

Faculty of Law
University of New Brunswick



Commercial Law
Law 2223

Commercial Law
Professor N. Siebrasse

12 December 2007
9:00 - 12:00 a.m.

INSTRUCTIONS

1. This examination is 5 pages long (including this page). Please check that you have all 5 pages.
2. This examination is 3 hours long.
3. 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 any other materials or devices prohibited by university or law faculty rules or regulations.
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.
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 be sure to address both advantages and disadvantages of the rule and the relevant options.
5. Assume all transactions occur in New Brunswick unless otherwise specified.
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 – 15 marks/minutes

Regulation 20(5) of the NB PPSA provides as follows:

20(5) Where the debtor is an individual, the name of the debtor shall be determined, for the purposes of this section, by the following rules: [detailed list of rules specifying applicable documentation]

A law reform proposal has been brought forward which would amend this regulation to provide:

20(5) Where the debtor is an individual, the name of the debtor shall be the name specified on such identification as is commonly used in business and consumer transactions for verification of personal identity.

Discuss the advantages and disadvantages of this proposal as contrasted with the current rule.

Question 2 – 20 marks/minutes

An employee at Dan's Home Appliance Store stacked some microwave ovens negligently. One of the microwaves toppled off a shelf and fell on June Caldwell. She sued and obtained a judgment in the amount of \$65,000. She correctly registered a notice of judgment against Dan's in the Personal Property Registry. Dan then sold 30 of the washers which it kept as inventory to Better Home Appliances in Oromocto in a bulk sale. Better Home Appliances sold one of those washers to Pam, a customer who walked in off the street, for \$850. What are June's rights with respect to the washers held by (a) Better Home Appliances, and (b) Pam? Explain.

Question 3 – 26 marks/minutes (total)

Part A – 4 marks/minutes

What is meant by a "right of reinstatement" under the PPSA.

Part B – 16 marks/minutes

There is no right of reinstatement in land law in New Brunswick. Should land law be reformed to provide a right of reinstatement? Explain.

Part C – 6 marks/minutes

The right of reinstatement cannot be waived prior to default, but it can be waived after default. Why? Consider both why the right cannot be waived prior to default, and why it can be waived after default.

Question 4 – 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 5 – 25 marks/minutes

You are acting for a client who is purchasing an expensive home in an exclusive neighbourhood in Toronto, Ontario. The property is held by the current owner under the Ontario land titles system. Title insurance is available for \$200. Would you advise your client to purchase title insurance? Would your advice be different if the property were located in Fredericton and governed by the New Brunswick land titles system? Explain.

Question 6 – 18 marks/minutes

Under the common law rule in *Jellett v Wilkie* the interest of a judgment creditor would be subordinate to the interest of any prior interest holder that would be enforceable against the debtor, regardless of whether the prior interest was registered. The PPSA now provides that the interest of a prior unperfected secured party is subordinate to the interest of a judgment creditor who has registered a notice of judgment. Is the PPSA provision sound as a matter of policy, in comparison with the common law rule?

Question 7 – 44 marks/minutes

Diane Daigle's uncle had operated a florist business in Moncton. When he died, he left the property from the business to Diane. The main asset was a large glass front Moffat brand florist's display refrigerator, worth approximately \$5000. (While the refrigerator is large, it is free-standing – that is, it is not a fixture.) The other property included various display cases, chairs, a computer and other furniture and office equipment. Diane decided to use the property to start her own florist business in Fredericton. She rented a shop and approached the Miramichi Trustco for a start-up loan. The Trustco agreed to lend \$5000, taking the refrigerator as collateral. Diane and the Trustco entered into a security agreement to that effect. However, when the Trustco registered its financing statement in the PPR on 10 January, it specified "all present and after-acquired property" as the collateral. (The registration was otherwise correct in all respects, including Diane's correct full name as the debtor name. Note that notwithstanding that Diane is running a business, the PPSA regulations specify that for a sole proprietorship the proper debtor is the name of the individual proprietor.) After registering the financing statement the Trustco advanced the \$5000 in full to Diane.

In addition to the start-up funds, Diane needed an operating line of credit and she approached the Bank of Fredericton for that purpose. At the outset of the negotiations the Bank did a PPR search and discovered the prior registration by the Trustco. Diane explained that only the refrigerator has actually been given as collateral. Pursuant to s.18 of the PPSA Diane requested the Trustco provide a copy of the security agreement, clearly showing that only the refrigerator had been taken as collateral, to the Bank. On receipt of that information the Bank entered into a security agreement with the Diane, in which the Bank took "all present and after-acquired property" as collateral. The following day, 20 January 2007 the Bank registered a financing statement in the PPR specifying Diane's correct name as the debtor and "all present and after-acquired property" as the collateral.

Diane then drew \$1000 from her line of credit with the Bank.

Diane needed a car for her business to deliver flowers. She purchased a used 2003 Ford Escort from Uptown Motors for \$5,000. Diane paid \$500 in cash and the remainder of the price was financed by Ford Credit, with monthly payments of \$150 / month for three years. On 1 February Ford Credit registered a financing statement in the PPR specifying Diane as the debtor, using her correct full name, and "one 2003 Ford Escort" as the collateral. Ford Credit also specified the serial number of the car in the serial number field, but unfortunately the serial number was entered incorrectly, with two of the numbers transposed. A search by the correct serial number would not reveal the registration, either as an exact or inexact match. On February 29, Ford Credit discovered the error in its routine month end checks. That day it amended the registration to change to the correct serial number. (The effect of the amendment is as if it had registered a new financing statement on that day.)

Diane's business did not do so well and in order to raise some cash she decided to sell the Ford Escort and deliver flowers by bicycle. She advertised in the Gleaner and soon sold the car to

Patricia Paramadevan for \$3500, who bought it for personal use on 30 April. Patricia did not search the PPR before making the purchase.

Diane then drew a further \$1000 on her Bank line of credit.

The Trustco became concerned about the health of Diane's business. They approached her and said that they would call in the loan (which was a demand loan, which specified in its terms that it was repayable in full on two weeks notice), unless she provided additional security. Accordingly she entered into a second security agreement with the Trustco specifying "all present and after-acquired property" as additional collateral for the loan.

Diane hoped to put the business back on a sound basis by making a big profit selling expensive orchids for the Fredericton High School graduation dance. She bought a large shipment of expensive orchids for \$2000 from Jewel Flowers, a flower wholesaler. Unfortunately, the orchids arrived in what Diane considered to be unsaleable condition, and she refused to pay. Jewel Flowers sued Diane successfully and obtained a judgment against her for \$2000. On 1 June Jewel Flowers registered a notice of judgment in the PPR specifying Diane (using her correct name) as the debtor.

Diane then drew a further \$1000 on her Bank line of credit.

On 30 June Jewel Flowers gave notice of its registration to the Bank of Fredericton, the Trustco and Ford Credit.

Diane then drew a further \$1000 on her Bank line of credit.

What are the priority positions of all the parties, including Diane, Pam, Jewel Flowers, Ford Credit, the Trustco and the Bank, in respect of the refrigerator, the car, and the other property (the computer and other office furniture etc.)? Explain. \$3800 remains owing to Ford Credit on the Ford Escort, and otherwise no payments have been made on any of the debts. (Ignore interest.) You do not need to specify how the money would be distributed in the event of a default. You do not need to consider whether the policy underlying any rule you apply is sound.

***** THE END *****