



# Navigating NOSIs and PPSA:

## A practical approach for real estate lawyers

An expired or deemed expired Notice of Security Interest (NOSI) does not affect title; however, the underlying contractual and financial obligations remain outstanding and must be addressed by payout or assumption.

Read below for tips on avoiding unsatisfied clients and finding information about claims a secured party may have against goods and fixtures registered against that seller under the Personal Property Security Act (PPSA).

The PPSA has priority (s.73(1)) over virtually all other legislation so you must consider undertaking a search to identify any security interest that a purchaser did not agree to assume or for which the lender did not agree to give up its priority.

Cooperation between lawyers can minimize the impact of this new due diligence requirement while ensuring that both clients and lawyers reduce risk and transactions proceed smoothly.

If the AGREEMENT OF PURCHASE AND SALE (APS) identifies financed or leased equipment to be paid out by the seller or assumed by the purchaser, consider the following actions:

- Perform or receive the PPSA search report from the seller's lawyer:
  - Any search should be conducted against the seller's legal name, as shown in the best available valid government-issued ID document, as well as against the name registered on title (if different from the name shown on the government ID), the name of the seller's spouse, including the name used before their marriage, any former name of the seller and any other name that the seller or spouse uses or may have used. Refer to the "PPSA Registration Guide for Lenders and Lawyers" and to the "Search Guide for Lawyers" to coordinate and align both PPSA registrations and searches to ensure the best positive results for all.
- If there is a registration, establish direct contact with the secured party to request:
  - (1) a copy of the payout statement setting forth the total amount due from the seller to buy out the financed or leased equipment, or
  - (2) if the purchaser plans to continue leasing/renting the equipment from the secured party, a copy of the underlying contract and the secured party's assignment and assumption documentation.
- Even if the APS lists some or no equipment, you should not assume that the real estate agents have done thorough due diligence:
  - Ask the purchaser or their agent if there is an ownership sticker on any equipment or other evidence of the equipment being financed or leased.
  - Ask if the seller is making any periodic payments for any equipment/service in or for the property.

If the APS is silent on financed or leased equipment, perform a PPSA search or request the report from the seller's lawyer. If the seller's lawyer does not provide PPSA search results:

- Requisition a copy of the PPSA search report from the seller's lawyer; or
- Requisition copies of the seller's valid government-issued ID documentation to undertake a search.

- If you do not have the seller's ID documents, consider doing a PPSA search against the name of the seller(s) as registered on title. The seller's (hopefully correct) date of birth should be on the transfer registered on title when the seller acquired the real property, and that date should be used to validate the correct debtor when searching the PPSA.
- If there is a registration, follow up on any necessary assignment documentation or payout process as noted above.

If there is no notice of financed or leased equipment and no PPSA registration:

- The Sale of Goods Act (the "SGA"), s.24 provides an argument for the purchaser, and their chargee/mortgagee, that they obtain title to such purchased fixture(s) free and clear of the secured party's interest therein, so long as they do not have notice of the secured party's interest in the fixture(s).
- What now constitutes noticed in these situations in Ontario has not yet been determined by a court, but knowledge of any of the following by the purchaser, the chargee/mortgagee or any of their agents could mean that the SGA protection will be unavailable: the reference to rental equipment in the APS or in an appraisal or inspection report; a title search discloses an expired or deleted NOSI; a label/sticker on the rented equipment; or knowledge of the seller's regular payment for leased equipment.

If a NOSI is found on title securing "consumer goods", it can be deleted:

- Follow the guidance provided by the Director of Title's Bulletin 2024-12 to delete a NOSI.
  - Only the property owner's lawyer may delete a deemed expired NOSI and that lawyer must make a Statement of Law that the equipment is consumer goods. The lawyer must retain the evidence upon which they based their determination in their file.
  - The PPSA defines consumer goods as "goods that are used or acquired for use primarily for personal, family or household purposes"
  - The definition of "consumer goods" under the PPSA does not provide any explicit guidance for the purposes of section 54 of the PPSA on determining the relevant date to ascertain the characterization of "goods" as "consumer goods"; unlike all other provinces with similar legislation.



- For example, if the goods that were installed into a new house or condo unit were initially rented or financed by a builder, then those goods would be characterized as “inventory” of the builder. If the builder sells the real property to a purchaser who plans to lease it or use it for short-term rental, then goods would be characterized as “inventory” of that purchaser. In this scenario, the right to discharge the NOSI would not apply. Alternatively, if the purchaser from the builder resides in the new home/condo unit, then it is arguable that the goods should be characterized as “consumer goods” of this purchaser and the right to discharge a NOSI filing in respect of such consumer goods should be available to the registered owner of the real property.

### Other important issues to consider about NOSIs:

1. Even if no negligence claim results from an undisclosed security interest, it is still a reputational risk for lawyers, as clients will assume or may be told, once they discover the issue, that their lawyer did not do a thorough job. It is recommended that you address the matter with clients in writing as to what risks and whether searches have or have not been conducted in case the client returns alleging you missed it.
2. Lawyers are encouraged to read the extended version of this article available on PracticePRO, along with the guides to registration and searching referenced therein, to reduce false search results.
3. The ban on the filing of NOSIs only applies to security interests that have attached to “goods” that are “consumer goods”.
4. The seller’s lawyer should draw the seller’s attention to the content of any bill of sale signed and delivered as part of the transaction which warrants clear title, such as the Working Group on Lawyers and Real Estate’s Vendor’s Closing Certificate, paragraph 3.
5. Title insurers have not yet conclusively indicated how they will respond to any claim.

### Cooperation between lawyers will minimize risk and reduce the burden of the new due diligence:

1. To avoid delays, the purchaser’s lawyer should send the PIN abstract to the seller’s lawyer and get the information of the seller’s title
2. Given that the seller’s lawyer is in a better position to obtain the current legal name of the sellers and any former names and their birthdates, the seller’s lawyer should do the PPSA search and provide the purchaser’s lawyer with a copy of the search reports so that the purchaser’s lawyer can make requisitions with respect to any problematic PPSA filings against the sellers. In this way, the purchaser’s lawyer avoids the possibility of not conducting PPSA searches against the correct legal names of the sellers.

### Timing:

Delivering the PIN abstract and the PPSA search results should be completed as soon as possible after the lawyers are retained. This cooperation by the bar would minimize the impact of this new due diligence requirement while ensuring that both clients and lawyers reduce risk, and transactions proceed smoothly. ■

*Full article, with search guide, available on PracticePRO.ca*