

**SUPREME COURT OF CANADA**

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| **Citation** : Bank of Montreal*v.*Innovation Credit Union,2010 SCC 47, [2010] 3 S.C.R. 3 | **Date** : 20101105**Docket** : 33153 |

Between:

Bank of Montreal

Appellant

and

Innovation Credit Union

Respondent

**Coram** : McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

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| **Reasons for Judgment** :(paras. 1 to 71) | Charron J. (McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Rothstein and Cromwell JJ. concurring) |

Bank of Montreal *v.* Innovation Credit Union, 2010 SCC 47, [2010] 3 S.C.R. 3

Bank of Montreal *Appellant*

v.

Innovation Credit Union *Respondent*

Indexed as:  Bank of Montreal ***v.*** Innovation Credit Union

2010 SCC 47

File No.:  33153.

2010:  April 19; 2010:  November 5.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

on appeal from the court of appeal for saskatchewan

 *Commercial law — Priorities — Unregistered provincial security interest taken in farm equipment owned by debtor — Bank Act security subsequently taken in same goods without notice of existing security — Property seized by Bank on default — Whether priority should be given to provincial security interest or Bank Act security interest — Bank Act, S.C. 1991, c. 46, ss. 427(2), 428, 435(2) — Personal Property Security Act, 1993, S.S. 1993, c. P-6.2, ss. 20(3), 66.*

 At issue is a priority dispute between a prior unregistered security interest taken under Saskatchewan’s *Personal Property Security Act, 1993* (“*PPSA*”) in farm equipment owned by the debtor, and a subsequent security interest in the same collateral taken and registered under the federal *Bank Act.*

 Innovation Credit Union took a *PPSA* security interest dated October 7, 1991, and registered on June 28, 2004. The Bank of Montreal, between 1998 and January 2004, took *Bank Act* security over much of the same property. The farmer, however, did not disclose either the Credit Union’s loans or its security interest and the Bank’s searches of both the *PPSA* and *Bank Act* security registries disclosed no prior security interests. After the debtor defaulted, the Bank seized and sold some of his property covered by its security.

 The Credit Union brought an application before the Court of Queen’s Bench pursuant to s. 66 of the *PPSA* seeking a declaration that it had a priority claim over the proceeds of the disposition. The applications judge held that the priority rule in s. 428 of the *Bank Act* gave the *Bank Act* security interest priority not only over subsequently acquired rights in respect of the property but also over subsequently acquired priority rights. The Court of Appeal allowed the appeal, holding that the proper interpretation of ss. 427(2) and 435(2) of the *Bank Act* leads to the application of provincial property law to determine the effect of a prior security interest. The first-in-time *PPSA* security interest had priority over the *Bank Act* security because the Bank acquired no greater interest than the debtor had at the time the *Bank Act* security was taken. The Bank’s security interest was therefore subject to the Credit Union’s prior interest, regardless of the fact that the latter was unperfected.

 *Held*: The appeal should be dismissed.

 The focal point for resolving a priority dispute involving a *Bank Act* security and provincial interests, such as *PPSA* security interests, is the *Bank Act* itself. The *Bank Act* security provisions are valid federal legislation which cannot be subject to the operation of provincially enacted priority provisions. Where the *Bank Act* contains an express priority provision that is applicable to a particular priority dispute, that provision will govern. Where the priority dispute is between a *Bank Act* security interest and a conflicting security interest acquired *prior* to the bank taking its security in the collateral, the priority rule set out in s. 428 does not assist in resolving the dispute. In such cases, the provisions of the *Bank Act* nonetheless govern. Here, the priority dispute must be resolved by determining what proprietary rights were granted to the Bank under s. 427(2) of the *Bank Act*.

 As the combined effect of ss. 427(2) and 435(2) is that the Bank can acquire no greater interest in the collateral than the debtor has at the relevant time, it becomes necessary to determine the nature of the debtor’s interest in the collateral at the time the Bank took its security interest. The question which arises, therefore, is the nature of the interest already conveyed to the Credit Union under the *PPSA*. Because the security regime contained in the *Bank Act* is property-based, the right claimed by the competing Credit Union must be characterized as a matter of property law. While the provinces cannot legislate in order to oust the bank’s rights, they can alter the law as it relates to property and civil rights. Saskatchewan did so when it enacted the *PPSA*. While the *PPSA* does not contain any provisions which identify the nature of a *PPSA* security interest in proprietary terms, the effect of the legislation is to create a statutory interest which is analogous to an inchoate property right. At the time the debtor gave the Bank its *Bank Act* security interest, Innovation Credit Union already held a valid security interest in the nature of a fixed charge. The lack of perfection did not affect this interest.

 The existing statutory scheme under the *Bank Act* does not permit the judicial creation of a first-to-register or, alternatively, a first-to-perfect priority rule as proposed by the Bank. Such a rule would have to be enacted by Parliament if it saw fit to do so. Under the common law, a priority dispute between two legal interests in the same property is determined in accordance with the maxim *nemo dat quod non habet*. Sections 427(1) and 435(2) of the *Bank Act* operate in the same way. The application of these provisions to the present case grants priority to Innovation Credit Union’s interest.

**Cases Cited**

 **Applied:** *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; **referred to:** *Royal Bank of Canada v. Radius Credit Union Ltd.*, 2010 SCC 48, [2010] 3 S.C.R. 38; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *Royal Bank of Canada v. Agricultural Credit Corp. of Saskatchewan* (1994), 115 D.L.R. (4th) 569; *Landry Pulpwood Co. v. Banque Canadienne Nationale*, [1927] S.C.R. 605; *Giffen (Re)*, [1998] 1 S.C.R. 91.

**Statutes and Regulations Cited**

*Bank Act*, S.C. 1890, c. 31, s. 74.

*Bank Act*, S.C. 1991, c. 46, ss. 425(1), 427, 428, 435(2).

*Civil Code of Lower Canada*.

*Civil Code of Québec*, S.Q. 1991, c. 64, Book Six.

*Federal Law—Civil Law Harmonization Act, No. 1*, S.C. 2001, c. 4, preamble.

*Interpretation Act*, R.S.C. 1985, c. I-21, s. 8.1.

*Personal Property Security Act*, S.S. 1979-80, c. P-6.1 [rep. S.S. 1993, c. P-6.2, s. 72].

*Personal Property Security Act, 1967*, S.O. 1967, c. 73.

*Personal Property Security Act, 1993*, S.S. 1993, c. P-6.2, ss. 2(1)(pp), (qq), 3(1)(a), 4, 9(2), 10, 12, 18, 20(2), (3), 25, 35(1), 59, 60, 66, 72.

*Uniform Commercial Code* [2000 rev.], art. 9.

**Authors Cited**

Canada. Law Commission. *Modernizing Canada’s Secured Transactions Law: The Bank Act Security Provisions*. Ottawa: The Commission, 2004.

Cuming, Ronald C. C. Case Comment: *Innovation Credit Union v. Bank of Montreal*  Interface between the *PPSA* and Section 427 of the *Bank Act*: Desirable Policy vs. Hard Legal Analysis (2008), 71 *Sask. L. Rev.* 143.

Cuming, Ronald C. C., and Roderick J. Wood. Compatibility of Federal and Provincial Personal Property Security Law (1986), 65 *Can. Bar Rev.* 267.

Cuming, Ronald C. C., Catherine Walsh and Roderick J. Wood. *Personal Property Security Law*. Toronto: Irwin Law, 2005.

Moull, William D. Security Under Sections 177 and 178 of the Bank Act (1986), 65 *Can. Bar Rev.* 242.

Poirier, Marc-Alexandre. Analysis of the Interaction between Security under Section 427 of the Bank Act and Provincial Law: A Bijural Perspective (2003), 63 *R. du B.* 289.

Saskatchewan. Law Reform Commission. *Tentative Proposals for a New Personal Property Security Act*. Saskatoon: The Commission, 1990.

Uniform Law Conference of Canada. *Uniform Law Conference of Canada Commercial Law Strategy*, vols. 1 and 2. Ottawa: The Conference, 2005 (loose-leaf updated 2010).

Ziegel, Jacob S. Interaction of Personal Property Security Legislation and Security Interests Under the Bank Act (1986-87), 12 *Can. Bus. L.J.* 73.

Ziff, Bruce. *Principles of Property Law*, 4th ed. Toronto: Thomson, 2006.

 APPEAL from a judgment of the Saskatchewan Court of Appeal (Sherstobitoff, Jackson and Smith JJ.A.), 2009 SKCA 35, 324 Sask. R. 160, 451 W.A.C. 160, 306 D.L.R. (4th) 407, [2009] 8 W.W.R. 473, 51 C.B.R. (5th) 163, 14 P.P.S.A.C. (3d) 149, [2009] S.J. No. 147 (QL), 2009 CarswellSask 156, reversing a decision of Zarzeczny J., 2007 SKQB 471, 306 Sask. R. 227, [2008] 4 W.W.R. 143, 39 C.B.R. (5th) 260, 12 P.P.S.A.C. (3d) 223, [2007] S.J. No. 679 (QL), 2007 CarswellSask 748. Appeal dismissed.

 *Rick M.* *Van Beselaere* and *Peter T. Bergbusch*, for the appellant.

 *Donald H.* *Layh*, *Q.C.*, and *Shawn M. Patenaude*, for the respondent.

 The judgment of the Court was delivered by

 Charron J. —

1. Overview

1. At issue in this appeal, as well as in its companion case, *Royal Bank of Canada v. Radius Credit Union Ltd.*, 2010 SCC 48, [2010] 3 S.C.R. 38, are competing security interests taken pursuant to the provisions of the *Bank Act*, S.C. 1991, c. 46, and Saskatchewan’s *The Personal Property Security Act, 1993*, S.S. 1993, c. P-6.2 (“*PPSA*”). In order to resolve the dispute, it is necessary to consider the interaction between the old and somewhat archaic *Bank Act* security scheme on the one hand and the modern provincial regime under the *PPSA* on the other. The *PPSA*, as well as other provincial personal property statutes in Canada, has radically changed the conception of security interests as they were understood at the time the *Bank Act* was enacted over a century ago. Conflicts arising from the interaction between the two regimes, not surprisingly, have been numerous and wide-ranging. Indeed, there appears to be a broad consensus that the difficulties are not entirely soluble without legislative reform. However, legislative action has not been forthcoming in this area. It therefore falls to this Court to decide the present cases and to provide some guidance in this muddled area of law.
2. In this case, the priority dispute is between a prior unregistered security interest taken under the *PPSA* in agricultural implements owned by the debtor at the time, and a subsequent security interest in the same collateral taken and registered under the *Bank Act*. In first instance, the applications judge held that because the Credit Union had not perfected its security interest through registration under the *PPSA*, the Bank’s security had priority. In his view, the priority rule specified by s. 428 of the *Bank Act*, which gives a *Bank Act* security interest priority over subsequently acquired rights in respect of the property, also gives the bank priority over subsequently acquired *priority* rights (2007 SKQB 471, 306 Sask. R. 227). The Court of Appeal for Saskatchewan allowed the appeal, finding that this reading of s. 428 cannot be supported. Rather, the proper interpretation of ss. 427(2) and 435(2) of the *Bank Act* leads to the application of provincial property law to determine the effect of a prior security interest. Here, the first-in-time *PPSA* security interest had priority over the *Bank Act* security because the Bank acquired no greater interest than the debtor himself had at the time the *Bank Act* security was taken. The Bank’s security interest was therefore subject to the Credit Union’s prior interest, regardless of the fact that the latter was unperfected (2009 SKCA 35, 324 Sask. R. 160).
3. On appeal before this Court, the Bank of Montreal argues that no proprietary interest in the collateral was conveyed to the Credit Union under its *PPSA* security agreement and that, consequently, it acquired an unencumbered interest in the debtor’s property at the time the *Bank Act* security was taken. Alternatively, it argues that the first-in-time principle should not apply to give priority to the first to execute a security agreement as banks have no way of discovering the existence of undisclosed and unregistered *PPSA* interests. As giving such interests priority over subsequent *Bank Act* interests would expose banks to unreasonable commercial risk, the rule should be modified so as to give priority to the first to register its security agreement.
4. In my view, the Bank’s contention that no interest affecting the debtor’s title was conveyed to the Credit Union under its prior, albeit unperfected, security agreement cannot be supported in law. The Court of Appeal was correct in its interpretation of the *Bank Act*. At the time that the Bank of Montreal took its *Bank Act* security, the debtor had already given the Credit Union a security interest in that collateral under the *PPSA*. As I will explain, the statutory interest acquired by the Credit Union is correlative to a proprietary right at common law and the Bank therefore took its security interest subject to it. The Bank’s argument that this interpretation leads to commercially absurd results echoes the numerous cries for legislative reform and is not without merit. However, in its current manifestation, I see no satisfactory interpretation of the existing statutory scheme that would permit the judicial creation of a first-to-register or, alternatively, a first-to-perfect, priority rule as proposed by the Bank.
5. I would dismiss the appeal.

2. The Facts and the Proceedings Below

1. James Buist, a Saskatchewan farmer, obtained a loan from Innovation Credit Union. In order to obtain this loan, he provided the Credit Union with a security interest governed by the *PPSA* in all of his present and after-acquired personal property pursuant to a security agreement dated October 7, 1991. The Credit Union did not register this security interest until June 28, 2004.
2. After the loans were provided by the Credit Union, the Bank of Montreal lent Buist money. In order to secure its loan, the Bank entered into security agreements with Buist between 1998 until January 2004, validly taking *Bank Act* security over much of the same property that the Credit Union had earlier taken a security interest in. Buist had not disclosed the existence of the loans from the Credit Union or the Credit Union’s security interest when he sought financing from the Bank. While the Bank performed searches of both the *PPSA* and *Bank Act* security registries, no prior security interests appeared in the course of that search, as the Credit Union’s security interest had not been registered.
3. Buist ultimately defaulted on his loans and, in December 2004, the Bank seized some of Buist’s property covered by its *Bank Act* security. The Credit Union brought an application before the Court of Queen’s Bench pursuant to s. 66 of the *PPSA* seeking a declaration that it had a priority claim over the proceeds of the disposition of that property.
4. The applications judge, Zarzeczny J., ruled in favour of the Bank of Montreal, holding that the unregistered *PPSA* interest was subordinate to the Bank’s *Bank Act* interest. Zarzeczny J. found that the priority rule specified by s. 428 of the *Bank Act* — which gives a *Bank Act* security interest priority over “all rights subsequently acquired in, on or in respect of that property” — also gives the bank priority over subsequently acquired priority rights. On this basis, Zarzeczny J. held that a security interest under the *PPSA* would only have priority over a subsequently taken *Bank Act* interest where the *PPSA* interest had been perfected prior to the bank taking its security interest under the *Bank Act*. Because the Credit Union obtained priority through registration only *after* the Bank had taken its *Bank Act* interest, Zarzeczny J. gave priority to the Bank under s. 428.
5. In addition to its being a reasonable interpretation of the text of the *Bank Act*, Zarzeczny J. viewed this interpretation as best promoting two policy goals reflected in the Act. First, it provides a means of achieving compatibility and resolving future conflicts between the *PPSA* and the *Bank Act*. Second, it promotes commercial and business lending efficacy and predictability.
6. The Saskatchewan Court of Appeal unanimously overturned Zarzeczny J.’s decision. Jackson J.A., writing for the court, conducted a thorough review of the jurisprudence, and ultimately decided that s. 428 of the *Bank Act* did not resolve the case, as Zarzeczny J. had concluded. Rather, she turned to ss. 427(2) and 435(2) of the *Bank Act* to resolve the dispute. Jackson J.A. held that under those provisions, when the Bank took its *Bank Act* security, it acquired only the right and title that the debtor had to give. At the time that the Bank of Montreal took its *Bank Act* security, the debtor had already given the Credit Union an interest in that collateral by granting it a *PPSA* security interest. The Bank’s interest in the collateral was therefore subject to the Credit Union’s prior interest and the Credit Union had priority over the proceeds.
7. The Bank of Montreal now appeals with leave to this Court.

3. Analysis

1. While the *Bank Act* and the *PPSA* both allow creditors to make secured loans by taking security interests in a debtor’s collateral, they have different historical origins and employ radically different conceptual frameworks. I will therefore briefly outline the history and structure of each of these statutory frameworks as a background for the discussion that follows.

3.1 *The Bank Act*

1. The statutory scheme currently grounded in s. 427 of the *Bank Act*, which allows federally regulated banks to take security interests in certain classes of debtors’ property for the purpose of taking collateral, has been a feature of the Canadian secured lending landscape in roughly its current form since the enactment in 1890 of s. 74 of *The Bank Act*, S.C. 1890, c. 31: see W. D. Moull, “Security Under Sections 177 and 178 of the Bank Act” (1986), 65 *Can. Bar Rev.* 242, at p. 243. For nearly a century prior to the enactment of statutes like Saskatchewan’s *PPSA*, the *Bank Act* afforded federally regulated banks a mechanism of providing secured loans to borrowers, which was undoubtedly superior to the mechanisms for taking security which existed at that time at common law and equity. This in turn had the effect of greatly facilitating the making of loans to Canadian businesses in need of capital. Indeed, as Justice La Forest remarked in *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121, at p. 140, what is now the s. 427 security interest has “played a primordial role in facilitating access to capital by several groups that play a key role in the national economy”.
2. The general structure of the regime governing *Bank Act* security can be summarized as follows. Section 427(1) authorizes banks to lend money to a variety of borrowers for a range of purposes and to take security in specified classes of property when making such loans. Section 427(2) states that the bank acquires certain rights and powers in the property upon the delivery of a document giving security to the bank in respect of that property. More specifically as it relates to this appeal, s. 427(2)(*c*) grants the bank taking a *Bank Act* security “the same rights and powers as if the bank had acquired a warehouse receipt or bill of lading in which that property was described”; in turn, s. 435(2) specifies that the effect of acquiring a warehouse receipt or bill of lading is to vest in the bank all the right and title of the owner of the goods. As we shall see, ss. 427(2)(*c*) and 435(2) are of critical importance on the issue that occupies us as, by their terms, the bank can acquire no greater interest in the collateral than the debtor himself has at the relevant time. Section 427(4) then states that unless the bank registers a notice of intention with the appropriate authority, its security interest will be void as against third parties. Finally, s. 427(3) provides the bank with an efficient mechanism of accessing its collateral by allowing the bank to seize property in the event of the debtor’s non-payment of a loan to the bank.
3. The *Bank Act* contains relatively few provisions which explicitly address whether a *Bank Act* security has priority over other interests in the same property. On the question that occupies us, it is particularly noteworthy that while s. 428 expressly gives a *Bank Act* security interest priority over “all rights subsequently acquired in, on or in respect of that property”, the *Bank Act* is silent with respect to conflicting third party interests acquired *prior* to the attachment of the bank’s security in the collateral. In the result, the *Bank Act* leaves most priority disputes to be resolved by considering whether, on the basis of applicable principles of property law, the proprietary rights granted to the bank under s. 427(2) have precedence over the competing proprietary interests. On this basis, the *Bank Act* can be characterized as a property-based security regime. This approach stands in stark contrast with modern provincial personal property security statutes such as the *PPSA*, to which I now turn.

3.2 *The Personal Property Security Act*

1. Although of recent origin, provincial personal property security statutes provide the dominant legal framework for secured lending throughout Canada. Based in part on Article 9 of the American *Uniform Commercial Code* (2000 rev.), every territory and common law province has now adopted its own personal property security act (“*PPSA*”), beginning with Ontario in 1967, *Personal Property Security Act, 1967*, S.O. 1967, c. 73. Quebec has its own civil law regime which has also undergone relatively recent changes with the proclamation of the new *Civil Code of Québec*, S.Q. 1991, c. 64, in 1994 (now R.S.Q., c. C-1991). While different jurisdictions adopting their own *PPSA*s have modified certain provisions of the statute in order to tailor the Act to respond to particular circumstances or meet specific objectives, the broad structure of these statutes is essentially the same in each enacting jurisdiction. Saskatchewan first enacted such a statute in 1980 with *The Personal Property Security Act*, S.S. 1979-80, c. P-6.1. This earlier statute was repealed with the enactment of *The* *Personal Property Security Act, 1993*, s. 72 with which we are concerned in the present case.
2. The Saskatchewan *PPSA*, like all other provincial personal property security statutes, has greatly clarified, simplified, and rationalized the law of secured lending in personal property by essentially rendering irrelevant the distinctions between the wide variety of instruments which existed at common law and in equity for taking security interests in another person’s personal property. It does so by employing a functional approach to determining what security interests are covered by its provisions. Section 3(1)(a) of the *PPSA* stipulates that the Act applies “to every transaction that in substance creates a security interest, without regard to its form and without regard to the person who has title to the collateral”. “Security interest” is in turn defined at s. 2(1)(qq) to include “an interest in personal property that secures payment or performance of an obligation”, subject to certain exceptions which are not relevant here. These provisions have the effect of extending the provisions of the *PPSA* to almost anything which serves the function of a security interest.
3. Contemporary personal property security statutes, such as the Saskatchewan *PPSA* at issue here, also employ a conceptual framework which is radically different from that employed by the *Bank Act* and common law mechanisms of secured lending. In contrast with the property-based regime in the *Bank Act*, contemporary personal property security statutes have followed what can be characterized as a priority-based approach. The *PPSA* 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. Rather, for those interests that come within the scope of the Act, the *PPSA* provides a compendium of rules establishing priority rankings both as between different security interests as well as between security interests and other interests in the collateral, with no regard to the question of who actually has title to the collateral.
4. A security interest under the *PPSA* is also enforceable against a third party. Section 10 specifies the criteria that must be met for a security interest to be enforceable against third parties in respect of the property. In a case such as this one where the collateral is tangible equipment, the principal requirement pursuant to s. 10(1)(d) is that there must be a signed security agreement that contains a description of the collateral. One of the central concepts in the *PPSA*, is the idea of attachment. As between competing security interests under the *PPSA*, attachment is of central importance since it defines when the creditor acquires an interest in specified property. In cases where the debtor owns the property at the time of execution of the security agreement, the creditor obtains a security interest in the property upon extending or promising to extend credit to the debtor, unless the parties have agreed to postpone the time of attachment. More precisely, s. 12 of the *PPSA* provides that a security interest attaches to property when:

**12.** (1) . . .

(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 within the meaning of section 10;

unless the parties have specifically agreed to postpone the time of attachment, in which case it attaches at the time specified in the agreement.

1. A security interest that is attached to property will be either unperfected or perfected. Like attachment, perfection is also a concept central to the *PPSA*. The significance of perfection in the *PPSA* scheme is that a perfected security interest generally takes priority over an unperfected security interest: s. 35(1)(b). Indeed, subject to certain exceptions, the security interest in collateral that is perfected first in time generally gives the secured creditor the strongest possible claim a secured creditor can have under the *PPSA*. While there are myriad mechanisms for perfecting security interests that need not be discussed in any detail here, it suffices to note that the registration of a financing statement is one of the most important mechanisms of perfecting a security interest: s. 25. Unlike the *Bank Act*, however, the *PPSA* does not void a secured creditor’s rights *vis-à-vis* third parties if the security interest is not registered.
2. The *PPSA* provides a detailed set of rules for resolving priority disputes between competing security interests; perfection and various temporal priority rules generally serve as the default priority rules where there is no more specific rule that governs in a particular circumstance: s. 35(1). While having a security interest gives the secured creditor an interest which is enforceable both as against the debtor and against third parties, the *PPSA* recognizes other stakeholders’ interests in collateral by subordinating secured creditors’ interests to third parties’ interests in various circumstances. For example, unperfected secured interests are subordinated to the interests of a trustee in bankruptcy and in certain circumstances to transferees for value without notice: ss. 20(2) and (3). Thus, within the domain of application of the Act, the *PPSA* provides a complete set of priority rules for ranking the interests of both creditors and third parties in particular property.
3. The *PPSA* is not, however, a fully comprehensive code. Section 4 of the *PPSA* lists a number of interests to which the *PPSA* does not apply. Of relevance to this case is s. 4(k) which provides that the Act does not apply to “a security agreement governed by an Act of the Parliament of Canada . . . including an agreement governed by sections 425 to 436 of the *Bank Act*”. More will be said later about this provision.

3.3 *The Troubled Relationship Between the Bank Act and the PPSA*

1. The scheme governing *Bank Act* security interests has not been without its critics, with commentators highlighting in particular the lack of a coherent interface between the archaic concepts underlying the *Bank Act* and the modern principles embodied in the provincial personal property security statutes: see e.g. M.‑A. Poirier, “Analysis of the Interaction between Security under Section 427 of the Bank Act and Provincial Law: A Bijural Perspective” (2003), 63 *R. du B.* 289, at pp. 395-400; Law Reform Commission of Saskatchewan, *Tentative Proposals for a New Personal Property Security Act* (1990); R. C. C. Cuming, “Case Comment: *Innovation Credit Union v. Bank of Montreal* —Interface between the *PPSA* and Section 427 of the *Bank Act*:Desirable Policy vs. Hard Legal Analysis” (2008), 71 *Sask. L. Rev.* 143.
2. Indeed, there appears to be a broad consensus as to the need to reform the scheme so as to harmonize it with the provincial *PPSA* regimes, and some commentators have gone so far as to suggest its total repeal, arguing that such a scheme is unnecessary in light of contemporary personal property security statutes in the provinces: see J. S. Ziegel, “Interaction of Personal Property Security Legislation and Security Interests Under the Bank Act” (1986-87), 12 *Can. Bus. L.J.* 73, at pp. 91-95; Uniform Law Conference of Canada, *Uniform Law Conference of Canada —* *Commercial Law Strategy* (loose-leaf); Law Commission of Canada, *Modernizing Canada’s Secured Transactions Law: The Bank Act Security Provisions* (2004), at pp. 26-30.
3. There is no question that the provisions relating to *Bank Act* security interests have given rise to interpretive difficulties, this appeal and its companion case being examples. However, the *Bank Act* remains an integral part of the Canadian landscape of secured lending, and courts are bound to resolve these difficulties as best as can be done on the basis of the modern approach to statutory interpretation and in light of applicable constitutional principles: see *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26.

3.4 *Resolving Priority Disputes Between the Bank Act and the PPSA*

1. The Saskatchewan Court of Appeal in *Royal Bank of Canada v. Agricultural Credit Corp. of Saskatchewan* (1994), 115 D.L.R. (4th) 569, at pp. 586‑87, formulated three basic rules for resolving priority issues of this sort: “(1) set aside the PPSA from the analysis and determine the priority as if the PPSA did not exist; (2) determine the priority pursuant to [applicable provisions of the *Bank Act*] to the extent it is possible to do so; (3) where appropriate, apply the first-in-time priority rule”. This framework of analysis was approved and applied by the Court of Appeal in this case. While this approach did not lead the Court of Appeal into error in deciding this case, it is important to note that, strictly interpreted, this formulation does not accurately reflect the applicable constitutional principles at play. It is correct to say, as directed under step (2), that the focal point for resolving a priority dispute involving a *Bank Act* security and provincial interests, such as *PPSA* security interests, is the *Bank Act* itself: *Landry Pulpwood Co. v. Banque Canadienne Nationale*, [1927] S.C.R. 605, at p. 615. The *PPSA* should not be set aside in all respects, however, as step (1) above might be read to suggest. Rather, step (1) means simply that the internal priority rules of the *PPSA* have no bearing on determining a priority dispute between *Bank Act* and *PPSA* security interests. However, the *PPSA* retains importance in resolving the priority dispute at issue here. I will explain.
2. As the Court held in *Hall*, the *Bank Act* security provisions are valid federal legislation which cannot be subject to the operation of provincially enacted priority provisions (*Hall*, at pp. 154-55). Because provinces cannot enact provisions that would affect the priority of a validly created federal security interest, the conceptual framework for resolving disputes between *PPSA* security interests and *Bank Act* security interests is necessarily that supplied by the *Bank Act*.
3. Thus, where the *Bank Act* contains an express priority provision that is applicable to a particular priority dispute, that provision will govern. For example, s. 428(1) provides that a *Bank Act* security interest has priority over rights subsequently acquired in the property, as well as priority over unpaid vendors. In such cases, s. 428(1) usually provides the total answer and the analysis can end there. Where the priority dispute is between a *Bank Act* security interest and a conflicting interest acquired *prior* to the bank’s taking its security in the collateral, there is no specific priority provision in the *Bank Act*. In such cases, the provisions of the *Bank Act* nonetheless govern. These priority disputes are resolved by determining what proprietary rights were granted to the bank under s. 427(2) of the *Bank Act*. As noted earlier and explained more fully below, the combined effect of ss. 427(2) and 435(2) is that the bank can acquire no greater interest in the collateral than the debtor has at the relevant time.
4. In determining what interest the debtor may have already conveyed to another creditor and, in such circumstances, what interest he or she had left to convey to the bank at the time of execution of the *Bank Act* security agreement, it becomes necessary to resort to the provincial property law, either at common law or under applicable provincial statutes. It is at this point that resorting to the *PPSA* becomes relevant. 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. Far from being irrelevant under the *Bank Act*, provincial property law plays a complementary role in defining the rights granted under the *Bank Act*: see *Agricultural Credit Corp.*; R. C. C. Cuming and R. J. Wood, “Compatibility of Federal and Provincial Personal Property Security Law” (1986), 65 *Can. Bar Rev.* 267, at p. 274; R. C. C. Cuming, C. Walsh and R. J. Wood, *Personal Property Security Law* (2005), at p. 589.
5. While the provinces cannot legislate in order to oust the bank’s rights, they can alter the law as it relates to property and civil rights in the province. This is what the common law provinces did when they enacted the *PPSA*s, and what Quebec did in 1994 when it adopted the *Civil Code* *of Québec*, Book Six. Just as the prior rules of the *Civil Code of Lower* *Canada* relating to security interests no longer apply, the prior rules of the common law have been significantly altered by statute. Thus, in determining the nature of any competing provincial security interest, resort has to be made to the relevant provincial statute and the *Bank Act* has to be read in harmony with it. This approach is reflected in the preamble to the *Federal Law*—*Civil Law Harmonization Act,* *No. 1*, S.C. 2001, c. 4 (“*Harmonization Act*”):

WHEREAS the harmonious interaction of federal legislation and provincial legislation is essential and lies in an interpretation of federal legislation that is compatible with the common law or civil law traditions, as the case may be;

. . .

WHEREAS the provincial law, in relation to property and civil rights, is the law that completes federal legislation when applied in a province, unless otherwise provided by law;

Section 8.1 of the *Interpretation Act*, R.S.C. 1985, c. I-21, as amended by s. 8 of the *Harmonization Act* specifically provides for the application of the “rules, principles and concepts in force in the province at the time the enactment is being applied”.

1. Indeed, the relationship between the *Bank Act* and provincial property law is in many ways analogous to the way in which this Court in *Giffen (Re)*, [1998] 1 S.C.R. 91, at para. 64, characterized the relationship between federal bankruptcy law and provincial law:

Even though bankruptcy is clearly a federal matter, and even though it has been established that the federal Parliament alone can determine distribution priorities, the [*Bankruptcy and Insolvency Act*] is dependent on provincial property and civil rights legislation in order to inform the terms of the *BIA* and the rights of the parties involved in the bankruptcy.

In much the same way, the *Bank Act* is dependent on provincial property law in order to give content to its provisions and to identify precisely the rights of the parties in a priority dispute involving *Bank Act* security.

4. Application to This Case

1. Nothing turns on the particular wording of the respective security agreements in this appeal and it is therefore not necessary to set out the relevant parts of each security agreement. It suffices to say that it is common ground between the parties that the Credit Union obtained from Buist a valid *PPSA* security interest that attached to the collateral in question on October 7, 1991, therefore at a time *prior* to the Bank acquiring its security interest under the *Bank Act*. The applications judge nonetheless reasoned that because the Credit Union took priority through perfection only years later after the Bank took its *Bank Act* interest, s. 428(1) of the *Bank Act* gave the Bank priority over the Credit Union’s subsequently acquired priority rights. He therefore concluded that s. 428(1) was determinative of the priority dispute.
2. I agree with the Court of Appeal that the approach adopted by the applications judge cannot be supported. First, his conclusion that s. 428(1) was determinative of the priority issue ignores the fact that the Credit Union had an existing valid security interest in the collateral, albeit unperfected at the time the Bank acquired its interest. On the question whether the Bank’s security interest has priority over this *prior* unperfected *PPSA* interest, it is clear that s. 428(1) has no application. Second, the applications judge may be correct in holding that s. 428(1) would give the Bank priority over any *additional* rights that the Credit Union might have acquired through perfection. Under the *PPSA*, however, the time of perfection or the lack of perfection does not determine the nature or validity of the interest. Rather, the concept of perfection plays a role in determining which of two or more competing security interests takes priority *under the PPSA*. This priority scheme cannot be invoked to resolve the dispute in this appeal. This dispute must be resolved by examining what rights were acquired by the Bank when it took its security interest and determining whether those rights were subject to the Credit Union’s prior *PPSA* interest. This requires a more detailed examination of the nature of the Bank’s security interest under s. 427(2) of the *Bank Act*.

4.1 *The Nature of the Security Interest Conveyed Under the Bank Act*

1. Section 427(2) specifies what rights and powers are conveyed to the bank when it takes a security interest under the *Bank Act* as follows:

**427.** . . .

(2) Delivery of a document giving security on property to a bank under the authority of this section vests in the bank in respect of the property therein described

(*a*) of which the person giving security is the owner at the time of the delivery of the document, or

(*b*) of which that person becomes the owner at any time thereafter before the release of the security by the bank, whether or not the property is in existence at the time of the delivery,

the following rights and powers, namely, . . . .

1. The “rights and powers” which vest in the bank are then defined differently depending on the nature of the collateral. When acquiring a security interest in the types of property listed in s. 427(2)(*c*), the bank acquires “the same rights and powers as if the bank had acquired a warehouse receipt or bill of lading in which that property was described”. When taking a security interest in the types of property listed in s. 427(2)(*d*), the bank acquires, in addition to the rights granted to it under s. 427(2)(*c*), “a first and preferential lien and claim thereon for the sum secured and interest thereon”. For the purposes of the present case, it is not necessary to decide what rights a bank acquires when it receives a “first and preferential lien”, as none of the collateral in dispute in this case is covered by s. 427(2)(*d*). It all consists of “agricultural implements” as defined in s. 425(1) of the *Bank Act*, which in turn falls within the scope of s. 427(2)(*c*). By contrast, collateral that consists of “agricultural equipment”, which by definition under s. 425(1) is “usually affixed to real property”, falls within the scope of s. 427(2)(*d*). Based on the record, it would appear that none of the collateral seized by the Bank is of a kind that is “usually affixed to real property”. In any event, I would agree with the Court of Appeal that the reference to the creation of a first and preferential lien does not increase the priority position of a bank. Jackson J.A. explained as follows, at para. 42:

The reference to the creation of a “first and preferential lien” does not increase the priority position of a bank vis-à-vis another secured creditor of personal property for this reason: it is contrary to the other, explicit priority rules contained in the *Bank Act*. Thus, this aspect of s. 427(2) has been interpreted, not as a priority rule per se, but as a statement of the nature of the interest acquired, and for the purposes of addressing conflicts between a bank and the holder of an underlying interest in real property upon which agricultural equipment or crops are affixed, for example.

(See Moull, at pp. 252-53; Poirier, at p. 314.)

1. The question then becomes one of identifying what rights a bank acquires when it receives “the same rights and powers as if the bank had acquired a warehouse receipt or bill of lading in which that property was described”. This question is answered by s. 435(2) of the *Bank Act*, which specifies that the effect of a warehouse receipt or bill of lading is to give the bank all the right and title of the owner of the goods. It provides as follows:

**435.** . . .

(2) Any warehouse receipt or bill of lading acquired by a bank under subsection (1) vests in the bank, from the date of the acquisition thereof,

(*a*) all the right and title to the warehouse receipt or bill of lading and to the goods, wares and merchandise covered thereby of the previous holder or owner thereof; and

(*b*) all the right and title to the goods, wares and merchandise mentioned therein of the person from whom the goods, wares and merchandise were received or acquired by the bank, if the warehouse receipt or bill of lading is made directly in favour of the bank, instead of to the previous holder or owner of the goods, wares and merchandise.

1. The precise nature of the rights and powers vested in the bank under these provisions was the object of some debate. This debate was settled by this Court in *Hall*. La Forest J., writing for the Court, described the combined effect of these provisions as follows:

The nature of the rights and powers vested in the bank by the delivery of the document giving the security interest has been the object of some debate. . . . I find the most precise description of this interest to be that given by Professor Moull in his article “Security Under Sections 177 and 178 of the Bank Act” (1986), 65 *Can. Bar Rev.* 242, at p. 251. Professor Moull, correctly in my view, stresses that the effect of the interest is to vest title to the property in question in the bank when the security interest is taken out. [Emphasis added; pp. 133-34.]

La Forest J. adopted the following explanation by Professor Moull, at p. 251:

The result, then, is that a bank taking security under section 178 effectively acquires legal title to the borrower’s interest in the present and after-acquired property assigned to it by the borrower. The bank’s interest attaches to the assigned property when the security is given or the property is acquired by the borrower and remains attached until released by the bank, despite changes in the attributes or composition of the assigned property. The borrower retains an equitable right of redemption, of course, but the bank effectively acquires legal title to whatever rights the borrower holds in the assigned property from time to time. [Emphasis added.]

1. In this appeal, the debtor owned the collateral in question at the time he gave the Bank its security interest and there is no issue that the Bank acquired the debtor’s interest in the property and that its interest vested at the time the security agreement was executed. The question of what interest the bank acquires at the time of delivery of the security document in respect of any assigned after-acquired property is discussed in the companion case.
2. As the Bank effectively acquired legal title to whatever rights the debtor held in the assigned property, it becomes necessary to determine the nature of the debtor’s proprietary interest in the collateral at the time that the Bank took its security interest under s. 427. Buist owned the property, but he had already given the Credit Union a *PPSA* security interest in the collateral in question. He could not convey to the Bank any greater interest than what he himself had left in the property. The question becomes: What is the nature of the interest already conveyed to the Credit Union by Buist under the *PPSA*?

4.2 *The Nature of the PPSA Security Interest*

1. The *PPSA* does not contain any provisions which identify the nature of a *PPSA* security interest in proprietary terms. This is because, as discussed above, for those interests to which the *PPSA* applies, the *PPSA* resolves priority disputes through a detailed set of priority rules rather than on the basis of title or the form of a transaction. However, because the *PPSA*’s internal provisions do not apply to *Bank Act* security, and because the security regime contained in the *Bank Act* is property-based, it is necessary for the purposes of deciding the priority dispute in this case to characterize the *PPSA* security interest as a matter of property law: see Cuming and Wood, at p. 274.
2. Two characteristics of the *PPSA* are relevant for the present case. First, it is clear that *PPSA* security interest, just as the *Bank Act* security interest, is a statutorily created interest and, as such, an interest recognized at law. While some of the historical forms of security created equitable rather than legal interests, the effect of the *PPSA*’s functional approach, which covers all of these antecedent security interests, is to treat them all equally as “security interests” under the *PPSA*. This conclusion is also the consensus found in the academic commentary, and I see no reason to depart from it: see Cuming and Wood, at p. 275; Poirier, at p. 360.
3. Second, it is clear that having a *PPSA* security interest in collateral does not give a creditor full right and title to the collateral. Rather, a *PPSA* security interest gives the secured creditor an interest in the property to the extent of the debtor’s obligation. Upon the debtor’s default, the secured creditor has no interest in the collateral beyond the satisfaction of the debtor’s obligation as well as reasonable costs of seizing and disposing of the collateral to satisfy the obligation: ss. 59 and 60.
4. The Bank’s argument, as I understand it, respecting the nature of the interest conveyed to the Credit Union under the *PPSA* and the consequential effect of that conveyance on Buist’s interest as owner appears to be twofold. First, the Bank argues that because the *PPSA* secured creditor does not acquire the debtor’s right and title to the collateral, Buist’s interest as owner is not lost as a result of his grant of a security interest and that he thus remains free to convey that full interest to the Bank under s. 427 of the *Bank Act*. As the Bank puts it in its factum: “A debtor retains the right and title to the goods, but encumbers the collateral by the grant of a security interest. The security interest clogs or encumbers the right and title but does not convey the debtor’s right and title” (para. 49). Second, the Bank acknowledges that “[t]his is not to suggest that the grant of a security interest does not affect a debtor’s right and title nor is it to suggest that the grant of a security interest would be of no consequence and no binding affect [*sic*] upon a bank taking *Bank Act* security.” The Bank urges the Court to find that the impact and sustainability of the *PPSA* security interest *vis-à-vis* the bank that acquires a *Bank Act* security falls to be determined on the basis of a first-in-time-to-register principle (Factum, para. 53).
5. I will deal firstly with the Bank’s contention that no proprietary interest was conveyed to the Credit Union under its prior security agreement because the agreement was not registered. I cannot accept this contention. The notion that no proprietary interest is conveyed until some later event occurs (i.e. registration), thereby allowing intervening interests to attach and take priority until such event occurs, would effectively characterize the *PPSA* security interest as analogous to a type of floating charge, an argument which was rejected by this Court in *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411. I will review the relevant findings of the Court in that case.
6. In *Sparrow Electric*, the Royal Bank secured a loan made to Sparrow Electric with a general security agreement under the Alberta *Personal Property Security Act*, S.A. 1988, c. P-4.05 (“Alberta *PPSA*”), covering Sparrow’s present and after-acquired property and with *Bank Act* security created by an assignment of inventory under s. 427 of the *Bank Act* over the same collateral. A question arose whether the Royal Bank’s security interests took priority over a deemed statutory trust which had subsequently attached to moneys deducted by Sparrow from wages but not remitted to the Crown. Much of the Court’s analysis is not of relevance to this appeal; in particular, the discussion about the nature of the competing Crown interest and the effect of a licence agreement entered into by the parties (which was the question over which the Court ultimately divided) need not be reviewed here. *Sparrow Electric* is of interest, however, because in resolving the priority dispute, it became necessary for the Court to determine the nature of both the Royal Bank’s security interest under the *Bank Act* and the nature of its security interest under the Alberta statute. There was much debate at the time as to whether the Bank’s security interest under each statute should be characterized as either a floating, or a fixed and specific charge. Gonthier J. (dissenting, but not on this point) explained the significance of the distinction between a fixed and a floating charge as follows (at para. 46):

The critical significance of the characterization of an interest as being fixed or floating, of course, is that it describes the extent to which a creditor can be said to have a proprietary interest in the collateral. In particular, during the period in which a charge over inventory is floating, the creditor possesses no legal title to that collateral. For this reason, if a statutory trust or lien attaches during this time, it will attach to the debtor’s interest and take priority over a subsequently crystallized floating charge. However, if a security interest can be characterized as a fixed and specific charge, it will take priority over a subsequent statutory lien or charge; in such a case, all that the lien can attach to is the debtor’s equity of redemption in the collateral . . . . [Emphasis added.]

1. As we can see, the Bank’s contention in this appeal that the *PPSA* creditor acquired no interest that would affect the title to the collateral echoes the argument made in *Sparrow Electric*. In *Sparrow Electric*, it was argued that the security interest did not “crystallize” until such time as the debtor acquired the property. Much in the same way, it is argued here that the creditor under the *PPSA* did not obtain an interest that affected the title to the collateral until such time as registration later occurred. The Court unequivocally rejected any notion that the *PPSA* security interest taken by the Royal Bank under the Alberta *PPSA* only crystallized upon the happening of a future event. After reviewing the relevant case law and academic commentaries, Gonthier J. concluded that the general security agreement taken under the Alberta *PPSA* could only be characterized as a fixed charge. (As we shall see in the companion appeal, the Court reached the same conclusion in respect of the *Bank Act*’s security interest over both present and after-acquired property.) He found support in this conclusion from the fact that the academic literature was unanimous that *PPSA* legislation treats *all* charges, including floating securities, as fixed charges. The *PPSA* security interest over all present and future inventory of the debtor was described as “correlative to the notion of a creditor’s having legal proprietary rights in the collateral” (para. 60), a right which “represents a proprietary interest over a dynamic collective of present and future assets” (para. 63 (emphasis added; emphasis in original deleted)). He further commented on how this legislative creation of a fixed charge over both present *and future* assets challenged our traditional conception of a fixed charge. The peculiar nature of a *PPSA* security interest over after-acquired property is discussed further in the companion *Royal Bank* appeal.
2. In my view, it is not open to the Bank in this appeal to now argue that the statutory interest conveyed to the Credit Union is not analogous to a proprietary right. At the time Buist gave the Bank of Montreal its *Bank Act* security interest, Innovation Credit Union already held a valid security interest in the nature of a fixed charge. This means that any subsequent interest could only be taken in respect of Buist’s equity of redemption in the property.
3. Nor can I accept the argument that the lack of perfection affects this characterization. Under the *PPSA*, the time of perfection, or the lack of perfection, determines which of two or more competing security interests takes priority. It does not determine the nature or validity of the interest. With the introduction of the *PPSA*, the legislation no longer declares unregistered interests void. Section 10 of the *PPSA* specifies what criteria must be met for a security interest to be enforceable against third parties. As the Bank acknowledges at para. 22 of its factum: “The principal requirement in a situation such as this, where the collateral is tangible equipment, is that pursuant to s. 10(1)(d) there must be a signed security agreement that contains a description of the collateral.” It is not disputed that this requirement is met in this case.
4. I now turn to the Bank’s submission that the dispute should be resolved according to a first-to-register priority rule.

4.3 *Resolving the Priority Dispute*

1. As determined above, this dispute is between two competing valid legal interests in the same collateral. Under the common law, a priority dispute between two legal interests in the same property is determined in accordance with the maxim *nemo dat quod non habet*: see B. Ziff, *Principles of Property Law* (4th ed. 2006), at pp. 432-34. Simply put, under this rule where A conveys legal title to property first to B and subsequently to C, legal title vests in B. Since A no longer has legal title to give to C, A cannot transfer title to C. Thus, as between two competing legal interests in property, the *nemo dat* rule gives priority to the first party to take a legal interest in the property. The application of the common law rule to the present case grants priority to Innovation Credit Union’s interest. As we have seen, the *Bank Act* establishes a property-based security scheme under which, by the combined effect of ss. 427(2) and 435(2), the Bank can receive no greater interest in the property than the debtor has. As such, these provisions operate in the same way as the common law *nemo dat* rule. At the time the Bank took its *Bank Act* security interest, the Credit Union already held a statutory interest in the same collateral which, in proprietary terms, is correlative to a fixed charge. Therefore, the Bank could only take its interest subject to this prior interest.
2. The Bank of Montreal submits that the *nemo dat* rule should not be applied in the circumstances of this case, as it leads to commercially unreasonable results. As banks taking *Bank Act* security have no way of discovering the existence of undisclosed and unregistered *PPSA* interests, giving such interests priority over subsequent *Bank Act* interests would expose banks to unreasonable commercial risk. The Bank therefore urges the Court to adopt a rule that would give priority to the party that is first in time to *register* its interest.
3. The Bank’s argument echoes the cry by many commentators for legislative reform. Of course, it would be open to Parliament to amend the *Bank Act* and to add expressly a priority rule which would subordinate a prior unperfected *PPSA* interest to a subsequent *Bank Act* interest. However, such a rule can only be judicially created if it is not contrary to the provisions of the *Bank Act* in its existing manifestation. In my view, the adoption of a first-to-register rule would run contrary to ss. 427(2) and 435(2). The failure to register does not take anything away from the nature and validity of the Credit Union’s prior interest. As Professors Cuming, Walsh, and Wood note, at p. 590 of their text, *Personal Property Security Law*, the property-based framework employed by the *Bank Act* does not reasonably allow for a distinction to be made between perfected and unperfected *PPSA* interests, nor is there any priority rule which specifically creates a distinction in treatment:

The effect of [s. 427(2)] is that a bank takes the debtor’s property subject to any pre-existing interest held by a third party. This means that a prior PPSA security interest will have priority over a subsequent *Bank Act* security. This holds true even if the prior PPSA security interest was not perfected. There is nothing in the *Bank Act* that subordinates a prior PPSA security interest for lack of perfection.

1. Thus, the Court cannot override the provisions of the *Bank Act*. For this reason alone, the Bank’s plea for a first-to-register rule cannot be accepted. However, a first-to-register rule gives rise to further difficulties.
2. A first-to-register rule rests on a notion that registration constitutes “notice to all”, a concept which has been abolished under the *PPSA*. As Jackson J.A. explained at para. 31:

Registration, in the context of the *PPSA*, does not serve this purpose. While its incidental purpose is to permit prospective creditors to search debtor names, and certain types of personal property by virtue of serial numbers, the fundamental effect of registration is to establish priorities by virtue of the time of registration, and for the purposes of the *PPSA* only. Registration no longer constitutes actual or constructive notice in the context of the *PPSA*. Section 47 of the *PPSA* abolishes that concept.

1. I agree that any notion that registration constitutes notice to all runs contrary to the express language of s. 47 of the *PPSA*. It provides as follows: “Registration of a financing statement in the registry is not constructive notice or knowledge of its existence or contents to any person.” There is no requirement to file the underlying security documentation under the *PPSA* or to submit it for scrutiny. Indeed, s. 25 of the *PPSA* allows for advance registration of a financing statement before a security agreement is entered into. Thus, the existence of a registered financing statement does not mean that a *PPSA* security interest necessarily exists. It only provides notice that one may exist or may be acquired in the future. As such, the notice registration adopted under the *PPSA* differs from the pre-*PPSA* registries or other title registers which provide *prima facie* proof of the security interest.
2. It may be argued that this feature of the *PPSA* would not create insurmountable problems in applying a first-to-register rule, as s. 18 of the *PPSA* empowers certain persons, including creditors, to require the secured creditor to provide a copy of the security agreement and information on the current status of the financing. However, the existence of these disclosure provisions does not address the further difficulty arising from the fact that it is the notion of *perfection* that is central to the *PPSA* priority scheme, not registration. Although registration is an important mechanism for perfecting a security interest, it is far from the only mechanism. Therefore, if the proposed first-to-register rule is intended to establish a priority rule over all *unperfected PPSA* security interests, it misses the mark, as some unregistered *PPSA* interests will be nonetheless perfected. The adoption of a first-to-*perfect* rule instead might resolve this particular difficulty but, in order to resolve the dispute on that basis, it would be necessary to resort to the entire *PPSA* perfection scheme. No one contends that the internal *PPSA* priority rules can be invoked to resolve the dispute. The reasons why that cannot be done are plain to see.
3. Consider how a first-to-*register* rule would operate to resolve a dispute between a prior provincial security interest and a subsequent *Bank Act* interest. Under one scenario, the prior provincial security interest would take precedence because it was registered first under the *PPSA*. The problem here is that it is not open to the province to impair the rights granted to the bank under the *Bank Act*. Therefore, if the provincial interest is to take precedence on the basis of registration or other form of perfection, it cannot be because of some provincially legislated priority rule. Under the second scenario, the *Bank Act* security interest would take precedence over the prior provincial interest because it was first registered under the *Bank Act*. In essence, this is the approach adopted by the applications judge in this case. As explained earlier, such an approach ignores the effect of ss. 427(2) and 435(2) of the *Bank Act*.
4. Finally, while it is open to the province to recognize *Bank Act* security interests as falling within the scope of the *PPSA* and to allow for registration of such interests under the provincial scheme, Saskatchewan has not done so. To the contrary, it has expressly excluded *Bank Act* security interests from the scope of its legislation. Section 4(k) of the *PPSA* provides as follows:

**4** Except as otherwise provided in this Act or the regulations, this Act does not apply to:

. . .

(k) a security agreement governed by an Act of the Parliament of Canada that deals with the rights of parties to the agreement or the rights of third parties affected by a security interest created by the agreement, including an agreement governed by sections 425 to 436 of the *Bank Act* (Canada).

1. As explained by Jackson J.A. in the court below, this provision was enacted in 1993 in order to prevent banks from registering their *Bank Act* security interests under the *PPSA*, thereby getting the benefit of the provincial statute without being bound by it. In my view, the adoption of a first-to-register rule which would give priority to the *Bank Act* security interest over a prior unregistered *PPSA* interest would effectively permit the Bank to take the benefit of the *PPSA* priority rules contrary to the manifest intention of the Saskatchewan legislature.
2. In its current manifestation, I see no satisfactory interpretation of the existing statutory schemes that would permit the judicial creation of a first-to-register or first-to-perfect priority rule as proposed by the Bank. Such a rule would have to be enacted by Parliament, if it saw fit to do so.
3. The Bank presents one additional argument based, not on the interpretation of the *Bank Act*, but on the combined effect of ss. 4(k) and 20(3) of the *PPSA*. I turn to this alternative argument.

4.4 *Section 20(3) of the PPSA*

1. The Bank of Montreal advanced an alternative argument for the first time in its factum before this Court. Specifically, it argues that, on the facts of the present case, s. 20(3) of the *PPSA* has the effect of subordinating an unperfected security interest to a *Bank Act* security interest.
2. As mentioned earlier, the *PPSA* recognizes other stakeholders’ interests in collateral by subordinating secured creditors’ interests to certain third parties’ interests. Section 20(3) is one such rule which, under certain circumstances, subordinates the rights of the holder of an unperfected *PPSA* interest to third parties who acquire the collateral for value without notice. The *PPSA* at the time read as follows:

**20** . . .

(3) A security interest in goods, chattel paper, a document of title, an instrument, an intangible or money is subordinate to the interest of a transferee who:

 (a) acquires the interest pursuant to a transaction that is not a security agreement;

 (b) gives value; and

 (c) acquires the interest without knowledge of the security interest before the security interest is perfected.

1. The Bank submits that ss. 20(3)(b) and (c) are clearly satisfied, as the granting of the loan constituted the giving of value, and it took the *Bank Act* interest without knowledge of the Credit Union’s prior security interest. So far, I agree.
2. As the Bank recognizes, the most significant hurdle preventing it from taking advantage of this provision is s. 20(3)(a), which requires that the Bank have acquired its “interest pursuant to a transaction that is not a security agreement”. Under the definitions of “security agreement” and “security interest” in the *PPSA*, an agreement creating a *Bank Act* security would clearly fall within the definition of a “security agreement”: ss. 2(1)(pp) and (qq). However, the Bank of Montreal argues that the effect of s. 4(k) of the *PPSA* which, as we have seen, specifies that the *PPSA* is not applicable to security interests created under the *Bank Act*, is to exclude a *Bank Act* security interest from the *PPSA* definition of “security interest”. This, the Bank submits, means that the requirement in s. 20(3)(a) is satisfied, thereby allowing the Bank to benefit from this subordination provision.
3. In my view, the Bank’s argument does not accord with the plain wording of the provision or the underlying legislative intention. The text of s. 4(k) specifies that the *PPSA* “does not apply to” *Bank Act* security. On the plain wording of the provision, it seems to me that the only coherent reading is that a *Bank Act* security does indeed fall within the definition of a “security interest” under the *PPSA*, but that s. 4(k) excludes the provisions of the Act as having any applicability to such security.
4. Considerations relating to legislative intention also run against the Bank’s proposed interpretation of ss. 20(3) and 4(k). While a provision which is substantially similar to the current s. 20(3) has been a feature of the Saskatchewan *PPSA* since its enactment in 1980, s. 4(k) of the *PPSA*, which specifically excludes *Bank Act* security interests from the scope of the statute, was only added to the *PPSA* in 1993. At the time that s. 20(3), or its equivalent predecessor, was first enacted, it clearly did not and was not intended to apply to *Bank Act* security, as the provision expressly provided that it only applied to interests that were *not* security interests and there was no question that *Bank Act* securities fell within the definition of a “security interest” under the *PPSA*. Given that the purpose of s. 4(k) was to exclude *Bank Act* security from the priority scheme of the *PPSA*, it seems to be contrary to legislative intention to interpret s. 4(k) as having the effect of making a previously inapplicable priority rule apply to *Bank Act* security. However, this is precisely what the Bank of Montreal’s interpretation would require the Court to conclude. Section 9(2), also enacted in 1993, further evidences the Legislature’s intention of preventing banks who take a *Bank Act* security from taking a *PPSA* security interest in the same collateral and thereby getting the benefit of both Acts. Section 9(2) provides as follows:

**9** . . .

(2) A security interest in collateral ceases to be valid with respect to that collateral to the extent that and for so long as the security interest secures payment or performance of an obligation that is also secured by a security in favour of that secured party on that collateral created pursuant to sections 425 to 436 of the *Bank Act* (Canada).

1. I therefore conclude that s. 20(3) does not operate to subordinate the Credit Union’s *PPSA* interest to the Bank’s *Bank Act* interest.

5. Conclusion

1. In summary, a proper interpretation of the *Bank Act* gives an earlier unperfected *PPSA* interest priority over a subsequent *Bank Act* interest, and there is no provision in the *PPSA* which subordinates an unperfected *PPSA* interest to a *Bank Act* interest.
2. For these reasons, I would dismiss the appeal with costs to the Credit Union throughout.

 *Appeal dismissed with costs.*

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