

Planes, Trains and Automobiles

Presentation for the Manitoba Bar Association
and Faculty of Law

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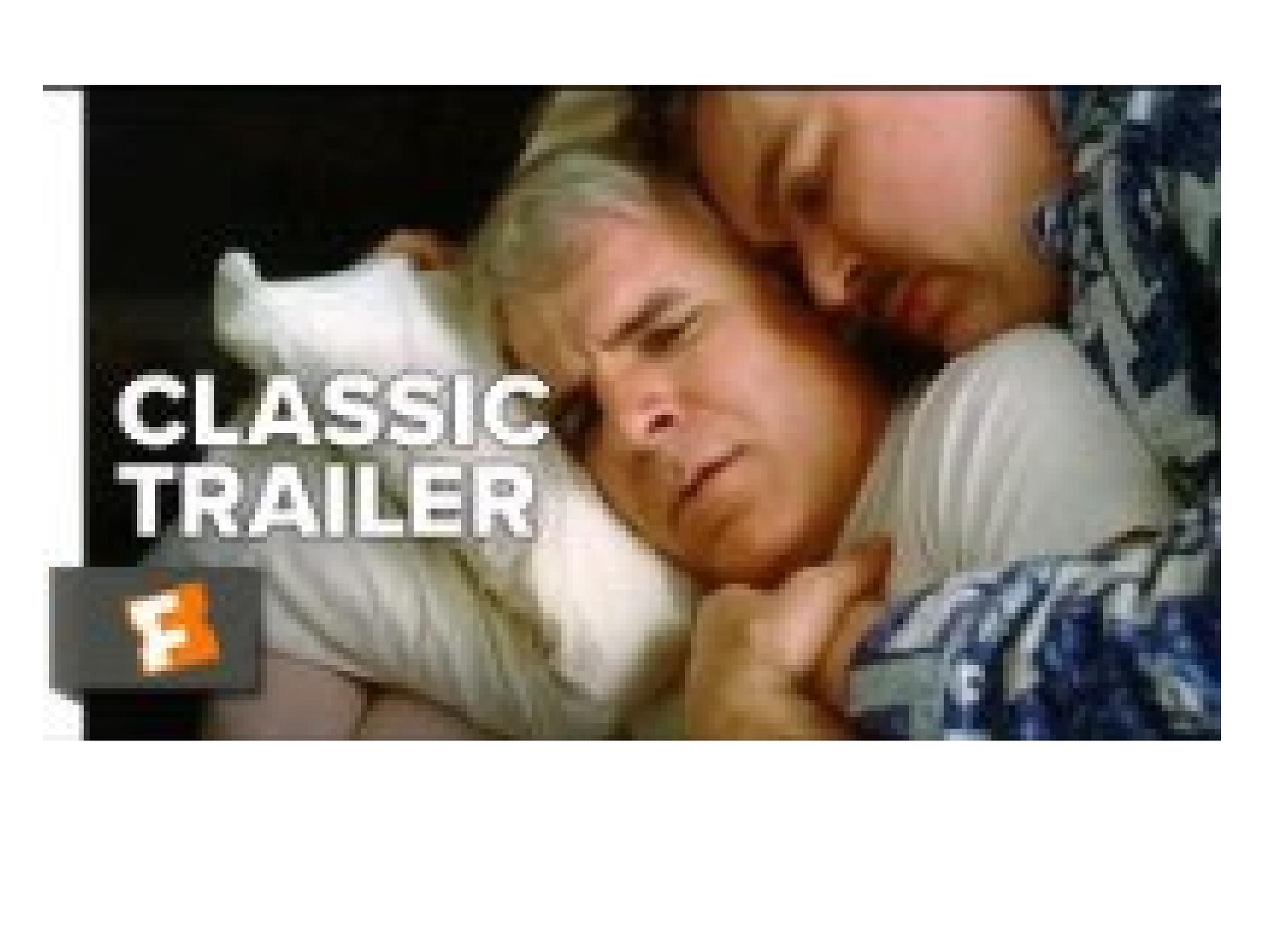
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Relationships. Respect. Results.

Warning:

This Presentation may contain adult content and coarse language.

Viewer discretion is advised

A close-up photograph of a man and a woman lying in bed together. The man is in the foreground, looking slightly to the right with a serious expression. The woman is behind him, her face partially visible as she looks towards the camera. They are both wearing light-colored t-shirts. The background is dark, suggesting a bedroom at night. The overall mood is intimate and dramatic.

CLASSIC TRAILER

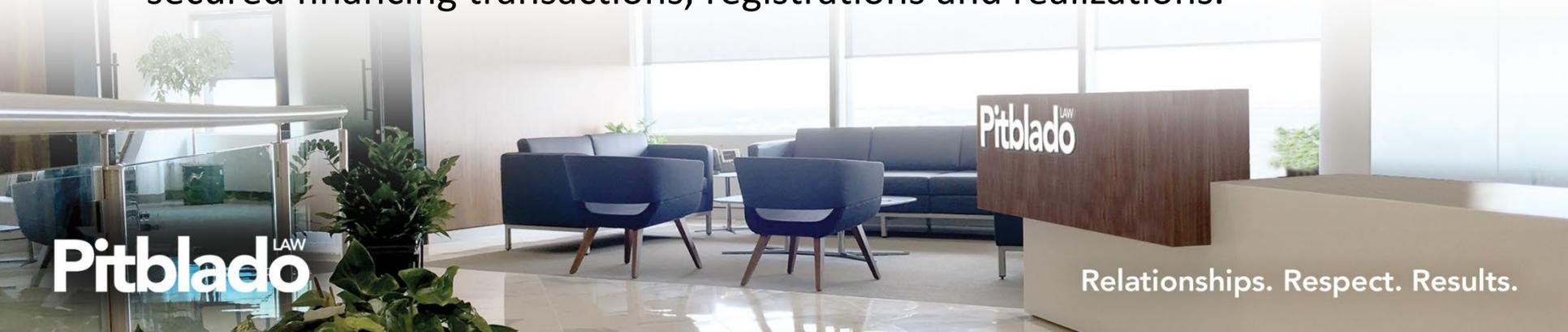


The Constitution Act, 1982 famously divides legislative power between federal and provincial governments.

While s. 92 (10) gives local works and undertakings to the provinces, it excepts: (a) **Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province**

They didn't have aircraft in 1867, but the courts since have consistently held that aeronautics falls under federal jurisdiction.

Property and civil rights is provincial (s.92(13)), encompassing most secured financing transactions, registrations and realizations.



Personal Property Security Act (PPR) registration is the common default for registering security against equipment and other chattels.



Securing transportation equipment is complicated:

- Sometimes a mix of Federal and Provincial jurisdiction and procedures
- PPR special rules, when applicable
- Special registries

What applies in what circumstances?



Trains



For railways, the Federal *Canada Transportation Act (CTA)* provides for the registration interests in Railway property.

104 (1) *The following may, in accordance with the regulations, be deposited by any person in the office of the Registrar General of Canada or in any other place that the Governor in Council may, by order, specify:*

- (a) a mortgage or hypothec issued by a railway company;*
- (b) a security agreement entered into by a railway company;*
- (c) an assignment or other document affecting a document referred to in paragraph (a) or (b); or*
- (d) a copy of any document referred to in any of paragraphs (a) to (c) or a summary of any such document made in accordance with regulations made under section 105.1.*

(2) Once the deposit is made, the mortgage or hypothec, security agreement, assignment or other document need not be deposited, registered or filed under any other law or statute respecting real or personal property, and the deposited document is valid against all persons.

105 *(1) A document, or a copy or summary of a document, evidencing any of the following transactions may, in accordance with the regulations, be deposited by any person in the office of the Registrar General of Canada or in any other place that the Governor in Council may, by order, specify:*

(a) a lease, sale, conditional sale, instalment sale, mortgage, hypothec, bailment, leasing, deposit or security agreement relating to rolling stock or any accessories or appurtenances relating to rolling stock; and

(b) an amendment, assignment or discharge of a document mentioned in paragraph (a).

(3) Once the deposit is made, the document need not be deposited, registered or filed under any other law or statute respecting real or personal property, and the document is valid against all persons.

s. 104 refers to security made by a “railway company”, which is defined as a railway coming under federal jurisdiction – primarily inter-provincial Railways.

s.105 covers security relating to rolling stock whether made by a railway company or not, for example bank financing of a fleet of cars owned by producers.

Rolling stock includes a locomotive, engine, motor car, tender, snow-plough, flanger and any car or railway equipment that is designed for movement on its wheels on the rails of a railway; (s.6) This includes hi-rail equipment that can be operated both on rail and road.

Section 105 includes sales and leases in the documents that can be registered, but 104 does not.

The CTA/Registrar General does not establish a title registry, nor does the Act say anything about remedies and realization.

Corporations Canada hosts the database of deposits with search and registration functions. Registrations are not amended, so they don't reflect subsequent amalgamations, other transactions involving successors in title, or any changes of corporate name of the parties to a document. You will need to determine all names to search.

Deposits are made electronically with a processing period for Corporations Canada staff to review the deposit to determine compliance before it is finalized.

<https://ised-isde.canada.ca/site/corporations-canada/en/railway-tool-services>

In addition to the inter-provincial and international federal railroads, Canada has a lot of short line railways that fall under Provincial jurisdiction. Manitoba has *The Provincial Railways Act*. It covers licensing and safety regulation, but says nothing about mortgages and other security, so the PPR applies.

What if you are securing rolling stock, but the borrower is not a federal railway? Even if the debtor is a short line, locomotives and car routinely cross borders.

Despite the assurances in 104 and 105: *“the document need not be deposited, registered or filed under any other law or statute respecting real or personal property, and the document is valid against all persons”*, many lenders will register under the CTA and in provincial PPR’s and LTO’s as a belt and suspenders approach regardless of whether they are dealing with a federal or provincial railway.

Surprisingly, there have been no reported cases on 104 and 105 and their predecessor sections vs. PPR , going back to the early 1900's, so caution and duplication is a prudent choice.

Railway equipment also moves across international borders – Canada, US and Mexico. We won't touch on that today, but there are a host of issues to consider.

We'll talk about PPR registration of mobile chattels later.



Planes



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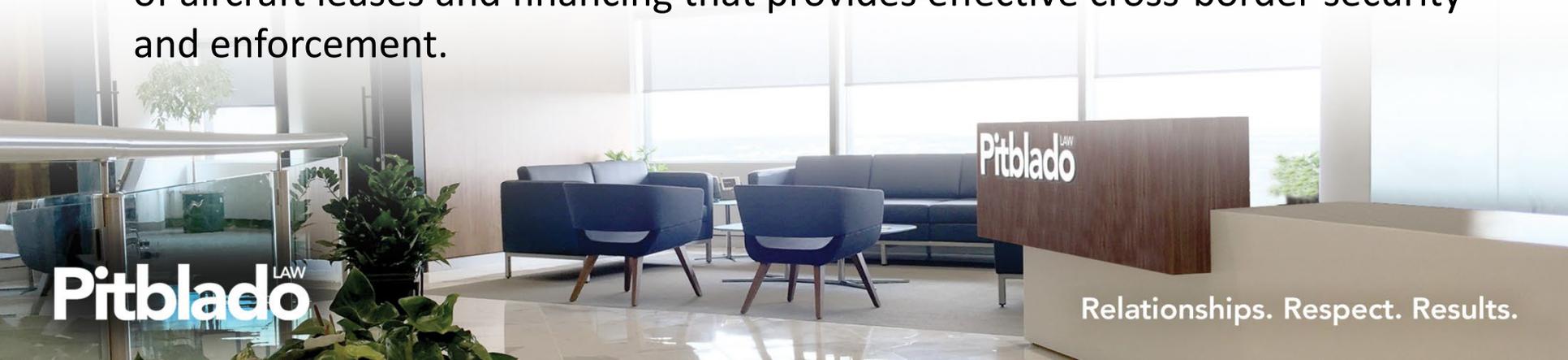
Relationships. Respect. Results.

Aircraft fly to every country on earth every day. Flights in Canada routinely criss-cross the country.

Modern transport aircraft cost hundreds of millions of dollars. One engine alone can approach \$50 million. US funds.

Commuter and charter aircraft, even well-used ones are in the millions. Overhauls of a small turboprop engine start at \$200,000 and go quickly up from there.

Led by the major airliner manufacturers, financiers and international airline organizations, a system was developed to allow registration and enforcement of aircraft leases and financing that provides effective cross-border security and enforcement.



Relationships. Respect. Results.

The result is the Cape Town Convention.

It is an International Convention which was formulated by the International Civil Aviation Organization (ICAO) legal committee and passed at a diplomatic conference at Cape Town, South Africa in 2001.

In 2005, Parliament passed the International Interests in Mobile Equipment (Aircraft Equipment) Act. Manitoba passed similar legislation in 2012, with MBA playing a key role in pushing the Government to get it done. The legislation was proclaimed in force on April 1, 2013.

The Federal Government also amended Canada's bankruptcy laws and the Bank Act to accommodate the Convention and the priorities it creates.



The Convention provides for the establishment of an international registry for international interests in aircraft objects.

The Convention specifically defines "aircraft objects":

1. Airframes - fixed wing aircraft, certified to transport at least eight persons including crew or freight of over 2,750 kg.
2. Aircraft engines - turbo jets of at least 750 lbs thrust and turbo props or piston engines of at least 550 take off shaft horsepower; and
3. Helicopters with at least five seats or able to transport 450 kg of freight.

"Interests" comprise security interests, leases and title reservation agreements (what we call conditional sales). Both operating and financial leases are included. An interest is "international" if it meets the convention's definitions of the interest and the object.



Priority is by the first to file rule. Registration lists the parties and records manufacturer, model and serial number of the aircraft object. There is a registry database that is serial-number based. Registrations cannot be searched by debtor name.

Some manufacturers file a list of serial numbers for their aircraft objects. That "official" version takes priority over other variants. Anyone can search an aircraft object on-line and get an electronic certificate of the results. Search guides are on the web site.

Registration is a more complex procedure and requires that the parties to the transactions be registered as users. Lawyers and service companies can register as professional users to affect registrations, but need the consent of the parties they represent - who must also be registered as transactional users - to complete the registration.



Unregistered international interests have no priority and do not survive a sale. You can assign and subordinate and provide notice of sales to cut off the effect of late registrations against prior owners. The register also allows the registration of prospective international interests, so you can file before the deal is signed, but both parties will need to consent to the registration. You also choose the life of the registration.

The Convention provides flexibility by allowing contracting states to make declarations on the terms and extent of the Convention's application.

The declarations that Canada and the provinces have made include: recognition of self-help; automatic deregistration from the civil register; acceptance of pre-authorization documents to permit export on realization; and remedies on insolvencies, particularly "alternative (A)" in Protocol Article 11, which gives favourable realization remedies to creditors and lessors.



Other declarations deal with certain unregistered interests - things like repair shop possessory liens and rights of seizure given to certain airports and NavCanada. By declaration these interests may(or may not) maintain priority, or they could be made the subject of registration themselves. With the declarations made in Canada, these types of interests do not need to be registered. They maintain the same priority as if the Convention did not apply.

Existing priorities, for example, your pre- April 1, 2013 PPSA registrations are grandfathered.

Be careful to determine the declarations made in the jurisdiction of the debtor or seller, if not Canada (or the US, which is equivalent to Canada).

So, financing, leases and in many cases, sales of aircraft airframes and engines and helicopters operated in Canada that fit the Cape Town size requirements need IR registration. Smaller objects remain under PPR.



PPSA registration may still be advisable in addition to the IR:

1. if the Debtor is located in a jurisdiction that has not adopted Cape Town but the aircraft objects are located here;
2. Cape Town has a narrower definition of "proceeds" than do the PPSA statues, so PPSA registration may be necessary to capture that additional collateral;
3. the Cape Town airframe definition limits accessories, parts and equipment to those that are "installed, incorporated or attached" and does not include spares or items removed temporarily, for example, out for overhaul. The registry does allow for spare engine registrations along with an airframe;
4. your security or lease document may include collateral beyond the aircraft objects, for example assignments of leases and warranties; and
5. the practical notoriety of having your security displayed on the local system.

Aircraft are "serial number goods" under Manitoba's PPR regulations, but the "serial number" is the registration marks of the aircraft as registered - in Canada C-G(F)ABC, for example, not the manufacturer's serial number. Ontario doesn't include aircraft as serial number goods and others use the manufacturer's serial number or don't include the hyphen in the TC registration marks.

The financing statement must include the serial number goods section properly filled out, but can also include a more complete collateral description.

Aircraft are also mobile chattels so registration in the debtor's location is required regardless of where the aircraft is based.



Automobiles



Motor Vehicle security falls under Provincial PPR schemes. There are Provincial variations, but I'll refer to Manitoba as our default.

The PPR defines motor vehicle as a motorized device by which people or goods maybe transported and that is designed for use on a road or natural terrain, or used for road construction or maintenance, **but does not include a device that runs on rails.** (remember CTA s. 105)

Motor vehicles are included in the definition of "serial Number goods", which means that the financing statement that is registered to record the security interest or lease (of more than one year) must have the serial number goods section completed properly. That allows searching by vehicle serial number as well as debtor name. Again, a more detailed collateral description can also be included.



If the debtor operates outside of the Province, because motor vehicles are a type of goods that is normally used in more than one jurisdiction, the PPR filing should be made in the jurisdiction "where the debtor is located" (PPSA s. 7.2). In Manitoba, the debtor is located at the place of its executive office, if it has more than one place of business.

Note that other provinces have slightly different criteria to determine the location of the debtor.



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Boats



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I am not competent to speak about security on boats.

Federal legislation includes provisions for registering security on vessels registered under the *Canada Shipping Act* while under constructions and when built. So, there are red flags for vessel financing as well.

43 (1) The Chief Registrar is responsible for establishing and maintaining a register to be known as the Canadian Register of Vessels. The Chief Registrar is to divide the Register into parts, including a small vessel register, for the classes of vessels that the Chief Registrar specifies.

65 (1) The owner of a vessel registered under this Part other than in the small vessel register, of a share in such a vessel or of a vessel recorded as being built in Canada may give the vessel or share, as the case may be, as security for a mortgage to be registered under this Part.

(2) A mortgage is to be filed with the Chief Registrar in the form and manner specified by the Chief Registrar.

Aircraft Deals - things to watch for.

- While there are some requirements, there are few restrictions on Canada / US aircraft sales
- There are differences in registration, title, tax and commercial laws in other jurisdictions
- There are some Canadian export requirements to some countries (Custom brokers usually deal with these)
- Export controls - UN embargo's and US Patriot Act restrictions



The Sale Process

- Most follow similar formula and process
 - Listing
 - LOI
 - Definitive Sale Agreement
 - Closing
- Brokers common in US deals
- Escrow Agents in Oklahoma City (Canada too)



The Sale Process

– LOI

- Brokers often initiate
- Will list price and parties
- Provision for visual inspection; maybe records; maybe evaluation flight
- May require a deposit
- Right to reject



The Sale Process

– Definitive Purchase Agreement

- PPI: **MOST IMPORTANT STEP IN THE SALE PROCESS**
- Records are critical, physical inspection and Test Flight
- Snag List
- Buyer can cancel or accept with Seller fixing airworthiness snags
- Good for Seller (not Buyer) for Seller to have a cancellation right if snags exceed a limit
- Closing arrangements - Escrow
- Reps and Warranties and Limitations – Condition: **AS-IS**; Title
- Conditions to close (aircraft condition to be met)
- Boilerplate

Title, Financing and Security

- Seller will Warrant title and agree to discharge leases and liens
- Due Diligence
- Cape Town Convention
 - Aircraft Objects
 - International interests
 - Sales
- Closing Process - money, actions and documents; Escrow agent role
- TC vs FAA Registry
- PPR; IR & FAA registrations and discharges



Title, Financing and Security

- Closing and Delivery Issues
 - Same issues CDA & US
 - Only register to nationals
 - Once sold, foreign buyer can't fly on Seller's marks
 - Need to get home - Seller to deliver (risk of loss/damage/snags) or get registration/ferry permit
 - Deregistration
 - C of A & Export C of A issues



Title, Financing and Security

- Taxes
 - Taxes imposed at location of sale / title transfer and/or on import
 - US - no Federal sales tax, but some State & local sales taxes up to 20%
 - Fly-away exemptions - often determines closing location
 - Canada - no GHT/HST/Provincial taxes on sales for export
 - GST/HST/Provincial taxes on import to Canada (Customs Brokers handle)
 - Manitoba RST exemption
 - Luxury tax



Closing thoughts:

Opinions: title and priority

Job 1 is to identify risks in the deal and help the client overcome those you can't eliminate (e.g. PPI)

Know when there is a red flag

Don't fake it

“Oh, you must be a pilot”



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Questions?



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