

**SUPREME COURT OF CANADA**

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| **Citation** : Royal Bank of Canada*v.*Radius Credit Union Ltd.,2010 SCC 48, [2010] 3 S.C.R. 38 | **Date** : 20101105**Docket** : 33152 |

Between:

Royal Bank of Canada

Appellant

and

Radius Credit Union Limited

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 37) | Charron J. (McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Rothstein and Cromwell JJ. concurring) |

Royal Bank of Canada *v.* Radius Credit Union Ltd., 2010 SCC 48, [2010] 3 S.C.R. 38

Royal Bank of Canada *Appellant*

v.

Radius Credit Union Limited *Respondent*

**Indexed as:**Royal Bank of Canada ***v.*** Radius Credit Union Ltd.

2010 SCC 48

File No.:  33152.

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 subsequently acquired property — Bank Act security subsequently taken in same property without notice of existing security — Collateral acquired by debtor after execution of both security agreements — 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*”) and a subsequent security interest taken and registered under the *Bank Act*. The dispute is in respect of property acquired by the debtor *after* the execution of both security agreements.

 The debtor borrowed money from Radius Credit Union and, on January 24, 1992, executed a General Security Agreement (“GSA”) giving it a security interest in all of his current and after-acquired property. The Credit Union did not register a financing statement in the Personal Property Registry or otherwise perfect its security interest until September 24, 1998. After executing the GSA with the Credit Union, the debtor turned to the Royal Bank for additional financing. The Bank registered its Notice of Intention to take *Bank Act* security on January 22, 1996, and first took *Bank Act* security on June 10, 1997. Its *Bank Act* security interest also covered both present and after-acquired property. When the debtor defaulted, the Bank seized and sold some of the collateral covered by both its *Bank Act* interest and the Credit Union’s security interest.

 The Credit Union brought an application before the Court of Queen’s Bench pursuant to s. 66 of the *PPSA* for a declaration that it had a priority claim over the proceeds of the disposition of that property. Applying the same reasoning as in the companion case *Bank of Montreal v. Innovation Credit Union*, the applications judge found the Bank’s interest had priority because the Credit Union had not perfected its security interest through registration under the *PPSA* before the Bank took and registered its *Bank Act* security; he did not address the issue arising from the fact that the competing interests in this case arose in respect of after-acquired property. The Saskatchewan Court of Appeal reversed the applications judge’s decision finding that the analysis must proceed along different lines than pursued in *Bank of Montreal*. Because both security interests attached simultaneously at the time the debtor purchased the collateral in question, the *Bank Act* does not provide a rule to address this priority dispute. Applying common law principles of property law, the Court of Appeal concluded that the priority rule to apply is “first in time is first in right” and that, notwithstanding the Credit Union’s failure to perfect its security interest under the *PPSA*, this rule should apply according to the date of execution of the respective security agreements.

 Held: The appeal should be dismissed.

 There is no basis upon which the Court could create a first-to-register priority rule as proposed by the Bank without doing violence to the terms of the *Bank Act* in its current manifestation. Such a rule would have to be enacted by Parliament, if it saw fit to do so. On this point, the Court agrees with the analysis of the Court of Appeal.

 The Court of Appeal was also correct in concluding that the dispute must be resolved in favour of the Credit Union. However, the priority dispute in this appeal falls to be determined on the same basis as the companion case. The fact that the collateral in question consists of after-acquired property does not change the framework of analysis. As the *Bank Act* contains no express priority provision applicable to this particular dispute, it is necessary to first look at the nature of the security interest conveyed to the Bank under the *Bank Act* and, in order to resolve the priority dispute, compare it to the prior competing *PPSA* interest to consider whether the Credit Union acquired any interest under its prior security agreement that would derogate from the debtor’s title.

 Under s. 427(2) of the *Bank Act*, the Bank acquired an inchoate proprietary interest in the assigned after-acquired property of the debtor from the time of execution and delivery of its security agreement on June 10, 1997. While the statutory interest created under the *Bank Act* is necessarily inchoate until the debtor acquires rights in the property, the time of attachment does not change the nature of the interest conveyed and, consequently, is not significant here. As the combined effect of ss. 427(2) and 435(2) of the *Bank Act* is that the Bank can acquire no greater interest in the collateral than the debtor has at the relevant time, the question which arises is whether the nature of the interest already conveyed to the Credit Union under the *PPSA* derogated from the debtor’s title.

 The provinces cannot legislate in order to oust the bank’s rights; however, 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 in after-acquired property which is analogous to an inchoate proprietary interest. Much as under the *Bank Act*, the statutory interest created under the *PPSA* is necessarily inchoate until the debtor acquires rights in the property. However, the time of attachment does not change the nature of the interest conveyed. At the time of execution of its security agreement on January 24, 1992, the Credit Union acquired an interest in the assigned after-acquired property, which effectively derogated from the title the debtor had available to assign to the Bank. Consequently, the Bank took its security interest subject to the *PPSA* security interest held by the Credit Union.

**Cases Cited**

 **Applied:**  *Bank of Montreal v. Innovation Credit Union*, 2010 SCC 47, [2010] 3 S.C.R. 3, aff’g (*sub nom. Innovation Credit Union v. Bank of Montreal*) 2009 SKCA 35, 324 Sask. R. 160, rev’g 2007 SKQB 471, 306 Sask. R. 227; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; **referred to:**  *Rogerson Lumber Co. v. Four Seasons Chalet Ltd.* (1980), 113 D.L.R. (3d) 671; *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121; *Abraham v. Canadian Admiral Corp. (Receiver of)* (1998), 158 D.L.R. (4th) 65; *Holroyd v. Marshall* (1862), 10 H.L. Cas. 191; *Tailby v. Official Receiver* (1888), 13 App. Cas. 523; *In re Lind*, [1915] 2 Ch. D. 345; *Banque nationale du Canada v. William Neilson Ltd.*, [1991] R.J.Q. 712.

**Statutes and Regulations Cited**

*Bank Act*, S.C. 1890, c. 31, s. 73.

*Bank Act*, S.C. 1944, c. 30, ss. 86(2), 88(2).

*Bank Act*, S.C. 1991, c. 46, ss. 427, 428, 435.

*Bank Act Amendment Act, 1900*, S.C. 1900, c. 26, s. 17.

*Personal Property Security Act*, S.A. 1988, c. P-4.05.

*Personal Property Security Act, 1993*, S.S. 1993, c. P-6.2, ss. 4(k), 10, 12, 13, 35(1)(c), 66.

**Authors Cited**

Cuming, Ronald C. C. “Fitting a Square (Federal) Peg in a Round (Provincial) Hole: Rationalizing Section 427 *Bank Act* With Provincial Property Security Law” (2010), 73 *Sask. L. Rev.* 1.

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

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*Fisher and Lightwood’s Law of Mortgage*, 11th ed., Wayne Clark, ed. London: Butterworths, 2002.

*Goode on Legal Problems of Credit and Security*, 4th ed., Louise Gullifer, ed. London: Sweet & Maxwell, 2008.

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

 APPEAL from a judgment of the Saskatchewan Court of Appeal (Sherstobitoff, Jackson and Smith JJ.A.), 2009 SKCA 36, 324 Sask. R. 191, 451 W.A.C. 191, 306 D.L.R. (4th) 444, [2009] 8 W.W.R. 60, 51 C.B.R. (5th) 197, 14 P.P.S.A.C. (3d) 124, [2009] S.J. No. 148 (QL), 2009 CarswellSask 157, reversing a decision of Zarzeczny J., 2007 SKQB 472, 39 C.B.R. (5th) 273, 12 P.P.S.A.C. (3d) 276, [2007] S.J. No. 680 (QL), 2007 CarswellSask 749. Appeal dismissed.

 *Michael W. Milani*, *Q.C.*, and *Erin M. S. Kleisinger*, 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. This case, like its companion case *Bank of Montreal v. Innovation Credit Union*, 2010 SCC 47, [2010] 3 S.C.R. 3, concerns 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*”). As in the companion case, the priority dispute in this case is between a prior unregistered security interest taken under the *PPSA* and a subsequent security interest taken and registered under the *Bank Act*. However, in the present case the dispute is in respect of property acquired by the debtor *after* the execution of both security agreements.
2. The applications judge viewed this case as raising the same issue as that raised in *Bank of Montreal*. In that case, he concluded that 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 (*sub nom. Innovation Credit Union v. Bank of Montreal*, 2007 SKQB 471, 306 Sask. R. 227). In a brief judgment, the applications judge held that the Royal Bank’s interest under the *Bank Act* takes priority over Radius Credit Union’s unperfected interest under the *PPSA* (2007 SKQB 472, 39 C.B.R. (5th) 273).
3. The Court of Appeal for Saskatchewan allowed the appeal, finding that the analysis must proceed along different lines than pursued in *Bank of Montreal*. Since the dispute was over after-acquired property, it was necessary to first determine at what time each creditor acquired its respective interest. After determining that both security interests attached simultaneously at the time the debtor purchased the collateral in question, the Court of Appeal held that the *Bank Act* does not provide a rule to address this priority dispute. Applying common law principles of property law, the Court of Appeal concluded that the priority rule to apply is “first in time is first in right” and that, notwithstanding the Credit Union’s failure to perfect its security interest under the *PPSA*, this rule should apply according to the date of execution of the respective security agreements (2009 SKCA 36, 324 Sask. R. 191).
4. The Royal Bank now appeals with leave to this Court, arguing that the conclusion reached by the Court of Appeal is neither commercially reasonable nor required by law. The Royal Bank essentially joins forces with the appellant in *Bank of Montreal* in advocating the adoption of a first-to-register priority rule.
5. I would dismiss the appeal. For the reasons stated in *Bank of Montreal*, I see no basis upon which the Court could create a first-to-register priority rule as proposed without doing violence to the terms of the *Bank Act* in its current manifestation. On this point, I agree with the Court of Appeal. Such a rule would have to be enacted by Parliament, if it saw fit to do so.
6. I also agree with the Court of Appeal that the dispute must be resolved in favour of the Credit Union. However, I reach this conclusion for different reasons. In my view, the priority dispute in this appeal falls to be determined on the same basis as the companion case. As I will explain, the fact that the collateral in question consists of after-acquired property does not change the nature of the competing interests at stake in this appeal. In each case, the competing Credit Union acquired a statutory and therefore legally cognizable interest in the assigned property *at the time of execution* of *its* security agreement. By the combined effect of ss. 427(2) and 435(2) of the *Bank Act*, the Bank *subsequently* acquired no greater interest than the debtor himself had at the time *of execution and delivery* of *its* security interest. Consequently, the Bank took its security interest subject to the *PPSA* security interest held by the Credit Union.

2. The Facts and Proceedings Below

1. Wayne Hingtgen, a Saskatchewan farmer, borrowed money from Radius Credit Union Limited (“Credit Union”). In order to secure the debt, Hingtgen executed a General Security Agreement (“GSA”) on January 24, 1992, giving the Credit Union a security interest in all of Hingtgen’s current and after-acquired property. The Credit Union did not register a financing statement in the Personal Property Registry or otherwise perfect its security interest, until September 24, 1998.
2. After the GSA with the Credit Union was executed, Hingtgen turned to the Royal Bank (“Bank”) for additional financing. The Bank first registered its Notice of Intention to take *Bank Act* security on January 22, 1996, and it first took *Bank Act* security on June 10, 1997. As with the Credit Union’s *PPSA* security interest, the Bank’s *Bank Act* interest covered both present and after-acquired property.
3. Ultimately, Hingtgen defaulted on his loans and the Bank seized and sold some of the collateral that was covered by both its *Bank Act* interest as well as the Credit Union’s security interest. This sale yielded $65,125 in proceeds. Importantly, the collateral that was seized and sold was property that Hingtgen did not acquire until after both the Credit Union and the Bank had taken security interests. The Credit Union brought an application before the Saskatchewan 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. Zarzeczny J., the applications judge, viewed this case as being “on all fours” with the legal issue in *Bank of Montreal* (para. 7). In that case, he held that 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. He thus held in a brief judgment that, as in *Bank of Montreal*, the Bank’s interest had priority because the Credit Union had not perfected its security interest through registration under the *PPSA* before the Bank took and registered its *Bank Act* security. The applications judge did not address the issue arising from the fact that the competing interests in this case arose in respect of after-acquired property.
5. The Saskatchewan Court of Appeal reversed the applications judge’s decision. Jackson J.A., writing for the court, viewed this case as requiring a different analysis than that adopted in *Bank of Montreal*. In *Bank of Montreal*, where Innovation Credit Union’s interest attached prior to the Bank of Montreal’s interest, ss. 427(2) and 435(2) of the *Bank Act*, according to which the bank acquires no greater interest than the debtor had at the time the *Bank Act* security was taken, was dispositive of the priority issue (*sub nom. Innovation Credit Union v. Bank of Montreal*, 2009 SKCA 35, 324 Sask. R. 160). Here, because the collateral at issue consisted of after-acquired property, both the Credit Union’s interest and the Bank’s interest attached simultaneously at the time that Hingtgen actually purchased the property. Since the *Bank Act* contained no priority rule to resolve this dispute, it was necessary to resort to applicable common law, rules of equity, and statutory law to fill the gap. While the time of perfection, or the lack of perfection, under the *PPSA* determined which of two competing security interests takes priority under that Act, it was of no consequence on the question of the validity or the enforceability of the interest. Based on applicable principles of property law, Jackson J.A. held that the appropriate rule was to accord priority to the security interest created pursuant to the first agreement to be executed. On that basis, she awarded priority to the Credit Union.

3. Analysis

1. As in *Bank of Montreal*, nothing turns on the particular wording of either respective security agreement in this appeal and it is not necessary to set out the relevant parts of the security agreements. The priority dispute essentially raises a question of statutory interpretation.
2. As explained in *Bank of Montreal*, the focal point for resolving a priority dispute involving a *Bank Act* security and provincial personal property security act security interests is the *Bank Act* itself. 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.* While the internal priority rules of the *PPSA* cannot be invoked to resolve the dispute, the provisions of the *PPSA* cannot be ignored as provincial property law plays a complementary role in defining the rights granted under the *Bank Act*. As the *Bank Act* contains relatively few provisions which explicitly address whether a *Bank Act* security has priority over other interests in the same property, most priority disputes are resolved by considering whether, on the basis of applicable principles of property law, the proprietary rights granted to the bank under that Act have precedence over competing interests.
3. In applying the framework of analysis set out more fully in *Bank of Montreal*, it is necessary to first look at the nature of the security interest conveyed to the Bank under the *Bank Act* and, in order to resolve the priority dispute, compare it to the prior competing *PPSA* interest to consider whether the Credit Union acquired any interest that would derogate from the debtor’s title.

3.1 *The Security Interest Conveyed Under the Bank Act*

1. In order to determine the nature of the security interest conveyed under the *Bank Act* we must construe the relevant provisions of the statute. It may be useful to situate the particular provisions at issue in this appeal within the general structure of the regime governing *Bank Act* security. The regime may be summarized as follows:

1. 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.

2. Section 427(2) states that the “[d]elivery of a document giving security on property to a bank . . . vests in the bank” certain “rights and powers” in respect of the property described in the document. Of course, the time at which a creditor acquires its security interest in the collateral is of critical importance in any priority dispute. As we shall see, there is some uncertainty on the question of when the Bank acquired its interest in this appeal. As the debtor only acquired rights in the collateral at a time subsequent to the “delivery” of the security document to the Bank, an issue arises as to what, if any, proprietary interest was acquired by the Bank under s. 427(2) at the time it took its *Bank Act* security interest.

3. The nature of the “rights and powers” which vest in the bank are defined further under s. 427(2) depending on the nature of the collateral. 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, “from the date of the acquisition”, all the right and title of the owner of the property. Just as in *Bank of Montreal*, ss. 427(2)(*c*) and 435(2) are of critical importance on the issue that occupies us in this appeal as, by their terms, the bank acquires all interest in the collateral, but no greater, than the debtor has at the relevant time.

4. Section 427(4) states that, unless the bank registers a notice of intention with the appropriate authority, its security interest will be void as against third parties. This notice of intention may be registered up to three years before the security is actually given. It is common ground that the notice of intention was duly registered by the Bank in this case.

5. Section 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, which is what the Bank did here.

6. The *Bank Act* contains few provisions that explicitly address the question of priority over competing interests in the same property. Of potential relevance to this appeal is s. 428 which gives priority to the bank “over all rights subsequently acquired in, on or in respect of that property”.

1. I now turn to ss. 427(2) and 435(2). The relevant wording of the provisions is 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,

(*c*) . . . the same rights and powers as if the bank had acquired a warehouse receipt or bill of lading in which that property was described . . . .

**435.** (1) A bank may acquire and hold any warehouse receipt or bill of lading as security for the payment of any debt incurred in its favour, or as security for any liability incurred by it for any person, in the course of its banking business.

(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. In this case, Mr. Hingtgen did not hold any right in the collateral in question at the time the security document was delivered to the Bank. It is only subsequently, at the time he purchased each item of property, that he acquired any rights in the assigned property. Therefore, it is correct to say that the Bank’s proprietary interest in after-acquired property can only “attach” to the property when the debtor acquires it. Before that time, there is evidently no collateral upon which it could attach. This conclusion finds support in the majority of the Canadian jurisprudence and virtually all academic commentary: see e.g. *Rogerson Lumber Co. v. Four Seasons Chalet Ltd.* (1980), 113 D.L.R. (3d) 671 (Ont. C.A.), *per* Arnup J.A.; *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121, at p. 134, citing W. D. Moull, “Security Under Sections 177 and 178 of the Bank Act” (1986), 65 *Can. Bar Rev.* 242, at p. 251; *Abraham v. Canadian Admiral Corp. (Receiver of)* (1998), 158 D.L.R. (4th) 65 (Ont. C.A.), at paras. 19-20; 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. 276.
2. The proprietary interest which attaches to the after-acquired collateral at the time of its purchase by Hingtgen, however, does not constitute the full extent of the interest granted to the Bank under the *Bank Act*. As the underlined words of the above-noted provisions make plain, the rights and powers conveyed under the security agreement *vest* in the Bank *on delivery* of the security document (s. 427(2)), *from the date of the acquisition thereof* (s. 435(2)). As discussed in the companion *Bank of Montreal* appeal, the nature of the interest acquired by the bank was explained in *Bank of Montreal v. Hall*, in these terms:

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.]

As Professor Moull explained 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.

1. At first glance, it may appear inconsistent to say, on the one hand, that the bank’s proprietary interest in after-acquired property does not attach until the property is actually acquired by the debtor and, on the other, that the bank’s interest in the assigned property vests at the time of execution of the security agreement. However, this peculiarity was not totally foreign to the law at the time the *Bank Act* was enacted. A similar concept was recognized by courts of equity. As I will explain, the *Bank Act* effectively creates an inchoate proprietary interest in the after-acquired property from the time of delivery of the security agreement, a notion that had been recognized in equity.
2. At common law, it was not possible for an individual to grant an interest in property that he or she did not at that time own. However, it has long been held that equity will recognize and enforce interests which are granted in after-acquired property: see *Holroyd v. Marshall* (1862), 10 H.L. Cas. 191; *Tailby v. Official Receiver* (1888), 13 App. Cas. 523 (H.L.). The grantee’s equitable interest in the property does not arise at the time the contract is executed. Rather, once the grantor acquires the property, the grantee immediately acquires an equitable interest in that property: see *Holroyd*; *Fisher and Lightwood’s Law of Mortgage* (11th ed. 2002), W. Clark, ed., at p. 133. As between competing equitable interests in after-acquired property, priority has generally been given to the first agreement to be executed: see *In re Lind*, [1915] 2 Ch. D. 345 (C.A.); R. C. C. Cuming, C. Walsh and R. J. Wood, *Personal Property Security Law* (2005), at p. 312. As explained by Professor Goode, equity in effect recognizes a type of inchoate proprietary interest in after-acquired property from the moment the agreement is executed:

For example, a debtor executes a charge in favour of X over future property on April 1 and acquires a new asset on August 1. The charge attaches on August 1. There appears to be no problem. But suppose that on May 1 the debtor had executed a second charge, in favour of Y, over the same classes of future assets. Who wins, X or Y? The answer is simple enough: X wins, as he is the first in time. The problem is to know how this result is arrived at, because, of course, the security interest does not attach until the debtor has acquired the asset, so that the competing interests of X and Y attach simultaneously. How, then, does X get priority?

Here we have a striking example of the intellectual subtlety of the law. In a number of cases the courts have ruled that whilst, in a sense, an agreement for security over after-acquired property cannot attach to that property prior to acquisition, yet the agreement constitutes a present security. In other words, it creates an inchoate security interest which is waiting for the asset to be acquired so that it can fasten on to the asset but which, upon acquisition of the asset, takes effect as from the date of the security agreement. Acquisition of the asset produces the situation in which the security is deemed to have continuously attached to the asset from the time of execution of the security agreement.

(*Goode on Legal Problems of Credit and Security* (4th ed. 2008), Louise Gullifer, ed., at p. 74)

1. Thus, in creating an interest which comes into existence immediately upon the delivery of a security document, but only attaches to the collateral at the time the debtor actually has an interest in the property, the *Bank Act* simply gives statutory recognition to this notion of “inchoate interest from the date of execution” that had long been recognized by courts of equity. In my view, this interpretation is the only one that gives effect to all the words contained in ss. 427(2) and 435(2).
2. This interpretation, while not explained in these terms, was effectively adopted by the Quebec Court of Appeal in *Banque nationale du Canada v. William Neilson Ltd.*, [1991] R.J.Q. 712. Rousseau-Houle J.A., writing for the majority (the dissenting opinion not on this point), described the nature of the bank’s interest under equivalent provisions of the *Bank Act* in these terms:

 [translation] The bank’s rights depend on when the security was given. . . .

The Bank may exercise its right under this section only if the person who gave the security has become the owner. This is the effect of section 178 [now s. 427].

. . .

These provisions necessarily lead to the conclusion that the Bank’s rights in the property it was given in security were acquired as of the date of the agreement, provided that the transferor was then or subsequently became the owner of the property in question. In this case, the Bank is deemed to have held its rights since the date of the agreement, regardless of the fact that the transferor acquired the property at different times. However, the Bank’s rights may be asserted as against third parties only if a notice of intention was registered not more than three years immediately before the security was given . . . . [Emphasis added; pp. 721-22.]

1. This interpretation also finds support in this Court’s decision in *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411. As explained in the companion appeal, it became necessary for the Court in that case to determine the nature of the Royal Bank’s security interest under the *Bank Act* and the nature of its security interest under the Alberta *Personal Property Security Act*, S.A. 1988, c. P‑4.05. Each security agreement covered both the present and after-acquired property of the debtor. The Court concluded that the security interest conveyed to the Bank under each statute was in the nature of a *fixed* charge over both the present *and future assets* of the debtor, which interest took effect *from the time the security agreement was entered into*. Gonthier J., dissenting but not on this point, acknowledged that the concept of a fixed charge over property that did not yet exist was a novel one, explaining as follows:

It would seem appropriate at this point, before leaving the present discussion, to comment briefly upon this novel and perhaps abstract notion of possessing a fixed charge over all of the present and future inventory of a debtor. To begin with, I note that traditional definitions of the fixed charge, as for example the one I previously quoted above from *Illingworth* [*v. Houldsworth*, [1904] A.C. 355], emphasize the ability to “settle and fasten” upon ascertainable and defined property as being an integral attribute to this particular form of charge. This type of attachment to tangible and ascertainable property, of course, is impossible to achieve in the case of an assignment of inventory, where that collateral is changing constantly. In short, the traditional concept of the fixed charge seems to be at odds with the notion of having a proprietary right over collateral such as after-acquired inventory which, by definition, is not yet in existence at the time the security agreement is executed.

In my view, however, a fixed charge over all present and future inventory represents a proprietary interest over a dynamic collective of present and future assets. To this extent, as stated above, this form of security interest challenges our traditional conception of a fixed charge; to the same extent, in my opinion, our conception of this form of charge must change to meet the modern realities of commercial law, and in particular the legislative provisions which have been brought to bear in this appeal. [First emphasis added; second emphasis in original; paras. 62-63.]

1. In a recent article, Professor Cuming suggests, on a review of the historical wording of the precursor sections to s. 427(2), that there was no legislative intention to confer to the bank any proprietary interest in after-acquired collateral at the date of execution of the security agreement. Rather, the bank would acquire a proprietary interest only when the debtor himself acquires such interest in the collateral, in other words, at the time of attachment (R. C. C. Cuming, “Fitting a Square (Federal) Peg in a Round (Provincial) Hole: Rationalizing Section 427 *Bank Act* With Provincial Property Security Law” (2010), 73 *Sask. L. Rev.* 1, at pp. 16-19). I do not share Professor Cuming’s concern on this point. In my view, the history of the provision does not detract from the conclusion that an inchoate proprietary interest in after-acquired collateral vests in the bank from the moment of delivery of the security document. I will briefly review this history.
2. In 1900, an amendment was made to s. 74(2) of *The Bank Act* to allow substituted collateral to be “covered by such security as if originally covered thereby”: *The Bank Act Amendment Act, 1900*, S.C. 1900, c. 26, s. 17. Thus, under the 1900 version of the Act, substituted collateral was treated as if an inchoate proprietary interest had been granted on the date the security agreement was executed. While the language of s. 74(2) was not literally replicated in the 1944 version of the *Bank Act*, s. 88(2) (the precursor to s. 427(2)) was to the same effect. It introduced the notion that the *delivery* of the document “vests and shall vest in the bank . . . the same rights and powers in respect of such property as if the bank had acquired a warehouse receipt or bill of lading” describing the property: *The Bank Act*, S.C. 1944, c. 30, s. 88(2). Explicitly, s. 88(2) applied to after-acquired property, or as the words of the statute then stated, property “of which such person [giving the security] becomes the owner at any time thereafter before the release of the security by the bank, whether or not such property is in existence at the time”. This provision, together with s. 86(2) of the same Act, a provision that existed in a similar form since at least 1890 (*The Bank Act*, S.C. 1890, c. 31, s. 73), explained that the effect of a bank’s acquiring a warehouse receipt or bill of lading was that “all the right and title” to the goods covered by the security “shall vest in the bank, from the date of the acquisition thereof”. In my view, these historical provisions have precisely the same effect as the current ss. 427(2) and 435(2), respectively.
3. Consequently, one can only read in ss. 427(2) and 435(2) the intention to statutorily vest in the bank a proprietary, albeit inchoate, interest in the after-acquired property enforceable against third parties from the time of execution of the security agreement, provided proper notice of intention was registered as required by the statute.
4. I therefore conclude that from the time the Bank first took *Bank Act* security on June 10, 1997, it acquired an inchoate proprietary interest in the assigned after-acquired property in the nature of a fixed charge, which interest subsequently attached to the various items of collateral at the time they were each purchased by Hingtgen.
5. I now turn to the Credit Union’s competing *PPSA* interest.

3.2 *The Credit Union’s Security Interest Under the PPSA*

1. It is not disputed that, at the time Hingtgen gave the Bank its security agreement in 1997, the Credit Union had a valid security agreement executed on January 24, 1992, in respect of the same collateral. It is common ground that, pursuant to ss. 12 and 13 of the *PPSA*, the security interest created under the *PPSA* agreement attached to the after-acquired collateral at the time Hingtgen purchased the property. Because attachment had not yet occurred at the time Mr. Hingtgen gave the Bank its *Bank Act* security interest, the critical question becomes whether the Credit Union acquired any interest in the assigned property at that time which would derogate from Mr. Hingtgen’s title. If so, by the combined effect of ss. 427(2) and 435(2), the Bank can only acquire its interest subject to the prior encumbrance.
2. Of particular relevance on this point is the fact that the Credit Union’s security agreement did not only constitute a valid contract as between creditor and debtor, but also, under s. 10 of the *PPSA*, was enforceable as against third parties. The relevant parts of s. 10 read as follows:

**10**(1) Subject to subsection (2) and section 12.1, a security interest is enforceable against a third party only where:

. . .

(d) the debtor has signed a security agreement that contains:

. . .

(iii) a statement that a security interest is taken in all of the debtor’s present and after-acquired personal property; . . .

1. The fact that s. 10 of the *PPSA* provides that a security interest is enforceable against third parties upon the signing of a security agreement (provided it contains a proper description of the collateral) must mean that, at the moment of execution, some statutory interest is acquired by the creditor. Otherwise, there would be nothing to enforce. As for the nature of this interest, I return to this Court’s holding in *Sparrow Electric* that all security interests under the Alberta *PPSA* were akin to a fixed charge and as such, correlative to “a proprietary interest over a dynamic collective of present and future assets” (para. 63 (emphasis in original deleted)). As to when this interest takes effect, Gonthier J. stated the following:

Generally speaking, therefore, absent an express intention to the contrary, a security interest in all present and after-acquired personal property will attach when that agreement is executed by the parties. . . .

. . .

Applying this principle to the case at bar, the GSA held by the respondent bank must certainly be characterized as a fixed and specific charge. It attached at the time the agreement was executed . . . . [Emphasis added; paras. 54-56.]

While Gonthier J. spoke in terms of *attachment* here, it is clear in the context of his analysis that he was referring to the time when the fixed charge over all present and future assets took effect and that this occurred upon execution of the agreement. While the statutory interest created in after-acquired property is necessarily inchoate in nature until the debtor acquires rights in the property, that does not change the fact that, *as of the date of execution*, the creditor — in this case the Credit Union — acquired an interest in the after-acquired property which derogated from the debtor’s title.

1. The time of attachment does not change the nature of the interest conveyed to the Credit Union and, consequently, is not significant here. For sure, the *PPSA* has chosen the date of *attachment*, rather than the date of execution of the agreement, as the pivotal date for resolving a priority dispute as between some competing *PPSA* interests. Notably, s. 35(1)(c) provides that

**35**(1) Where this Act provides no other method for determining priority between security interests:

. . .

(c) priority between conflicting unperfected security interests is determined by the order of attachment of the security interests.

However, it does not follow from this that the date of attachment has any effect on a priority dispute between *PPSA* and *Bank Act* security interests. Indeed, not only does s. 4(k) of the *PPSA* exclude from its application a *Bank Act* security interest, the Province of Saskatchewan could not enact a provision that would affect the priority of a federally created security interest.

1. However, as explained in *Bank of Montreal*, 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 each province. This is what Saskatchewan did in enacting the *PPSA*. The Legislature created a statutory interest in after-acquired property, an interest which is correlative to an inchoate proprietary interest. It also provided that this statutory interest is enforceable against third parties and that it comes into existence on the signing of the security agreement. In creating this interest, the Province acted within the scope of its constitutional authority. Thus, in a priority dispute such as this one where the priority rules under the *PPSA* can find no application, the date of execution of the agreement is the relevant date, as it is at that time that the statutory interest is created. The date of attachment is of no consequence.
2. I therefore conclude that, at the time of execution of its security agreement, the Credit Union acquired a statutory interest in the nature of a fixed charge over the debtor’s assigned after-acquired property, which effectively derogated from the title Mr. Hingtgen had available to assign to the Bank. This interest was in existence at the time the Bank took its *Bank Act* security interest, although it attached to the collateral in question only subsequently.

3.3 *Resolving the Priority Dispute*

1. For the reasons explained more fully in *Bank of Montreal*, by the combined effect of ss. 427(2) and 435(2), the Bank can receive no greater interest in the property than the debtor himself has. At the time the Bank took its *Bank Act* security interest, the Credit Union already held a proprietary interest in the same collateral in the nature of a fixed charge. The failure to register does not take anything away from the nature and validity of the Credit Union’s prior interest.
2. I therefore conclude that the Bank’s security interest is subject to the Credit Union’s rights under the *PPSA*.

4. Conclusion

1. I would dismiss the appeal with costs throughout.

 *Appeal dismissed with costs.*

 Solicitors for the appellant:  McDougall Gauley, Regina.

 Solicitors for the respondent:  Layh & Associates, Langenburg, Saskatchewan.