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Correctly Identifying the Debtor and Registering in the Personal Property Registry

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A. INTRODUCTION: IDENTIFYING THE DEBTOR

The Personal Property Registry (the “PPR”) is akin to a bulletin board on which you, as a secured creditor, can post public notice of a security interest you have in a debtor’s personal property. The debtor may be an individual or an artificial body (eg. a corporation or a partnership). In either case, it is paramount that you correctly identify the debtor in the PPR. If your registration is “seriously misleading”, it will be invalid and your security interest will remain “unperfected”.

The Regulations to *The Personal Property Security Act* (the “PPSA”) set out rules for determining the “name” of the debtor and how to register such name in the financing statement. For a corporation, simply use the corporation’s profile report or certificate of incorporation. For a number of reasons, however, correctly identifying the name of an individual is often more difficult. First, women commonly adopt their husband’s surname upon marriage. Secondly, many individuals are commonly referred to by a nickname, a middle name or a less formal version of their legal name: “Bill” for “William”. Perhaps the entire community refers to Greg Applegate as “Gator”. Michael Donald Anderson may prefer to be called “Donald” rather than “Michael”. Further complicating matters, his driver’s license may simply disclose his name as “Donald Anderson”. The Regulations set formal rules for determining the individual’s name. Knowing these rules, and designing and adhering to lending practices that properly address them, will help you

avoid the pitfalls of the PPR and ensure that you don't fall into the category of an "unperfected secured creditor".

B. THE RULES FOR DETERMINING THE DEBTOR'S NAME

General Rules

Assuming the debtor was born in Canada, the "default" rule is that his/her name is that disclosed on his/her birth certificate. If he/she does not have a birth certificate, the debtor's name is that disclosed on his/her passport. If he/she does not have a passport, the name is that disclosed on his/her social insurance card. If he/she does not have a social insurance card but has a passport issued by a non-Canadian jurisdiction, the name disclosed on that passport will be determinative.

Birth Certificate → Passport → Social Insurance Card → Foreign Passport

Name Changes: Marriage and Otherwise

If the debtor changed his/her name after marriage or in accordance with legislation respecting name changes, the name adopted after marriage (if recognized in the jurisdiction in which the individual resides) or stated on the debtor's name change certificate will be determinative. If the law of the jurisdiction in which the individual resides allows the person to use both his/her pre-marriage and post-marriage names, both names should be disclosed in the registration.

Individuals Born Outside of Canada

Note that additional rules determine the names of individuals born outside of Canada. If the individual was born outside of Canada, but is a Canadian citizen, the name is that stated on his/her citizenship certificate. If the individual was born outside of Canada and is not a Canadian citizen, the name is that disclosed on his/her government visa. If he/she was not granted a government visa, the name is that stated on his/her international passport. If he/she does not have either a government visa or an international passport, the name is that stated in the birth certificate (or equivalent document) issued by the government agency in the country in which he/she was born.

<i>Canadian Citizen</i> → Citizenship Certificate
<i>Non-Canadian Citizen</i> → Government Visa → International Passport → Birth Certificate

When All Else Fails

If none of the abovementioned rules assists in the determination of the debtor's name, his/her name is that stated on any two of the following documents:

- Current motor vehicle operator's license;
- Current vehicle registration;
- Current medical insurance card.

Practical Recommendations

Determining the debtor's name should be a simple matter. For an individual born in Canada, simply demand that the debtor provide you with the available identification document *highest* on the following list:

- Birth certificate;
- Passport;
- Social Insurance Card;
- Foreign Passport (if applicable);
- Marriage License or Name Change Certificate;
- Driver's License;
- Vehicle Registration; and/or
- Medical Insurance Card.

For a Canadian citizen born outside of Canada, demand that the debtor provide you his/her Citizenship Certificate. If the individual is not a Canadian citizen, and was born outside of Canada, demand a copy of the available identification document *highest* on the following list:

- Government Visa;
- International Passport;
- Foreign Birth Certificate;
- Driver's License;
- Vehicle Registration; and/or
- Medical Insurance Card.

C. THE RULES FOR REGISTERING AGAINST THE DEBTOR'S NAME

In registering against the debtor's name, the Regulations require that the financing statement (ie. the registration document) set out the following information in the prescribed fields:

- The debtor's surname;
- The debtor's first given name; and
- The debtor's second given name.

The Regulations do not provide for the insertion of any additional "middle names" the debtor may have. Consider, for example, a person named "Michael Donald Louis Anderson". The Regulations make no provision for the name "Louis" to be used in identifying the debtor on the financing statement. As you will see below, this has significant implications.

Note that you may register against "additional debtor names" in a financing statement. Therefore, if you remain unsure of how to identify your debtor, register against as many variants of the debtor's name as necessary to ensure proper identification in the PPR.

D. THE INTERPLAY BETWEEN THE PPSA AND THE MANITOBA PPR

As a prospective secured creditor, you will typically have dual concerns:

1. Determining whether another creditor has registered a security interest in the debtor's personal property (ie. determining your priority); and
2. Perfecting your security interest in the debtor's personal property (ie. ensuring your priority).

Due Diligence: Determining Your Priority

You must first determine the proper legal name of the debtor using the above rules. Secondly, you must conduct a PPR search (in accordance with Part C of this document) to determine whether any other creditor has registered against the debtor's name.

If a PPR debtor name search discloses no matches, you will be assured of priority once you register in the PPR. If a PPR debtor name search discloses "similar matches", you must examine these registrations to determine whether they are referring to your debtor. If there is any doubt, you should err on the side of caution and conduct further investigations to determine whether these registrations were intended to perfect a security interest in your debtor's personal property. If the PPR debtor name search discloses "exact matches", you must determine whether to proceed with the transaction or perhaps seek subordination from the previously registered creditors.

Registration: Perfecting Your Security Interest and Ensuring Your Priority

In order for your security interest to be perfected, your registration must not be "seriously misleading". Using the rules above will ensure that you properly identify and register against the debtor. Simply put, if you properly adhere to the rules above, you will not have a "seriously misleading" error in your registration. Hence, your security interest will be perfected.

Priority Competitions: An Error In Your Registration

But what if you do make a mistake in registering against the debtor's name? Will such a mistake render your registration invalid? The answer – "Not necessarily". Provided that your mistake is not "seriously misleading", your registration will be valid and you will remain a perfected secured creditor.

The next logical question, then, is how you know whether a registration is "seriously misleading" respecting the debtor's name. The answer is based both on the mechanics of the electronic PPR and the relevant case law, and often varies from jurisdiction to jurisdiction. A seriously misleading error in Manitoba may not be seriously misleading in Saskatchewan, both by virtue of "case law principles" and the peculiarities of the electronic PPR systems adopted in each province. Below are principles that will be of assistance to you in navigating this complex area of law.

The PPR search result is the fundamental mechanism used to determine whether a registration is "seriously misleading". Conducting a debtor name search in the PPR will reveal a list of all "exact matches" and "similar matches".

Exact Matches

Obviously, a registration that is revealed as an “exact match” is valid (ie. the registration is not seriously misleading).

Similar Matches

A registration revealed as a “similar match” **may** be “seriously misleading”. The registration is not necessarily invalid. The PPSA provides a measure of leniency to secured creditors using the PPR. The question is whether a reasonable searcher could reasonably conclude that the “similar match” referred to the debtor. If so, then the registration is not seriously misleading. However, if a reasonable searcher could not reasonably conclude that the similar match referred to the debtor, then the registration error is not seriously misleading.

No Matches

Finally, if a debtor name search does not disclose the registration as an “exact match” or a “similar match”, then such registration must be seriously misleading because a third party searching the PPR would have no hope of discovering it. Judges have not always applied this rule so “harshly”, but from a practical perspective, a registration that is neither disclosed as an “exact match” or a “similar match” is seriously misleading.

Note to the Wary: Multiples Middle Names

Recently, our office stumbled onto an interesting "quirk" in the Manitoba PPR, illustrated by the following example. Please note that, in this example (and all examples used in this paper), we are using “surrogate names” so as not to breach confidentiality concerns.

Example: The debtor’s full name was “Margaret Mary Jean Simpson”. As described above in Part C, only the names “Margaret”, “Mary” and “Simpson” should be used in identifying this debtor in the PPR. However, our client also used “Jean” when it registered its security interest in the PPR. Surprisingly, a PPR search against the name “Margaret Mary Simpson” did not disclose our client’s registration, either as an exact match or a similar match. Therefore, our client’s registration was seriously misleading and the client remained unperfected with respect to Ms. Simpson. This is a simple illustration of how the Manitoba legal regime, coupled with the peculiarities of the search mechanics of the Manitoba PPR, invalidated what one would expect to be a valid registration. Attention to detail is critical when registering financing statements in the PPR.

Simply put, upon conducting a debtor name search, your registration should be disclosed as an “exact match”. However, at the very least, you will want to ensure that it is revealed as a “similar match”. Under this scenario, the registration may be valid. But if your registration is not disclosed upon conducting a debtor name search, such registration is certainly seriously misleading and as a result, you are unperfected.

E. CONCLUSION

As illustrated in this paper, the seemingly simple matter of identifying and registering against a debtor can be more problematic than one would think. Gaining familiarity with the rules and the peculiarities of the Manitoba PPR will put you in good stead respecting your security.

For more information on this topic, please contact Layh & Associates at (306)743-5520 or visit our website at www.layhlaw.com.