

- (1) a transfer of an interest in an unearned right to payment under a contract to a transferee who is to perform the transferor's obligation under the contract (s. 4(e)) (*this excludes assignments of ongoing contracts as part of the sale of a business as a going concern*);
- (2) a sale of accounts or chattel paper as part of a sale of a business out of which they arose unless the vendor remains in apparent control of the business after the sale (s. 4(h)); and
- (3) a transfer of accounts made solely to facilitate the collection of the accounts for the assignor (s. 4(i)).

4. DOES PART 5 APPLY? [§4.22]

Part 5 of the *PPSA* applies to all security interests except transfers of accounts or chattel paper, commercial consignments, and leases for a term of more than one year that do not secure payment or performance of an obligation. This does not prevent the secured party and the debtor from adding remedies and rights found in Part 5 of the *PPSA* to their agreement. Adding the specific remedies and rights is preferable to simply incorporating all of Part 5 by a single reference, although the latter approach could also suffice if clearly worded language is used.

III. ATTACHMENT [§4.23]

A. IMPORTANCE OF ATTACHMENT [§4.24]

A security interest effectively comes into existence when it attaches. Unless a security interest has attached to a particular item of personal property, that property can be dealt with without reference to the security interest and the secured party will not have a remedy as secured party against the personal property.

B. TIME OF ATTACHMENT [§4.25]

Under s. 12(1) of the *PPSA*, a security interest attaches when:

- (a) value is given,
- (b) the debtor has rights in the collateral or power to transfer rights in the collateral to a secured party, and

- (c) except for the purpose of enforcing rights between the parties to the security agreement, the security interest becomes enforceable under section 10, unless the parties have specifically agreed to postpone the time for attachment in which case the security interest will attach at the time specified in the agreement.

Accordingly, a security interest can attach between the parties whether or not the debtor has signed a security agreement.

See s. 12(4) and (5) and s. 12.1 of the *PPSA* for specific rules relating to attachment of security interest in certain kinds of investment property.

C. VALUE [§4.26]

“Value”, as defined in s. 1(1), means any consideration sufficient to support a simple contract, and includes an antecedent debt or liability.

The inclusion of “an antecedent debt or liability” as consideration may be an exception to the contractual requirement for new consideration. Therefore, an existing unsecured creditor may secure itself over personal property without providing new consideration.

The laws relating to fraudulent conveyances and fraudulent preferences may affect the validity of a security interest, even if value has been given.

A binding commitment to lend is sufficient to constitute value, even if the commitment is subject to conditions.

It appears that the value need not be given to the debtor, but may be given to a third party (*Agricultural Credit Corp. of Saskatchewan v. Pettyjohn*, 1991 CanLII 7979 (SK CA)).

D. RIGHTS IN THE COLLATERAL [§4.27]

For a security interest to attach, the debtor must have rights in the collateral or power to transfer rights to a secured party (s. 12(1)(b)). The debtor has rights in the collateral if it is the owner of the collateral or if it has any legal or equitable proprietary interest in the collateral. A purely personal right (for example, as a licence to use) is not sufficient for attachment. The debtor will have rights in the collateral if:

- (1) the debtor has possession of goods belonging to another, including under a chattel lease or conditional sales contract (s. 12(2)); or
- (2) the debtor has voidable title to the goods (*O'Brien v. Chandler*, 765 P. 2d 1165, 7 U.C.C. Rep. 2d 1450 (N.M., 1988)).

However, where the debtor has possession only as a bailee or by some other right that does not amount to ownership or constitute a security interest, a security interest granted by the party in possession will not take priority over the interest of the owner in the goods.

E. POSTPONING ATTACHMENT [§4.28]

Unless the parties to a security agreement agree to postpone attachment, attachment will occur automatically upon the conditions specified in s. 12 (or, in certain cases involving investment property, s. 12.1) being satisfied.

The ability to postpone the time for attachment is useful as a means of avoiding breaches of contractual provisions that prohibit assignments of security interests. Security agreements often provide that the security interest will not attach to a contract that is not assignable without consent until the required consent is obtained. See also “Negative Covenants” in this chapter about negative covenants.