

**PENTALOGY: RECOMMENDATIONS FOR REFORM
OF THE “SELLER IN POSSESSION” STATUTORY REGIMES
OF ALBERTA, BRITISH COLUMBIA, NORTHWEST TERRITORIES,
NUNAVUT, AND SASKATCHEWAN**

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This article concludes a five-part series of articles dedicated to the exposition of and improvement to “seller in possession” disputes in common law Canada. Alberta, British Columbia, Northwest Territories, Nunavut, and Saskatchewan most appropriately define the risk that a buyer is exposed to when they leave bought goods in the seller’s possession. These provinces and territories also offer the most suitable registration facilities for the protection of the buyer’s non-possessory interest in the goods.

Therefore, this article focuses on the scope of registration-based protection and the eligibility in these provinces and territories for registration-based protection with respect to buyers who leave bought goods in the seller’s possession. Legislators in these provinces and territories should not expand eligibility for registration-based protection to conditional buyers out of possession. Additionally, registration-based protection should only be extended to a conditional buyer out of possession if the Sale of Goods Act in these jurisdictions is modernized in a manner that places less emphasis on title and the nemo dat principle.

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THE GREAT FIGURE

by William Carlos Williams

Among the rain
and lights
I saw the figure 5
in gold
on a red
firetruck
moving
tense
unheeded
to gong clangs
siren howls
and wheels rumbling
through the dark city.

I. INTRODUCTION

A pentalogy is a compound literary or narrative work explicitly divided into five parts. The parts are connected, so a pentalogy may be regarded either as a single work or as five independent pieces. This is the final instalment of a pentalogy focused on the resolution of “seller in possession” disputes in common law Canada. A “seller in possession” dispute arises when a buyer (B) leaves bought goods with a seller (A) who, without authorization, resells¹ them to a subsequent buyer (C). Both B and C have contractual recourse against A, but only one can succeed in the title dispute. The other must bear loss of the goods.

In my four previous articles — published in the *Saskatchewan Law Review*,² *Dalhousie Law Journal*,³ *Supreme Court Law Review*,⁴ and the *University of New Brunswick Law Journal*,⁵ respectively — I surveyed and critiqued various aspects of the “seller in possession” statutory regimes of Canada’s 12 common law provinces and territories. While statutory uniformity is the norm in Canadian sale of goods law, variable governance of the “seller in possession” problem presents a rare and interesting exception. Presently there are four distinct statutory models in force across common law Canada that apply to settle this kind of title conflict. Depending on where these events unfold, the matter is resolved

¹ The subsequent transfer of possession from A to C may also occur pursuant to a “pledge or other disposition.”

² Clayton Bangsund, “ABCD Remoteness Problems: *Nemo Dat* & Its Exceptions Under Subsection 26(1.2) of Saskatchewan’s *The Sale of Goods Act*” (2018) 81:2 Sask L Rev 133 [Bangsund, “ABCD Remoteness Problems”].

³ Clayton Bangsund, “A Survey and Critique of the ‘Seller in Possession’ Statutory Regimes of Common Law Canada: An ABC Prequel” (2019) 42:2 Dal LJ 243 [Bangsund, “ABC Prequel”].

⁴ Clayton Bangsund, “Eliminating Redundancy in Legislation Governing the Sale of Goods: A Threequel” (2019) 93 SCLR (2d) 367 [Bangsund, “Threequel”].

⁵ Clayton Bangsund, “Uniquely Treacherous Waters: More on the ‘Seller in Possession’ Statutory Regimes of New Brunswick, Newfoundland & Labrador, Nova Scotia and Prince Edward Island” (2020) 71 UNBLJ 30.

according to criteria set out in a variety of provincial and territorial statutes including the *Sale of Goods Act (SGA)*, the *Factors Act* and the *Personal Property Security Act (PPSA)*.

My research has led me to conclude that, of the four statutory models in force (which I have labelled Models 1,⁶ 2, 3,⁷ and 4⁸), Model 2 — representing the law of five jurisdictions, Alberta, British Columbia, Northwest Territories, Nunavut, and Saskatchewan — most appropriately defines buyer B’s risk exposure while offering suitable registration facilities for the protection of his or her non-possessory ownership interest in the goods. By offering B attenuated registration-based protection, Model 2 is most consonant with and responsive to the legitimate expectations and needs of parties to commercial transactions. I advanced this argument in the *Dalhousie Law Journal*,⁹ and will not repeat it here. Instead, in this final edition of the series, I turn my attention to two discrete aspects of Model 2, then recap my recommendations for statutory reform in western and northern Canada.

In Part II, relying on the relevant statutory text and my earlier works on the subject, I build toward and describe a key difference — concerning the scope of registration-based protection available to B against C — between the law of Alberta, British Columbia, Northwest Territories, and Nunavut on one hand (“Model 2A”), and Saskatchewan on the other (“Model 2B”). I recommend that legislators in Saskatchewan align the province’s *The Sale of Goods Act*¹⁰ with the SGAs in force in the Model 2A provinces and territories. In Part III, I review B’s eligibility for registration-based protection in all Model 2 jurisdictions, and canvass the possibility of extending such protection to B even where she is a non-owning buyer pursuant to an executory conditional sale contract. Part IV draws on earlier parts of the article and editions of the pentalogy to synthesize my recommendations for reform in each of the Model 2 provinces and territories. In Part V, I offer some closing remarks on a five-part series of articles dedicated to the exposition of and improvement to an obscure and complex body of Anglo-Canadian sales law.

II. SCOPE OF REGISTRATION-BASED PROTECTION

A. COMMONALITY AND PROXY LAW

Before highlighting variability in the scope of the registration-based protection conferred by Models 2A and 2B, I must first identify commonalities in the statutory provisions in force across all Model 2 jurisdictions. In this article, Alberta law serves as proxy for the law of all Model 2A provinces and territories. At this early stage of the discussion, and except as otherwise expressly indicated, Alberta law also serves as proxy for the lone Model 2B province, Saskatchewan.

⁶ Model 1: Manitoba, Ontario, Yukon.

⁷ Model 3: New Brunswick, Newfoundland & Labrador, Nova Scotia.

⁸ Model 4: Prince Edward Island.

⁹ Bangsund, “ABC Prequel,” *supra* note 3 at 254–59.

¹⁰ RSS 1978, c S-1 [SSGA].

1. *NEMO DAT*

The Latin maxim *nemo dat quod non habet* — which means “no one can give what he does not have” — is the analytical starting point for resolution of a “seller in possession” dispute under Model 2. Section 23(1) of Alberta’s *Sale of Goods Act*¹¹ provides: “Subject to this Act, if goods are sold by a person who is not the owner of them and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had unless the owner of the goods is by the owner’s conduct precluded from denying the seller’s authority to sell.”¹²

With reference to the article’s introductory scenario, title has already vested in B under the initial sale, thus A is unable to transmit title to C. Pursuant to ASGA section 23(1), B prevails over C pursuant to the *nemo dat* principle unless B is estopped from denying A’s authority to sell the goods or C is able to avail herself of an exception to *nemo dat* recognized by an overriding statutory provision.

2. EXCEPTION TO *NEMO DAT*

Model 2 recognizes an exception to *nemo dat* in the “seller in possession” context. Section 26(1) of the ASGA provides:

When a person who has sold goods continues or is in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for that person of the goods or documents of title under any sale, pledge or other disposition thereof, to any person receiving them in good faith and without notice of the previous sale has the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make it.¹³

Pursuant to ASGA section 26(1), C prevails over B if B leaves the bought goods in the possession of A, who then resells, pledges, or otherwise disposes of them to C, a good faith purchaser without notice. The rationale for this exception to *nemo dat* is articulated in the first edition of the pentalogy:

Although A no longer owns the goods, the subsection provides that he is able to convey title as if B had expressly authorized him to do so. Accordingly, C can rely on A’s possession of the goods or documents of title as sufficient proof of his ownership or authority to sell or grant some other possessory interest in them.

¹¹ RSA 2000, c S-2 [ASGA]; *Sale of Goods Act*, RSBC 1996, c 410 [BCSGA]; *Sale of Goods Act*, RSNWT 1988, c S-2 [NWTSGA], duplicated for Nunavut by section 29 of the *Nunavut Act*, SC 1993, c 28 [NUSGA]; SSGA, *ibid*.

¹² ASGA, *ibid*, s 23(1); BCSGA, *ibid*, s 26(1); NUSGA, *ibid*, s 25(1); NWTSGA, *ibid*, s 25(1); SSGA, *ibid*, s 23(1).

¹³ See also *Factors Act*, RSA 2000, c F-1, s 9(1) [Alberta *Factors Act*]; BCSGA, *ibid*, s 30(1); NWTSGA, *ibid*, s 27(2); *Factors Act*, RSNWT 1988, c F-1, s 8(1) [NWT *Factors Act*]; NUSGA, *ibid*, s 27(2); *NWT Factors Act*, s 26(1) duplicated for Nunavut by section 29 of the *Nunavut Act* [Nunavut *Factors Act*]; SSGA, *ibid*, s 26(1); *The Factors Act*, RSS 1978, c F-1, s 9(1) [Saskatchewan *Factors Act*]. To simplify and streamline the discussion, and to make the article more comprehensible for the reader, I primarily discuss the SGA subsections in Parts II and III, and identify in the footnotes, where applicable, concordant provisions of the *Factors Act*. For a critical discussion of this peculiar statutory replication, see Bangsund, “Threequel,” *supra* note 4.

Subsection 26(1) furnishes an exception to *nemo dat* based on a policy of protecting innocent purchasers who rely, in good faith, on seller possession as a badge of authority.¹⁴

3. RESURRECTION OF *NEMO DAT*

Model 2 furnishes a registration-based exception to the exception to — or resurrection of — *nemo dat* in defined circumstances under which the subsequent sale to C occurs outside the ordinary course of A's business. Section 26(2) of the *ASGA* provides:

Subsection (1) does not apply to a sale, pledge or other disposition of goods or of documents of title to goods, other than negotiable documents of title to goods, that is out of the ordinary course of business of the person having sold the goods where, prior to the sale, pledge or disposition, the interest of the owner is registered in the Personal Property Registry in accordance with the regulations made under the *Personal Property Security Act*, and Part 4 of that Act applies, with the necessary modifications, to that registration.¹⁵

The provision is a modernized successor to repealed bills of sale legislation that was in force in all Model 2 jurisdictions except British Columbia immediately prior to the inception of the *PPSA*.¹⁶ It confers registration-based protection to B in relation to C in defined circumstances. The operation and effect of *ASGA* section 26(2) are described in the second part of the pentalogy:

Under Model 2, B is unable to prevent A from conferring title to C pursuant to an ordinary course sale. Registration offers B attenuated protection, serving as a pre-condition to the categorical application of *nemo dat vis-à-vis* C where C is a buyer outside the ordinary course. Specifically, *ASGA* s. 26(2) requires that B, the buyer/owner who occupies a position analogous to that of a secured party, register notice of his interest in the PPR if he wishes to preserve *nemo dat* and gain optimal protection against third parties, like C, who deal with A in good faith outside the ordinary course of business. B is protected against C provided he properly registers notice of his interest in the PPR; the exception to *nemo dat* in *ASGA* s. 26(1) no longer applies, and B prevails pursuant to the joint application of *ASGA* ss. 23(1) and 26(2). This registration-based system, which replaces repealed bills of sale legislation in Model 2 jurisdictions, is fully integrated with the PPR's electronic notice-registration system and enables C to discover B's ownership by conducting a search of A's name, thus justifying an outcome in B's favour.¹⁷

¹⁴ Bangsund, "ABCD Remoteness Problems," *supra* note 2 at 142. In Model 1 provinces and territories — Manitoba, Ontario, and Yukon — the analysis ends with the "seller in possession" exception to *nemo dat*. Despite having existing Personal Property Registry (PPR) infrastructure, none of these jurisdictions confer registration-based protection to B as a buyer out of possession. See Bangsund, "ABC Prequel," *supra* note 3 at 254–56.

¹⁵ *ASGA*, *supra* note 11, s 26(2) [emphasized text highlights the different operative language in Models 2A and 2B, described below in Part II.B]. See also *Alberta Factors Act*, *supra* note 13, s 9(2); *BCSGA*, *supra* note 11, s 30(2); *NWTSGA*, *supra* note 11, s 27(2.1); *NWT Factors Act*, *supra* note 13, s 8(2); *NUSGA*, *supra* note 11, s 27(2.1); *Nunavut Factors Act*, *supra* note 13, s 8(2); *SSGA*, *supra* note 10, s 26(1.1); *Saskatchewan Factors Act*, *supra* note 13, s 9(2).

¹⁶ *Bills of Sale Act*, RSA 1980, c B-5, as repealed by the *Personal Property Security Act*, SA 1988, c P-4.05, s 101(b); Northwest Territories, *Consolidation of Bills of Sale Act*, RSNWT 1988, c B-1, as repealed by the *Consolidation of Personal Property Security Act*, SNWT 1994, c 8 [NWTPPSA], s 87; Nunavut, *Consolidation of Bills of Sale Act*, RSNWT 1988, c B-1, duplicated for Nunavut by section 29 of the *Nunavut Act*, SC 1993, c 28, as repealed by the *Consolidation of Personal Property Security Act*, SNWT 1994, c 8, s 87 [NUPPSA]; *The Bills of Sale Act*, RSS 1978, c B-1, as repealed by *The Bills of Sale Repeal Act*, SS 1979-80, c 13, s 3. See generally Bangsund, "ABCD Remoteness Problems," *supra* note 2 at 147–48. Bills of sale legislation was not in force in British Columbia prior to the inception of the *Personal Property Security Act*, SBC 1989, c 36.

¹⁷ Bangsund, "ABC Prequel," *supra* note 3 at 250 [footnotes omitted].

Having recounted the commonalities between Models 2A and 2B, I focus next on a key difference.

B. POINT OF DIFFERENCE: GOODS SUBJECT TO A NEGOTIABLE DOCUMENT OF TITLE

In earlier parts of the pentalogy,¹⁸ I deliberately avoided analyzing scenarios in which the goods are subject to a negotiable document of title.¹⁹ In this context, the goods bought by buyer B from seller A continue in the possession of a bailee — like a warehouse under a warehouse receipt,²⁰ or a carrier under a bill of lading²¹ — rather than seller A himself. The key point of distinction between Models 2A and 2B concerns the strength of registration-based protection conferred to B in these circumstances. The italicized text in *ASGA* section 26(2) (reproduced above in Part II.A.3), which excludes goods covered by a negotiable document of title from the scope of registration-based protection, is absent in Saskatchewan's concordant provision, *SSGA* section 26(1.1).²² The following scenario illustrates the effect of this variance:

Scenario 1. A owns a transformer that is stored at Warehouse X pursuant to a negotiable warehouse receipt registered in A's name. Pursuant to a written contract of sale, A sells the transformer to B for value. B does not require use of the transformer for several months, and accordingly does not demand immediate possession of the transformer. Nor does B take delivery of the negotiable warehouse receipt, but instead leaves it in the possession of A without any notation evidencing the sale. B does, however, effect valid registration at the PPR in order to give public notice of his interest in the transformer. A later resells the transformer, outside the ordinary course of business, to C who takes possession of the endorsed negotiable warehouse receipt in good faith and without notice of B's interest. C presents the negotiable warehouse receipt to Warehouse X and obtains possession of the transformer. B eventually discovers that the transformer has been resold, and a title dispute erupts between B and C.

In Alberta, under Model 2A, C prevails over B pursuant to the exception to *nemo dat* recognized in *ASGA* section 26(1) because C acquired the endorsed negotiable document of title in good faith without notice of B's interest in the transformer.²³ In accordance with the carve-out language in *ASGA* section 26(2), B does not enjoy registration-based protection against C in these circumstances.²⁴ Under Model 2A, the negotiability of the warehouse

¹⁸ *Ibid* at 247, n 11.

¹⁹ *ASGA*, *supra* note 11, s 1(e):

“[D]ocument of title to goods” includes (i) a bill of lading, dock warrant, warehousekeeper's certificate or warrant or order for the delivery of goods, and (ii) any other documents used in the ordinary course of business as proof of the possession or control of goods or authorizing or purporting to authorize, either by endorsement or delivery, the possessor of the document to transfer or receive goods represented by the document.

²⁰ See also *Alberta Factors Act*, *supra* note 13, s 1(1)(a).

²¹ See generally *Warehouse Receipts Act*, RSA 2000, c W-1; *Warehouse Receipts Act*, RSBC 1996, c 481. Similar legislation is not in force in Northwest Territories, Nunavut, or Saskatchewan.

²² See generally Michael D Boole, *The Bill of Lading: A Document of Title to Goods, an Anglo-American Comparison* (London, UK: LLP Limited, 1997).

²³ *SSGA*, *supra* note 10, s 26(1.1).

²⁴ *ASGA*, *supra* note 11, s 26(1).

²⁵ *Ibid*, s 26(2).

receipt supersedes B's registered notice of ownership in the PPR. Meanwhile, in Saskatchewan, under statutory Model 2B, B prevails over C pursuant to *SSGA* sections 23(1) and 26(1.1) because B registered notice of his ownership in the PPR prior to A's resale of the transformer to C — the resurrection of *nemo dat*.²⁵

C. DISCUSSION

Model 2B confers registration-protection to buyer B even where goods are covered by an unmarked negotiable document of title. To justify the discrepant outcome produced by the *SSGA* favouring B, one might observe that C was in a position to discover B's interest in the transformer by conducting a search of A's name in the PPR. By taking this precautionary step, C could have avoided or resolved any potential conflict from the outset. While this is true, an outcome in favour of B nullifies a core attribute of negotiability and blunts C's ability to transact in reliance on unmarked documents of title. Also, keep in mind that B could have taken additional steps to protect himself against C by, for example, insisting on immediate delivery of the endorsed warehouse receipt at the time the contract of sale was signed. The outcome produced by the *SSGA* is anomalous within a legal system in Saskatchewan that otherwise recognizes the negotiability of documents of title.²⁶

Saskatchewan was the first Model 2 jurisdiction to introduce a registration-based resurrection of *nemo dat* in the “seller in possession” provisions of its *SGA*. In 1981,²⁷ as part of a broader modernization effort, *SSGA* sections 26(1.1)²⁸ and 26(1.2)²⁹ took force simultaneously with *The Personal Property Security Act*.³⁰ The Model 2A provinces and territories subsequently enacted concordant legislation³¹ and, in borrowing from Saskatchewan, benefited from both its progressive elements and missteps.³² The variable language of Model 2A reflects an incremental improvement to sale of goods legislation in force in Alberta, British Columbia, Northwest Territories, and Nunavut, based on lessons learned from Saskatchewan's experience.

D. RECOMMENDATION

The anomalous treatment of negotiable documents of title under *SSGA* section 26(1.1) has not yet been litigated before a Saskatchewan court, perhaps due to the obscure nature of the provision. Nevertheless, since it is a live priority provision, I recommend that Saskatchewan's registration-based “resurrection” provision be aligned with its statutory equivalents in Alberta, British Columbia, Northwest Territories, and Nunavut.³³ Legislators should take this opportunity to amend the provision, thereby simultaneously creating: (1)

²⁵ *SSGA*, *supra* note 10, ss 23(1), 26(1.1).

²⁶ See e.g. *Saskatchewan Factors Act*, *supra* note 13, s 3; *The Personal Property Security Act*, 1993, SS 1993, c P-6.2, s 31(5) [*SPPSA*].

²⁷ Bangsund, “ABCD Remoteness Problems,” *supra* note 2 at 147.

²⁸ *Saskatchewan Factors Act*, *supra* note 13, s 9(2).

²⁹ *Ibid*, s 9(3).

³⁰ SS 1979-80, c P-6.1.

³¹ *Personal Property Security Act*, RSA 2000, c P-7, replacing *Personal Property Security Act*, SA 1988, c P-4.05 [*APPSA*]; *Personal Property Security Act*, RSCB 1996, c 359, replacing *Personal Property Security Act*, SBC 1989, c 36; *NWTPPSA*, *supra* note 16; *NUPPSA*, *supra* note 16.

³² On legislative borrowing, see Roderick J Wood, “Identifying Borrowed Sources in Secured Transactions Law Reform” (2019) 24:3 *Unif L Rev* 545.

³³ Bangsund, “ABCD Remoteness Problems,” *supra* note 2 at 160.

greater coherency in the law of negotiability within Saskatchewan's legal system as a whole; and (2) interjurisdictional uniformity with the Province's Model 2A counterparts. Specifically, section 26(1.1) of the *SSGA* should be amended to include carve-out language for goods covered by negotiable documents of title, as follows:

Subsection (1) does not apply to a sale, pledge or other disposition of goods or of documents of title to the goods [*other than negotiable documents of title to goods*] that is out of the ordinary course of business of the person having sold the goods, where, prior to the sale, pledge or disposition, the interest of the owner is registered in the Personal Property Registry in accordance with the regulations made under *The Personal Property Security Act, 1993*, and Part IV of that Act applies, *mutatis mutandis*, to such registration.³⁴

III. ELIGIBILITY FOR REGISTRATION-BASED PROTECTION

The discussion in Part III applies in relation to all Model 2 provinces and territories. Again, except where otherwise indicated, Alberta law serves as general proxy for British Columbia, Northwest Territories, Nunavut, and Saskatchewan.

A. RESTRICTED ELIGIBILITY

1. SALE VERSUS AGREEMENT TO SELL

The *SGA* has changed very little since its inception in Canada's common law provinces and territories during the late nineteenth and early twentieth centuries.³⁵ The statute attaches special significance to locus of title, that is, to who *owns* the goods that are subject to a "contract of sale."³⁶ A contract of sale may either be a "sale,"³⁷ connoting that title has passed from seller to buyer, or an "agreement to sell,"³⁸ connoting that title remains with the seller or a third party pending satisfaction of specified conditions.

An agreement to sell ripens into a sale when title to the goods is transmitted from seller to buyer.³⁹ This temporal point is determined according to the parties' intentions or, where no such intentions can be discerned, a set of suppletive statutory rules.⁴⁰ For instance, under an unconditional contract of sale for specific goods in a deliverable state, unless a contrary intention is shown, the buyer acquires title to the goods at the time of contract formation irrespective of postponed payment or delivery.⁴¹ In contrast, under the express terms of a conditional sale contract the seller retains title to the goods until the purchase price is fully paid.⁴²

³⁴ *SSGA*, *supra* note 10, s 26(1.1) [proposed additional language has been italicized].

³⁵ Roderick J Wood, "The Codification of Commercial Law" (2016) 79:2 Sask L Rev 179 at 191.

³⁶ *ASGA*, *supra* note 11, s 1(c): "'contract of sale' includes an agreement to sell as well as sale."

³⁷ *Ibid*, s 3(4) ("[w]hen under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale").

³⁸ *Ibid* ("but when the transfer of the property in the goods is to take place at a future time or subject to some condition subsequently to be fulfilled, the contract is called an agreement to sell").

³⁹ Roderick J Wood, "The Interface Between Sales Law and Secured Transactions Law" (2018) 61 Can Bus LJ 27 at 33.

⁴⁰ *ASGA*, *supra* note 11, ss 18–20.

⁴¹ *Ibid*, s 20(2).

⁴² *Ibid*, s 19(1).

2. IMPLICATIONS

Under the *ASGA*, it is axiomatic that B cannot assert the *nemo dat* principle against C under either section 23(1) or 26(2) until B becomes the *owner* of the goods pursuant to a *sale*.⁴³ If the goods are subject to a mere *agreement to sell*, then title remains vested in A and the *nemo dat* principle cannot operate to prevent A from transferring title to C.⁴⁴ It follows that B is only entitled to registration-based protection under *ASGA* section 26(2) once he acquires title to the goods, after they have been *sold*.⁴⁵ Consider the implications:

Scenario 2. A owns a crane. A agrees to sell the crane to B pursuant to a conditional sale contract (CSC). Under the CSC: (1) B makes an initial down payment of 20 percent of the purchase price and agrees to pay monthly instalments toward the remainder over a term of 24 months; (2) A retains title to the crane until the purchase price is paid in full, at which time title is to pass to B; and (3) B is entitled to possess and use the crane at his earliest convenience upon execution of the CSC and provided that payments continue to be made to A, as agreed. B does not require immediate use of the crane and, in any event, lacks immediate access to the equipment and labour necessary to disassemble and transport the crane to B's next jobsite. A retains possession of the crane while B makes arrangements for disassembly, loading, and transportation. B effects registration at the PPR in order to give public notice of his interest in the crane. A later resells the crane, outside the ordinary course of business, to C, who takes possession in good faith and without notice of B's interest. B soon discovers that A resold the crane, and a title dispute develops between B and C.

Under Model 2, C prevails over B because A retained title to the crane and was therefore able to transfer ownership to C at the time of the subsequent sale. B does not gain the benefit of *nemo dat* under *ASGA* section 23(1) because he never acquired title to the crane. As such, C need not rely on the exception to *nemo dat* recognized in *ASGA* section 26(1) in order to defeat B's interest. It follows that B is unable to resurrect *nemo dat* via registration under *ASGA* section 26(2).⁴⁶ While furnishing C a method of discovering B's limited interest in the crane, the registration effected by B is unsanctioned by the *ASGA* and completely ineffective in protecting his interest as conditional buyer. As noted by Roderick Wood, "[s]ales law in Canada, Australia, and New Zealand does not recognize any proprietary right in a buyer who acquires neither title nor possession of the goods."⁴⁷

⁴³ MG Bridge, *Sale of Goods* (Toronto: Butterworths, 1988) at 635.

⁴⁴ Bangsund, "ABCD Remoteness Problems," *supra* note 2 at 144.

⁴⁵ *ASGA*, *supra* note 11, s 26(2).

⁴⁶ *Ibid.*

⁴⁷ Roderick J Wood, "Transplanted Legal Controversies: Buyer Status Under Secured Transactions Law" (2019) 54:2 *Tex Intl LJ* 305 at 320 [Wood, "Transplanted Legal Controversies"]. But see Part III.C.5 for recent developments on this point.

B. CONTEMPLATING ELIGIBILITY-EXPANSION FOR CONDITIONAL BUYERS

The question arises whether Model 2 jurisdictions should confer registration-based protection to B where he is a non-owning buyer (a “conditional buyer”) out of possession under a conditional sale contract. In Part III.C, I canvass numerous arguments both for and against the expansion of registration-based protection to conditional buyers.

C. DISCUSSION: CANVASSING ARGUMENTS FOR AND AGAINST ELIGIBILITY-EXPANSION

1. FACILITY, FLEXIBILITY, AND TRANSPARENCY

The first argument in favour of eligibility-expansion is predicated on values of facility, flexibility, and transparency. Extending the *SGA*'s registration-based protection to conditional buyers would facilitate a broader range of deferred-possession contracts of sale and at the same time enhance public transparency in respect of non-possessory interests in goods. One can readily imagine sensible reasons why conditional buyer B might wish to purchase goods under a conditional sale contract without taking immediate possession from seller A. As in Scenario 2 above, B may lack access to the equipment and labour required for disassembling, loading, and transporting the goods. Alternatively, “B may have a job pending at a worksite near A’s premises that will require use of the goods; if B can comfortably postpone the possession date to coincide with set-up at the new worksite, he is spared the additional and unnecessary expenses and risks associated with moving the goods twice, thereby realizing economic efficiencies.”⁴⁸ Or, the reason for B’s delayed possession may simply be that he is “trying to find a place for his stuff.”⁴⁹

If the *SGA* were amended to confer a registration option to B as a conditional buyer out of possession, then *all* buyers — not just owning buyers — would enjoy the same level of flexibility in crafting and effectuating delayed-possession arrangements involving goods subject to a contract of sale. Under such a statutory system, a broader range of buyers would be incentivized to publicize notice of their non-possessory interests in goods, and greater overall transparency in the commercial marketplace would result.

2. NEED AND INCENTIVIZATION

Two initial arguments counter those advanced in favour of expanding eligibility for registration-based protection. First, as a practical matter, there are relatively few instances in which a conditional buyer will see fit to leave goods in the uninterrupted possession of the seller. According to this view, there is little-to-no need to expand eligibility for registration-based protection to conditional buyers in the “seller in possession” context because few conditional buyers out of possession are likely to exercise their option to register.⁵⁰

⁴⁸ Bangsund, “ABCD Remoteness Problems,” *supra* note 2 at 155.

⁴⁹ *Ibid.* On “stuff,” see George Carlin with Tony Hendra, *Last Words: A Memoir* (New York: Free Press, 2009) at 214.

⁵⁰ This point is confirmed by annual registration statistics furnished to The Canadian Conference on Personal Property Security Law (CCPPSL) by its member jurisdictions.

Moreover, by depriving conditional buyer B of registration as a prophylactic, lawmakers effectively incentivize her to take early possession of goods subject to a conditional sale contract so as to eliminate the possibility of the goods being lost to a prospective transferee C.⁵¹ Through behavioural incentives, Model 2 both addresses transparency concerns and ensures that goods are swiftly acquired by those who are able to put them to their most productive use.

There may be some merit in the above arguments, but I do not find them altogether persuasive. As highlighted above, there are plausible, albeit rare, circumstances in which a conditional buyer may wish or need to defer acquisition of possession of the subject goods. The relative improbability of such a scenario arising does not justify a deprivation of statutory protection to B. As I posited in my second contribution to the pentalogy, “[i]f a modern registration-based system facilitates secured transactions involving goods, protecting secured parties against subsequent competitors like C, then surely it should facilitate sales of those same goods on equally robust terms.”⁵²

3. INTEGRATION AND SYMMETRY

Another argument in favour of granting registration-based protection to conditional buyers is that it would create better integration between the *SGA* and the *PPSA* in their co-governance of conditional sale contracts. The *PPSA* disregards locus of title under a conditional sale contract, focusing instead on its substance as a secured financing transaction.⁵³ The legislation recharacterizes: (1) a non-owning conditional buyer of goods as an owner/debtor; and (2) an owning conditional seller as a mere secured party with a statutory charge in the goods. Conditional seller A must perfect her security interest by effecting registration at the PPR within a short time frame of relinquishing possession of the goods to conditional buyer B.⁵⁴ Conferring the *SGA*’s registration-based protection to B as a conditional buyer out of possession would essentially symmetrize the treatment afforded to non-possessory interests in subject goods during different phases of the same transaction.

4. CONCEPT AND PRACTICE

The arguments in favour of expanding eligibility for registration-based protection to conditional buyers are pragmatic, and seem compelling on first reading. However, deeper analysis reveals even more persuasive arguments *against* the expansion of registration-based protection, at least under the *SGA* in its present form. First, eligibility expansion would create conceptual confusion and forge a disquieting new principle, to wit, that in certain circumstances an owner of goods cannot give what she does have, namely, title to the goods; *nemo dare potest quod habet*.⁵⁵ It is tempting to invoke functionalism as grounds for dismissing the conceptual concern, but this counterpoint is fallacious because the *nemo dat*

⁵¹ Bangsund, “ABCD Remoteness Problems,” *supra* note 2 at 154.

⁵² Bangsund, “ABC Prequel,” *supra* note 3 at 256.

⁵³ *PPSA*, *supra* note 31, s 3(1).

⁵⁴ Clayton Bangsund, *Bangsund on the Personal Property Security Act: The CCPSL Model* (Toronto: Thomson Reuters, 2021) at 64 [Bangsund, *Bangsund on the PPSA*].

⁵⁵ Thank you to Professor Ann DeVito of the University of Saskatchewan for assisting with this Latin translation.

principle and its exceptions operate within the *SGA*'s formal title-based system.⁵⁶ The *PPSA* places substance above form, but for the most part, the *SGA* strictly adheres to the form of a contract of sale and attaches significance to locus of title. In this sense, the statutes co-exist in two solitudes. Under the *SGA*, conceptual purity is important for reasons of coherency and certainty.

The prospect of eligibility-expansion also creates practical problems. Serious legislative drafting difficulties arise because *ASGA* sections 23(1), 26(1), and 26(2) are explicitly couched in language of "title," "ownership" (that is, the owner), and the goods being "sold."⁵⁷ The analytical starting point for a "seller in possession" dispute is that owner B prevails unless C can avail herself of an exception to *nemo dat*.⁵⁸ Such an exception is available if C receives the goods in good faith without notice of B's interest.⁵⁹ However, B may resurrect *nemo dat* against a subsequent non-ordinary course buyer C by effecting registration in the PPR prior to that sale. In the explicit language of *ASGA* section 26(2), "[s]ubsection (1) does not apply to a sale ... that is out of the ordinary course of business of the person having sold the goods."⁶⁰ It is not obvious how to modify the language of the existing "seller in possession" subsections in a manner that achieves the desired object without simultaneously altering the subsections' substantive meaning through use of facially self-contradictory language. In a commercial statute, every word matters, and even seemingly innocuous wording and phrasing modifications can have serious and unintended consequences.⁶¹ A good rule is that, in trying to make things better, lawmakers should never make things worse. Attempting to extend registration-based protection to a conditional buyer out of possession could do just that.

I think it would be difficult to modify the existing subsections of *ASGA* section 26, or to add new sections, in simple and clear language that does not concomitantly introduce incoherency and confusion into the law. Section 26(2) of the *ASGA* operates to resurrect *nemo dat* in favour of buyer B through timely registration. However, in the context of a conditional sale contract, *nemo dat* is a presumptive starting point that conditional buyer B never enjoyed. If legislators wish to protect the interest of a conditional buyer out of possession, they should do so within the framework of a modern sale of goods statute that places less emphasis on locus of title.

5. PRECEDENT

To confer registration-based protection to a conditional buyer under the *SGA* would be to sacrifice conceptual purity in the interests of justice. Interestingly, a recent legislative precedent established in the Province of Saskatchewan may be cited in support of this approach. In addition to implementing the reform items recommended in the 2017 *CCPSL*

⁵⁶ Royston M Goode, "Ownership and Obligation in Commercial Transactions" (1987) 103 Law Q Rev 433; Wood, "Transplanted Legal Controversies," *supra* note 47 at 320.

⁵⁷ *ASGA*, *supra* note 11, ss 23(2), 26(1)–26(2).

⁵⁸ *Ibid*, s 23(1).

⁵⁹ *Ibid*, s 26(1).

⁶⁰ *Ibid*, s 26(2).

⁶¹ Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham: LexisNexis Canada, 2008) (although Sullivan makes this claim as so to all statutes, not just commercial ones).

Report,⁶² Saskatchewan legislators included parallel provisions in both the *SPPSA* and the *SSGA* that address the patent unfairness of depriving a prepaying buyer of her merchandise simply because title has not yet passed under the formal rules of title transmission.⁶³ Under a contract for the sale of unascertained or future goods, a buyer who has paid all or substantially all of the price of the goods acquires an equitable interest in goods falling within the same description immediately upon the seller acquiring an interest in such goods despite the fact that title has not yet passed.⁶⁴ This equitable interest is extended to a buyer pursuant to an agreement to sell whereby the seller retains title or ownership to secure performance of the purchase obligation (such as a conditional sale contract).⁶⁵ In the *SPPSA* context, the prepaying buyer's equitable interest in goods prevails over security interests granted by the seller to her secured creditors, while in the *SSGA* context, the statutorily-recognized equitable interest protects the prepaying buyer against the trustee if, prior to formal title transmission, the seller is subject to a bankruptcy order or makes an assignment in bankruptcy.⁶⁶

Saskatchewan's recent amendments to the *PSPA* and *SGA* may be cited in support of the argument for expanding the *SGA*'s registration-based protection to conditional buyers in the "seller in possession" context. A proponent might contend that the interest of a conditional buyer ought to be recognized in the same vein as that of a prepaying buyer,⁶⁷ and that registration should be made available to B as a simple and efficient method of protecting his interest in goods against the competing interests of subsequent non-ordinary course buyers, pledgees, and disponees. The argument carries some persuasive force, but in the present context, several key points of distinction weaken it considerably.

The amendments to the *SPPSA* and *SSGA*, which recognize a prepaying buyer's equitable interest in goods not yet passed, address a more pressing problem than that presented in the "seller in possession" context. Troubling outcomes, produced by litigated cases in which the law was correctly applied,⁶⁸ laid bare the need for change and paved the way to statutory reform in Ontario, British Columbia, and Saskatchewan.⁶⁹ To date, a parallel series of case law decisions resolving "seller in possession" disputes has not produced similarly disturbing outcomes for conditional buyers. This may simply be because A's resale of B's goods to C generally requires an act of "outright dishonesty or extreme forgetfulness," and is thus unlikely to occur in everyday business affairs.⁷⁰ By comparison, "it is far more probable ...

⁶² Working Group of the Canadian Conference on Personal Property Security Law, *Report to the Canadian Conference on Personal Property Security Law: Proposals for Changes to the Personal Property Security Acts*, 2017 CanLII Docs 3526 [CCPPSL Report].

⁶³ *The Personal Property Security Amendment Act, 2019*, SS 2019, c 15, ss 14(1), 26. For general discussion of these amendments, see Bangsund, *Bangsund on the PSPA*, *supra* note 54 at 273–74.

⁶⁴ *SSGA*, *supra* note 10, s 20(1.2); *SPPSA*, *supra* note 26, s 30(2.1).

⁶⁵ *SSGA*, *ibid*, s 20(1.1); *SPPSA*, *ibid*, s 30(2.2).

⁶⁶ In contrast, in the present "seller in possession" context, expanding the *SGA*'s registration-eligibility to a conditional buyer would offer him attenuated registration-based protection against subsequent buyers, pledgees, and other disponees.

⁶⁷ In fact, a conditional buyer who has paid substantially all of the purchase price qualifies as a prepaying buyer.

⁶⁸ *Royal Bank of Canada v 216200 Alberta Ltd* (1986), 33 DLR (4th) 80 (Sask CA); *Spittlehouse v Northshore Marine Inc* (1994), 18 OR (3d) 60 (CA).

⁶⁹ *Consumer Protection Statutes Amendment Act, 1993*, SBC 1993, c 39, s 27, amending the *Sale of Goods Act*, RSBC 1979, c 370 to include buyer's lien provisions in Part 9; *Ministry of Government Services Consumer Protection and Service Modernization Act, 2006*, SO 2006, c 34, Schedule E, s 9, amending the *Personal Property Security Act*, RSO 1990, c P.10.

⁷⁰ Bangsund, "ABC Prequel," *supra* note 3 at 254.

that A will go ... bankrupt as an honest but unfortunate debtor.”⁷¹ The recent amendments to the *SPPSA* and *SSGA*, which recognize a prepaying buyer’s equitable interest in goods not yet passed, simply and elegantly address a more vexing issue than that presented in the “seller in possession” context. In the latter context, a legislative solution does not appear to be achievable with the same degree of simplicity and elegance.⁷² Simply put, the case for sacrificing conceptual purity in the interests of justice was stronger for *SSGA* sections 20(1.1)–(1.2) (that is, the substantially prepaying buyer) than it is for title disputes governed by sections 23 and 26 (that is, the conditional buyer out of possession).

6. SLIPPERY SLOPE

One might also advance a slippery slope argument against the expansion of registration-based protection. If eligibility is expanded beyond buyers who own the subject goods, where is the new line to be drawn? A lessee (“B”) who leaves goods subject to a security lease in the uninterrupted possession of the lessor (“A”) has an equally compelling argument (in comparison with a conditional buyer out of possession) that he deserves registration-based protection. Akin to a conditional sale contract, a security lease is designed to culminate in the transfer of title from A to B upon satisfaction of the payment obligation. If non-owning buyers are protected by the *SGA*, then security lessees should be protected too; so the argument goes. On a general level, the argument raises interesting and important questions about eligibility for statutorily conferred registration-based protection of non-possessory interests in goods. However, it is a red herring in the present context. The *SGA* governs the rights of sellers⁷³ and buyers⁷⁴ under *contracts of sale*. A contract of sale, whether constituting a sale (in respect of an owning buyer) or agreement to sell (in respect of a non-owning conditional buyer), brings a transaction under *SGA* governance. Referring to the style of argument, the slippery slope definitively “bottoms out” with the conditional buyer.

If legislators in Model 2 jurisdictions decide to expand the scope of registration-based protection beyond the sales context, to lessees out of possession, this protection should not be conferred by the *SGA* due to a lack of statutory fit.⁷⁵ It would be unreasonable to expect a lessee to consult the *SGA* — a statute concerned with the sale of goods — for governance of its rights and obligations in respect of leased goods. Instead, legislators ought to confer registration-based protection to lessees out of possession under a separate statute aimed directly at governance of leasing. Additional eligibility questions arise. For instance, if it is decided that a lessee under a security lease is entitled to registration-based protection, should a lessee under an operating lease (that is, a pure use arrangement that does not secure payment of the price of the leased item) be similarly entitled to registration-based protection

⁷¹ *Ibid.*

⁷² I do not suggest that Saskatchewan’s recent amendments are irreproachable; sacrificing conceptual purity does have unintended consequences. The new *SSGA* provisions that recognize a prepaying buyer’s equitable interest create potential uncertainty in the “seller in possession” context. Can a conditional buyer who meets the definition of prepaying buyer in *SSGA*, *supra* note 10, s 20 now assert its statutorily recognized equitable interest against a subsequent buyer, lessee, or disponent who otherwise qualifies for the exception to *nemo dat* conferred by *SSGA*, s 26(1)? I think the answer is no, because the general (s 20, title passage) must give way to the specific (ss 23, 26, *nemo dat*, and its exceptions). Nonetheless, this line of argument is now open by virtue of the recent Saskatchewan amendments.

⁷³ *ASGA*, *supra* note 11, s 1(l): “‘seller’ means a person who sells or agrees to sell goods.”

⁷⁴ *Ibid.*, s 1(b): “‘buyer’ means a person who buys or agrees to buy goods.”

⁷⁵ Bangsund, “Threequel,” *supra* note 4 at 380.

of her limited proprietary interest? What other types of non-possessory interests are worthy of this protection? These are questions that legislators will need to wrestle with and answer if they decide to expand eligibility for registration-based protection to a broader array of persons holding non-possessory interests in goods. To date, lawmakers in Canada's common law provinces and territories have refrained from introducing comprehensive legislation governing the rights and obligations of lessors and lessees.⁷⁶

D. RECOMMENDATION

My recommendation in Part III is contingent in nature, dependent on the extent of statutory reform undertaken by Model 2 legislators. In principle, it makes good sense to confer registration-based protection to conditional buyers, lessees, and other non-possessory interest holders, but only in the context of a modern, coordinated, and uniform statutory system. If the *SGA* remains a title-based statute that settles disputes principally with reference to *nemo dat* and its exceptions, then registration-based protection should not be extended to a conditional buyer out of possession given the conceptual and practical problems associated with such reform. If, however, the *SGA* is modernized in a manner that places less emphasis on title and the *nemo dat* principle, then registration-based protection should be conferred to conditional buyers. Indeed, if Canadian provincial and territorial commercial legislation is opened up to this degree, the effort should be broader in scale and should arguably include governance of leasing.

IV. SYNTHESIS

In this Part IV, I synthesize the pentalogy and recap my recommendations for and against statutory reform in each of the Model 2 provinces and territories, namely: Alberta, British Columbia, Northwest Territories, Nunavut, and Saskatchewan. Assuming the Canadian provincial and territorial *SGAs* remain Victorian-era title-based statutes, I first recommend that legislators in Model 2 jurisdictions do not expand eligibility for registration-based protection to conditional buyers out of possession.⁷⁷ Second, in all Model 2 jurisdictions except British Columbia,⁷⁸ I recommend that legislators eliminate legislative redundancy via repeal of the “seller in possession” provisions contained in the *Factors Act*.⁷⁹ Third, I recommend that legislators in Saskatchewan introduce, in *SSGA* section 26(1.1), carve-out language in respect of goods covered by negotiable documents of title.⁸⁰ Fourth, I recommend that legislators in Saskatchewan eliminate the layered exception to *nemo dat* recognized in *SSGA* section 26(1.2) via repeal of the section.⁸¹

⁷⁶ Jacob S Ziegel, “Should Canada Adopt an Article 2A Type Law on Personal Property Leasing?” (1990) 16:4 Can Bus LJ 369; Charles W Mooney Jr, “Filing Requirements for Personal Property Leases: A Comment and Response to Professor Ziegel” (1990) 16:4 Can Bus LJ 419; RCC Cuming, “An Article 2A for Canada?: A Comment on Professor Ziegel’s Paper” (1990) 16:4 Can Bus LJ 439.

⁷⁷ I recommend eligibility-expansion only if broader-scale legislative reform is undertaken. See Part III.D above.

⁷⁸ Bangsund, “Threequel,” *supra* note 4 at 377.

⁷⁹ *Ibid* at 380–81. The “buyer in possession” provisions of the *Saskatchewan Factors Acts*, *supra* note 13, should also be repealed.

⁸⁰ See Part II.D above. *SSGA*, *supra* note 10, s 26(1.1).

⁸¹ Bangsund, “ABCD Remoteness Problems,” *supra* note 2 at 155–61. *SSGA*, *ibid*, s 26(1.2).

V. CONCLUSION

In the fall of 2013, shortly before I took up my academic post at the College of Law, University of Saskatchewan, Distinguished Professor Ronald C.C. Cuming asked me to teach his course on Commercial Relationships while he was away at an international conference. As a rookie law professor, keen to test my pedagogical skills, I gladly agreed. I did not expect that the esoteric subject of the weeks' lectures — *nemo dat* and its exceptions under the *SGA* — would become a focus of my research. Since then, I have spent countless hours reflecting on the history and meaning of these legislative provisions, and pondering their future. Having written five articles dedicated to the exposition of and improvement to this obscure and complex body of Anglo-Canadian sales law, I will now let the matter rest.