions Law: Best Practices, Cont'd

## G. Clear Provisions on Conflict of Laws

- UNCITRAL Model Law and most domestic legislation include provisions on conflict of laws
- There is always a possibility that the parties or the property might be related to two or more jurisdictions
- Need clear rules to deal with conflict of laws issues
  - *Ref. s. 4 of MPSIA of Zambia and s. 5, 6, and 7 of PPSA of Alberta, Canada*



# Canadian System Governing Secured Transactions

## ■ Enactment of laws by Canadian provinces

Some examples:

- Personal Property Security Act (PPSA) of Ontario (1967)
- Personal Property Security Act (PPSA) of Alberta (1990)
- Personal Property Security Act (PPSA) of British Columbia, (1990)
  - In Canada, Ontario was the first province to enact the PPSA

## ■ Case law also plays a key role in Canada in shaping the legal system for secured transactions

## ■ Next slides shed light on Alberta's PPSA



# Canadian Laws, Cont'd

## PPSA of Alberta, Canada

- The Act modernized and rationalized secured credit law in Alberta by amending or repealing several former acts, some of which were very outdated, and by providing a uniform system of security registrations and priorities
- Single unified Act of Alberta dealing with security interest in personal property



# Canadian Laws, Cont'd

## PPSA of Alberta, Canada

- The PPSA applies to most transactions in which creditors obtain an interest in a debtor's personal property to secure payment or performance of an obligation
- The PPSA simplified and modernized the registration of and searches for security interests by the creation of the Personal Property Registry (PPR)
  - Basically an electronic registry system



# Canadian Laws, Cont'd

## PPSA of Alberta, Canada

- The PPSA does not apply to some types of liens and interests that are governed entirely by other provincial laws or common law, or to security interests under federal statutes, such as security given by farmers to banks pursuant to the *Bank Act*





# Canadian Legal System, Cont'd

## PPSA of Alberta, Canada: Some Key Features

- Clear rules on perfection and priorities
- Simplified registration procedures by creating the Personal Property Registry
  - Online system > *can be accessed 24 hours a day, seven days a week*
  - Alberta and other provinces in Canada have done well on making the registration system easily accessible and effective
- Effective mechanism for enforcement



# Roles/Powers of the Court

- The PPSA of Alberta and other Canadian PPSAs stipulate numerous provisions which authorizes application to court
  - These provisions vary somewhat from province to province
- The power of the courts can be broadly categorized as “general” and “supervisory”



# Roles/Powers of the Court:

## General Roles/Powers: Examples

- Order requesting copy of security agreement be given to debtor > *s.11 of PPSA of Alberta, Canada*
- Order allowing secured party to use collateral > *s.17(3) (c) of PPSA of Alberta, Canada*
- Order that a security party's registration be maintained, discharged or amended > *s. 50 (7) of PPSA of Alberta, Canada*



# Roles/Powers of the Court

## Supervisory Roles/Powers: Examples

- Make any order, including a binding declaration of right and injunctive relief, that is necessary to ensure compliance with Part 5 (Rights and Remedies on Default) or section 17 (Preservation of Collateral), 36 (Fixture), 37 (Security Interests in Crops) or 38 (Security Interests Re Accessions), and may give relief with respect to these issues
- Give directions to any person regarding the exercise of the person's rights or discharge of the person's obligations under Part 5 or section 17, 36, 37 or 38

*Ref. s.64 of PPSA of Alberta, Canada*



# Roles/Powers of the Court

## Supervisory Roles/Powers: Examples

- Stay enforcement of rights provided in Part 5 or section 17, 36, 37 or 38 PPSA of Alberta, or
- Make any order, including a binding declaration of right and injunctive relief, that is necessary to ensure protection of the interests of any person in the collateral

*Ref. s.64 of PPSA of Alberta, Canada*



# Roles/Powers of the Court

## Supervisory Roles/Powers: Examples

- Make an order determining questions of priority or entitlement to collateral
- Direct an action to be brought or an issue to be tried

*Ref. s.69 of PPSA of Alberta, Canada*



# Roles/Powers of the Court

## Supervisory Roles/Powers: Examples

- Extension of Time

Where in Part 5 or in sections 11, 36(13), 38(13) and 43(11) a time is prescribed not later than or before which an act or thing must be done, the Court, on application made before or after the time has expired, may extend or abridge, conditionally or otherwise, the time for compliance. *(For the purpose of PPSA of Alberta, the Court means the Court of Queen's Bench of Alberta)*

*Ref s.71 of PPSA of Alberta, Canada*



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# A story from Alberta, Canada







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# Then add





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# Rancher Bob

- Barley and Wheat crops
- 6 gas wells, through a lease with Pyramid Oil.
- Cattle herd averaging 200 head
- Usual farming and ranching equipment – trucks, farm machinery, sheds



# The Royal Bank

- Loan agreement for \$2 million, with security against all equipment, cattle, crops
  - “Borrower grants to and in favour of Bank, a continuing security interest in the collateral, together with all replacements for accessions and proceeds thereof specified in Schedule A....



# What questions can arise?

- Bob sells one of his trucks (and the purchaser is in Montana, USA)
- Bob sells off his herd
- Bob puts the proceeds from the sale in an account with the gas royalties
- Bob's herd increases by birth of several calves
- The bank claims the proceeds of the sale of the crop



# My Case

- Arose in the context of an insolvency
- Involved trucks, a skid office
- Who between Receiver and Bank best able to sell the property
- Was bank's security properly registered



# Overview of MPSIA

- Scope of the Act
- The registry
- Creation of security interest
- Perfection
- Priority between security and other interests
- Enforcement of security interests



# Objectives and Salient Provisions of Act

- **Provides mechanism for determining that security is not encumbered through a unified Collateral Registry**
  - **Ensures certainty as to priority vis-à-vis competing claims over collateral**
- **Eases enforcement in case of default**





# Scope of the Act

- S. 3 – applies to all interests in movable property created by agreement that secures payment or other performance of an obligation... (lists many different kinds of instruments).
- Conflicts of law provision



# Registration of Security Interests (Collateral Registry)

- Collateral Registry shall maintain a register of security interests
- A Collateral Registry Office is to be established under the Agency (s 7.1)
- The Registry shall be fully electronic (s 11) and open to the public at all working hours (s 26)
- Registration shall be by lodging a financing statement (s12)  
– Minister to prescribe further details (s 11.5)
- Act prescribes information to be contained in financing statement (s 13)



# Creation of Security Interest

- **Created by security agreement when agreement is reached – can also be created after (s 37)**
- **Security agreement spells out the terms of the secured obligation**
- **Any person (natural and artificial) may create security interest (s 33.1)**
- **Act prescribe minimum requirements for security agreement (s 34)**
- **Act spells out requirements for validity of security agreement (s 35 and 36)**



# Perfection of Security Interest

- **Perfection or a perfected security interest is one that becomes binding or effective against third parties (s 2, p 130)**
- **Perfection may be by registration, possession or control (banks or upon execution of control agreement) (s 44)**
- **Perfection follows proceeds (s 46)**
- **Perfection determines priority claim (s 52)**



# Priorities

- Part V of the Act
- Addresses several potential contests between securities, eg. PMSI, goods prior to accession, commingled goods



# Enforcement

- **Modes of enforcement include taking possession, rendering it unusable (s 72 & 73) , remove the collateral and disposal**
- **An enforcement notice to be lodged with the Registry before enforcement (s 71)**
- **Enforcement may be with or without court involvement (s 72.3)**
- **Creditor to obtain reasonable price possible (s 76)**
- **Debtor and other parties having an interest in the collateral to be notified 14 days before sale (s 79)**



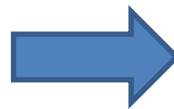
# Enforcement Cont'd

- **Creditor should render statement of accounts within 21 days after disposal (s 81)**
- **Net proceeds of the sale to go towards settling the debt (s 82) and surplus to be paid to debtor**
- **Debtor has redemption rights (s. 85 & 86)**



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# Conflict issues - Bob's truck







# Creation of the security interest

## ■ Key point –

- The agreement governs
- But remember s. 37 which says that a security interest in after-acquired movable property is created without written further consent or any further act of a debtor, except for consumer goods.



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# Creation of security interest





# Perfection of security interests

- First past the post principle



- s. 17 & 18 – invalidity of registration
  - Minimum requirements
  - Otherwise not invalid unless defect is “seriously misleading”  
Canadian interpretation is an objective test (p.364)



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# Priority between security interests





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# Let's go back to Rancher Bob





# PMSI

- Buys a wind turbine for \$80,000 to power his home
- Buys from Windy Pete with loan from friend
- Borrows \$80,000 from Royal Bank with the turbine as security under a PMSI
- Bob puts the \$80,000 from the bank in his account that now totals \$140,000
- Pays back his friend \$80,000



# What questions arise

- Is this a PMSI?
  - A security interest taken to secure all or part of the purchase price of the collateral
- Can the bank trace the money



# Enforcement

- S. 72 permits a secured creditor to take possession, remove collateral and dispose of collateral when debtor is in default or collateral at risk.
- S. 72(3) permits a secured creditor to proceed to act under s. 72(1) either pursuant to judicial process or without judicial process where the debtor consents in the agreement to relinquish possession without a court order.





## 7. Issues Which Might Arise Based on Canadian Experience

- Each legal system is unique in a way
- Difficult to make predictions about the legal issues which might emerge in the future
- Some legal issues likely to come to the courts in Zambia (based on Canadian experience)
  - Security interest related issues
  - Registration related issues



## 7. Issues Which Might Arise, Cont'd

- Priority issues
- Seizure related issues
- Right to reinstate contracts
- Distribution of equity after sale
- Need to effectively case manage cases



# 8. Moving Towards An Effective Legal System for Secured Transaction System

- Efficient and Effective Law
- Judicial Training
- Effective Registry
- Consistent Decision Making by Judges
- Enforcement of Decisions