Cassels

# Lessons Learned: Lesson Eight - Never Use a Caution Filing Unless Section 6 Applies

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*Cassels developed this **Lessons Learned** series based on our experience with priority disputes between secured creditors and the realization that many secured parties make fundamental errors of law that cause them to lose priority in their collateral. Each lesson in the series will outline a basic mistake and the lesson to be learned…*

## Lessons Learned: Lesson Eight – Never Use a Caution Filing Unless Section 6 Applies

In a recent case, our firm observed an equipment lessor who registered a *Personal Property Security Act* (Ontario)[1] (PPSA) financing statement indicating that the registration was a "caution" filing. In the circumstances of that case, this was an unexpected finding, as the context was not appropriate for this type of registration.

It is likely that in this case, the lessor did this out of a familiarity with registering financing statements in the United States, where a caution or precaution filing is used to distinguish between a true lease and a finance lease. However, this is simply not the law under today's PPSA.

## Caution Filings in Ontario

Caution filings relate only to the scenario contemplated by section 6 of the PPSA, where collateral that is subject to a security interest in one jurisdiction is brought into, or is intended to be brought into, another jurisdiction for purposes other than transportation through the other jurisdiction.

If the above facts exist, it may be appropriate to register a caution filing against such collateral. By doing so, a secured creditor gives notice that its security interest in the collateral remains valid in the original jurisdiction, despite the collateral being moved into the new jurisdiction. A secured creditor would still be required to comply with section 5 of the PPSA to perfect its security interest in Ontario pursuant to the Ontario PPSA.

There is very little reported law on what the impact of a caution filing is. In the recent case mentioned above, the mere fact that a lessor had designated its registrations as caution filings, where section 6 did not apply, caused much uncertainty with respect to the nature and validity of the security interest. Although the issue was ultimately settled, all parties involved incurred undue costs arguing over the validity or materially misleading nature of the lessor's security.

## Lesson Learned

Never use a caution filing unless section 6 of the PPSA applies.

[1] *Personal Property Security Act*, R.S.O. 1990, c. P.10.

*This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.*