

PERFECTION IS CRITICAL TO MAINTAINING PRIORITY OVER JUDGMENT CREDITORS

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A recent decision of the Ontario Superior Court of Justice serves as a reminder for secured lenders of the importance of perfecting a security interest by registration. Absent perfection, collateral is at risk of seizure by judgment creditors of the borrower. Perfection, however, insures that a creditor has a priority interest in collateral over any subsequent judgment creditor. The decision also shows the importance to vendors of conducting continuous diligence on customers when credit is being extended on a regular basis.

Background

In *1889072 Ontario Limited v Globealive Wireless Management Corp.*,^[1] 1889072 Ontario Limited financed Selectore Ltd. The loan agreement was subject to a general security agreement providing for a security interest in all of Selectore's assets, including its receivables. The security interest was perfected by registration in 2013.

At the end of 2014, one of Selectore's vendors, Globealive Wireless Management Corp., obtained a judgment against Selectore for \$1 million. Globealive then sought to enforce the judgment by issuing a notice of garnishment to the City of Toronto relating to a receivable of approximately \$80,000 owing to Selectore by the City for certain goods and services.

188 learned of the garnishment and sought to block it, claiming to have a security interest in the receivable that trumped Globealive's right to garnishment.

Before Justice Newbould, 188 sought a declaration that the receivable owing to Selector by the City was subject to a security interest standing in priority to any interest of Globealive. In response, Globealive argued that at the time of its notice of garnishment, and at the time the receivable was due to be paid, Selectore was not in default on any loan from 188 and so 188 did not have any right in the receivable.

Declaration Granted

Justice Newbould agreed that the relevant section of the *Personal Property Security Act* was 20(1)(a)(ii) which provides that: "until perfected, a security interest in collateral is subordinate to the interest of a person who causes the collateral to be seized through...garnishment." After reviewing the authorities, His Honour accepted

that "the purport of section 20(1)(a)(ii) of the PPSA [is] that once perfected, the security of a lender takes priority over a later notice of garnishment."

The consequence of this interpretation was that even though there was no default under the loan to Selectore, the garnishment by Globealive served on the City was ineffective to require the payment of that receivable to Globealive. 188 had a security interest in the receivable ranking in priority to Globealive's interest and was entitled to the declaration it sought.

A Reminder to Business Extending Credit to Customers Too

Aside from serving as a reminder for secured creditors of the importance of perfection, the result in *Globealive* shows the importance of obtaining and reviewing a PPSA search in respect of customers to whom credit is extended on a regular basis.

Globealive had done business with Selectore since 2010. Selectore kept its account current through 2013, around the time 188's security interest was perfected by registration. Globealive, however, then continued to supply Selectore on credit until August 2014, perhaps unaware that its potential for recovery had been impacted by 188's PPSA registration the year before. The oversight appears to have cost Globealive at least \$80,000.

So while the decision confirms the importance for secured creditors to perfect their security interests by registration, it also demonstrates that regular reviews of PPSA searches on customers to whom material credit is extended is a sound business practice.

by Jeffrey Levine and J.R. Beaudrie

1 [1889072 Ontario Limited v Globealive Wireless Management, 2016 ONSC 3578](#)[ps2id id='1' target='']

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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