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The source of every crime is some defect of the understanding; or some error in reasoning; or some sudden force of the passions. Defect in the understanding is ignorance; in reasoning, erroneous opinion.

~ Thomas Hobbes
(1588 -1679)

SECURED AND UNSECURED TRANSACTIONS

Trouble in naming individual debtors under PPSA

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Determining the correct name of an individual debtor for registration purposes under the *Personal Property Security Act* can be problematic.

The importance of spelling a debtor's name correctly on a financing statement is well known. If spelled incorrectly, a creditor's interest may be found to be unperfected under the

Personal Property Security Act (Ontario) (the "PPSA").

What, then, is the correct name of an individual debtor for registration purposes under the PPSA? The answer to this question will vary depending on the specific characteristics of the debtor.

Unfortunately, the PPSA and other regulatory direction from the Minister yield limited guidance. While case law and provincial guidelines offer a degree of assistance in the matter, uncertainties arise as we progress through the debtor situations outlined below.

Birth certificate

The least complicated scenario is one where the debtor is a Canadian citizen

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TECHNOLOGY LAW

Serious repercussion for ignoring section 45 notice

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Not responding to a notice under s. 45 of the *Trade-Marks Act* could lead to a registered trade-mark being expunged.

The case of *Medos Services Corporation v. Ridout and Maybee* serves as

an example of what happens when the owner of a registered trade-mark ignores a notice under s. 45 of the *Trade-Marks Act* (the "Act").

As a basic premise, a registered trade-mark must be used to maintain the rights associated with registration. A procedure exists under s. 45 of the Act to weed out "dead wood" from the Register. Upon receipt of such a notice, the registered owner has three months to provide an affidavit or statutory declaration.

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with a registered Canadian birth. The decisions in several cases, such as that in *Re Haasen*, establish that the correct name in this circumstance is the name as shown on the debtor's birth certificate.

Government guide

A similar position is endorsed by the Government of Ontario in its guide entitled *The Personal Properties Registration System Guide* (the "Guide"). That Guide contains naming recommendations across various debtor characteristics.

While the Guide is not a legal authority for debtor names, it does offer a degree of clarification. The purpose of this section of the Guide is to assist a registrant in correctly naming an individual debtor for registration purposes.

The Guide notes that for a person born in Canada with a registered birth in Canada, the suggested name is that as shown on the person's birth certificate or "other equivalent document." Unfortunately, the Guide does not provide specific details regarding the meaning of "other equivalent document." This rule remains subject to a change of name or surname (as discussed below).

Canadian citizenship certificate

The appropriate debtor name for a Canadian citizen born outside of Canada was considered by the Ontario Court of Justice in *Canadian Imperial Bank of Commerce v. Melnitzer (Trustee of)* ("*Melnitzer*"). In *Melnitzer*, Justice Killeen stated that in this circumstance, it is "practical" and "rational" to use the name on one's Canadian citizenship certificate.

The Guide reiterates this position by noting that, for these debtor characteristics, one must look to the certificate of citizenship for the correct name. This rule also remains subject to a change of name or surname.

Real and substantial connection

Interestingly, a different outcome might have been reached in *Melnitzer* if sufficient supporting evidence had been present. Justice Killeen stated that, for a person born outside of Ontario, one must consider the law of the jurisdiction in which the person most recently had a "real and substantial connection."

This rule is in accordance with the *Change of Name Act* (Ontario) (the "*Change of Name Act*"). However, in *Melnitzer*, sufficient evidence connecting the debtor to this geographic location did not exist.

Change of name

According to the *Change of Name Act*, a person is entitled to be recognized by a change of name certificate. In *Re Haasen*, the court affirmed that a person is at liberty to choose any name that he or she likes and assume any name by way of addition or substitution.

With respect to a change of name, the court suggested in *Re Haasen* that the correct name would be that as evidenced by measures outlined under the relevant change of name legislation. In other words, the name as stated on a change of name certificate is sufficient in Ontario.

The Guide also takes this position by stating that the correct name if a person changes his or her name is that as stated on a change of name certificate or "other equivalent document."

Assumption of surname

As with a change of name, the assumption of a surname upon marriage has similar implications. According to the Guide, where a person adopts a name upon marriage, the correct name is that adopted by the debtor if the name is recognized by the jurisdiction in which he or she habitually resides.

In Ontario, under the *Change of Name Act*, a spouse may elect, in the

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prescribed manner, to change his or her surname. Therefore, if a surname has been assumed or formally changed after marriage, it is the new name that is correct for registration purposes.

Case law

Case law, however, has created some uncertainty in this context. In *Re Grisenthwaite*, the court decided that the sporadic use by a debtor of her second husband's surname was sufficient to find that that surname was her legal surname for registration purposes at common law.

The debtor had adopted by usage the new surname which had the effect of an election under the *Change of Name Act*. While the *Change of Name Act* has since been amended, it remains unclear what constitutes the adoption of a surname for registration purposes at common law.

Choice of correct name

An individual debtor's name under the PPSA varies on a case-by-case basis depending on the specific characteristics of the debtor. In some instances, the documents described above may be unavailable and, as a result, the issue becomes increasingly complicated and the correct name is unclear. Without further clarity from provincial lawmakers, uncertainties will prove to be problematic.

Significance

In the meantime, careful consideration must be given as to the correct name to address the risk of leaving the security interest unperfected. The best approach is to refer to a Canadian birth certificate, if available, and then consider additional elements such as a subsequent name change.

The naming of individual debtors under the PPSA is heavily regulated by the courts. As a result, it is critical that one consult current case law on a regular basis to ensure effective registration.

REFERENCES: *Re Haasen*, 13 CBR (3d) 94 (overturned on points of law other than those discussed above); ServiceOntario, *The Personal Properties Registration System Guide*, online: <<http://www.ontario.ca/home-and-community/personal-properties-registration-system-guide>>; *Canadian Imperial Bank of Commerce v. Melnitzer (Trustee of)*, 23 CBR (3d) 161; *Change of Name Act*, RSO 1990, Chapter C7; *Re Grisenthwaite*, 63 CBR (NS) 235; For a helpful guide, see: Richard H. McLaren, *Secured Transactions in Personal Property in Canada*.

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Required response

With respect to each of the wares or services specified in the registration, the affidavit or statutory declaration must indicate whether the trade-mark was in use in Canada at any time in the previous three years and, if not, the date when it was last used and the reason why it has not been used since.

Facts

In this case, the Registrar of Trade-marks, at the request of the respondent law firm, mailed a letter by Express Post to the registered owner. No reply was received by the deadline and accordingly, the trade-mark registration was expunged.

Proper address

The appeal of the decision to expunge the trade-mark clarifies numerous items important to owners of registered trade-marks. The registered owner should ensure that the address on file at the Trade-marks

Office is the correct and current address, or appoint an agent and representative for service who has a current address.

Recourse

There is no basis for a submission that the registered owner was not afforded natural justice in ignoring or not responding to the s. 45 letter as the law provides the owner perfectly adequate recourse — an appeal under s. 56 of the Act with new evidence.

Ignorance of the law

In this case, the appellant was self represented. The court and respondent did not rely on the many procedural irregularities, but they did object to the appellant giving what was tantamount to evidence. The court noted the famous words of Lord Atkins in *Evans v. Bartlam* as follows:

The fact is that there is not and never has been a presumption

that every one knows the law. There is the rule that ignorance of the law does not excuse, a maxim of very different scope and application.

Evidence

The evidence must show the connection between the alleged use and the mark in relation to the claimed wares or services. On the evidence, the court in this case observed that a bill from a telecommunications service provider does not speak to the use of the mark if it does not show a connection to the mark.

Moreover, correspondence with possible business partners that does not mention the mark, does not show use of the mark, and rental receipts which do not show use of the mark do not provide evidence of use in advertising.

The court held that correspondence relating to product maintenance that did not refer to the mark

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