

**Faculty of Law**  
**University of New Brunswick**



**Commercial Law**  
**Law 2223**

**Commercial Law**  
**Professor N. Siebrasse**

**12 December 2005**  
**1:00 - 4:00 p.m.**

INSTRUCTIONS

1. This is an "open book" examination. You may bring the course text, your class notes and any review materials. You may *not* use library materials or electronic aids.
2. This examination is 3 hours long.
3. This examination is 5 pages long (including this page). Please check that you have all 5 pages.
4. The examination is marked out of 170. Questions are *not* all of equal value. The time you spend on each question should be approximately equal to the value of the question. There are no optional questions. Attempt all questions.
5. Assume all transactions occur in New Brunswick unless otherwise specified.
6. Unless the question specifically states otherwise, you must explain your answer. "Yes/no" answers are not sufficient. When a question requires you to assess a particular rule from a policy perspective (for example, if the question asks if the rule is sound as a matter of policy, or asks whether the rule should be implemented in some area of law) be sure and address both advantages and disadvantages of the rule and the relevant options.
7. This examination is to be identified *only* using the anonymous number system. A penalty of one grade ranking (i.e. a B grade will become a B- grade) will be assessed against any student who writes his or her name on his or her examination booklets or who otherwise indicates his or her identity on or in his or her examination.
8. Handwriting must be legible. Passages written in illegible handwriting will be disregarded in assessing the grade.

**Question 1 – 14 marks/minutes**

SP1 and SP2 have entered into security agreements with D, taking all of D's present and after-acquired property as security. SP1 has first priority and SP2 has second priority. D defaults on both loans with \$100,000 owing to SP1 and \$50,000 owing to SP2. SP1 has notified SP2 that it intends to dispose of D's property pursuant to s. 59 of the PPSA. Can SP2 redeem? Should it? Explain.

**Question 2 – 22 marks/minutes**

Section 59(14) of the PPSA provides that when the secured party exercises its right to dispose of the collateral on default, "The secured party may purchase the collateral or any part of it but only at public sale, including public auction or closed tender, and only for a price that bears a reasonable relationship to the market value of the collateral." In real estate law in most jurisdictions the secured party (mortgagee) is *not* entitled to purchase the collateral when it exercises its right to dispose of the collateral. Should the PPSA approach be adopted in real estate law? Explain, discussing the advantages and disadvantages of both the real estate law approach and the PPSA approach. Include a discussion of the PPSA requirement that the secured party can buy only at public sale and for a price that bears a reasonable relationship to the market value of the collateral

**Question 3 – 22 marks/minutes**

Subsection 19(2) of the New Brunswick *Registry Act* provides in effect that an unregistered interest in land is subordinate to the interest of a judgment creditor who has registered a memorial of judgment in the land registry unless the interest is registered within three months of its execution. What would the law be regarding a competition between an unregistered interest and the interest of a judgment creditor in the absence of this subsection? What is the equivalent rule under the PPSA? Which rule is best, as applied to land? Explain.

**Question 4 – 12 marks/minutes**

Section 3(2)(b) of the PPSA provides that the priority and registration provisions of the PPSA apply to a lease for a term of more than one year that does not secure payment or performance of an obligation (a "true" lease); however, Part V of the PPSA, dealing with rights and remedies on default, does *not* apply to a true lease for a term of more than one year. Explain why, as a matter of policy, the priority and registration provisions of the PPSA apply in this case while the default provisions (Part V) do not.

**Question 5 – 35 marks/minutes**

Owen is the owner of a house at 44 Pleasant Lane. The house is worth \$300,000 and is subject to a mortgage in favour of the Bank of Fredericton in the amount of \$150,000. Felicity is a rogue. She forges a discharge of Owen's mortgage to the Bank of Fredericton and a conveyance from Owen to herself, and registers both in the land registry. She then approaches the Miramichi Trustco for a "low-ratio" mortgage. She explains that she wants a loan of \$50,000 to finance a 'round the world trip. She explains that her dying grandmother is currently living in the house, and she asks the Trustco not to do a full appraisal before advancing the funds. Since the property alone is worth more than \$50,000, the Trustco agrees. It enters into the mortgage agreement, registers its mortgage, and advances the funds. Felicity leaves on her trip around the world, and fails to make payments on the loan from the Trustco, which goes into default. The full situation is discovered when the Trustco sends a letter to 44 Pleasant Lane stating that its mortgage is in default and that it will take steps to realize on its security if the mortgage is not paid in full. Owen comes to you for advice. What are the priorities of Owen, the Bank and the Trustco in respect of the land? How are the interests of the parties affected by Felicity's fraud? Who, if anyone, is entitled to compensation from the land registration office, and under what conditions?

- A) Assume the land is under the Registry Act system.
- B) Assume the land is under the Ontario Land Titles Act.
- C) Assume the land is under the New Brunswick Land Titles Act.
- D) Compare the results in Parts B and C. Which result is preferable from a policy perspective? Explain, discussing the advantages and disadvantages of both approaches.

**Question 6– 30 marks/minutes (total)**

Derrick's property is collateral for a line of credit given by the Bank of Fredericton. The Bank has properly taken all steps to perfect its interest by registration in the appropriate register. At present, \$50,000 is outstanding on the line of credit. An intervening party wishes to gain priority in Derrick's property over any advances on the line of credit that might be made by the Bank in the future.

*Part I – 12 marks/minutes*

What steps, if any, can be taken by the intervening party to secure the best possible priority position in the following scenarios:

- A) the property is personal property and the intervening party is a consensual secured creditor;
- B) the property is land and the intervening party is a consensual secured creditor;
- C) the property is land and the intervening party is a contractor who has built an addition on the house but has not yet been paid;
- D) the property is personal property and the intervening party is a judgment creditor;

*Part II – 18 marks/minutes*

Compare the following pairs of your answers to Part I:

- i) Scenario A & B
- ii) Scenario B & C
- iii) Scenario A & D

In each pair, consider the *differences*, if any, between the two scenarios regarding the best priority that can be secured by the intervening party and the steps which must be taken to secure that priority. If there are differences, explain whether the differences are justified as a matter of policy. If there are no differences, explain whether, as a matter of policy, there should be differences

**Question 7 – 35 marks/minutes**

Southville Honda Dealership deals in new and used cars. It is financed by a line of credit provided by the Bank of Fredericton under a security agreement in which “all present and after-acquired property” of Southville is specified as collateral. The Bank has registered a financing statement to that effect; however, it does not include in the registration the serial numbers of any of the cars on Southville’s lot.

Debbie purchases a new 2005 Acura MDX car from Southville for \$60,000. The purchase is financed in part by a \$50,000 loan from Honda Finance Inc. (‘HFI’). As part of the financing, the loan agreement grants HFI a security interest in the MDX. HFI registers a financing statement to that effect. The financing statement describes the collateral as “2005 Acura MDX” and includes the serial number of the MDX in the serial number field. However, the clerk entering the serial number mistranscribed it by reversing two numbers.

Six months later, Debbie is dissatisfied with the car and advertises it for sale for \$50,000. Pam is interested and approaches the Miramichi Trustco to borrow \$40,000 to finance the purchase. The loan officer for the Trustco searches the Personal Property Registry against Debbie’s name and discovers the financing statement describing the MDX as collateral. At the same time, the loan officer notices the error in the serial number provided in the serial number field. She then searches the PPR again, using the correct serial number. No results are returned; that is, HFI’s registration does not appear, even as an inexact match. The Trustco agrees to lend the money to Pam, with the car as collateral. The Trustco registers a financing statement describing the collateral as “2005 Acura MDX” and includes the correct serial number in the serial number field. The Trustco then advances the money to Pam, who then purchases the Acura from Debbie.

Pam also becomes dissatisfied with the car and sells it to Ron, who pays \$40,000 cash. Ron does not search the PPR. Ron then sells it to Steve, who pays \$35,000 cash. Like Ron, Steve does not search the PPR.

Southville Honda Dealership runs into financial trouble and defaults on its loan from the Bank of Fredericton. Debbie and Pam also default on their loans from HFI and the Trustco, with \$45,000 and \$35,000 outstanding, respectively.

Describe the interests, if any, and the priorities of the Bank, HFI and the Trustco in the MDX. Which, if any, can seize the car from Steve? If so, could Steve have protected himself? How? Who will ultimately bear the loss?

**\*\*\* THE END \*\*\***