OBA Submission on Proposed Reform of the Conflict of Laws Provisions under the *Personal Property Security Act* (Ontario)

Date: January 27, 2022

Submitted to: Minister of Government and Consumer Services and the Business Law Modernization and Burden Reduction Council

Submitted by: The Ontario Bar Association

ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

L'ASSOCIATION DU BARREAU DE L'ONTARIO
Une division de l'Association du Barreau canadien

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I. Introduction

The Ontario Bar Association appreciates the opportunity to provide this proactive submission to the Ministry of Government and Consumers Services on proposed amendments to the Ontario *Personal Property Security Act* (the "**OPPSA**").

Established in 1907, the OBA is the largest volunteer lawyer association in Ontario, with over 16,000 members who practice on the frontlines of the justice system and who provide services to people and businesses in virtually every area of law and in every part of the province.

Each year, through the work of our 40 practice sections, the OBA provides advice to assist legislators and other key decision-makers in the interests of both the profession and the public and delivers over 325 professional development programs to a diverse audience of over 16,000 lawyers, judges, students and professors.

This submission was prepared by members of the OBA's Business Law Section. The Business Law Section has over 1,700 members representing clients before every level of court in Ontario.

II. Overview

In 2017, the Canadian Conference on Personal Property Security Law released a report recommending various changes to the provincial and territorial *Personal Property Security Acts* (the "**PPSAs**").[1] Part II(12) of the CCPPSL Report makes recommendations for reforming the conflict of laws provisions in ss. 5 – 8.1 of the various PPSAs.

Subject to one qualification discussed in Part 2 below, we agree with the arguments put forward in the CCPPSL Report and we recommend the adoption in Ontario of all the CCPPSL conflict of laws recommendations. Part II(12) of the CCPPSL Report, found on the CanLII site, is attached to this submission for ease of reference.[2] We have nothing to add to the discussion in the CCPPSL Report, except in relation to the recommendations relating to the location of the debtor test, which we address in Part 2 below.

[1] *Report to the Canadian Conference on Personal Property Security Law on Proposals for Changes to the Personal Property Security Acts* (prepared by a Working Group of the Canadian Conference on Personal Property Security Law ("CCPPSL") and ratified at the CCPPSL Annual Meeting in Edmonton, Alberta, 21-23 June, 2017) available on CanLII at https://www.canlii.org/en/commentary/reports/273/ (the "CCPPSL Report").
[2] *Ibid*

III. Location of the Debtor

The CCPPSL Report makes a number of recommendations for amending the test for determining the location of the debtor set out in s. 7(3). The s. 7(3) recommendations are largely based on amendments enacted by Ontario in 2006 and which came into effect in 2015, but there are several important differences. These are identified and discussed in Part II(12)(a)(iii) of the CCPPSL Report and are reflected in the proposed legislative provisions set out in Part II(12)(a)(iv) of the CCPPSL Report.

With one qualification, we agree with and support the CCPPSL's proposed amendments to s. 7(3). The qualification relates to the test for determining the debtor's location in cases where the debtor is (1) a partnership (other than a limited partnership) or (2) a trustee acting for a trust that has more than one trustee. The current Ontario version of the provision states that in these cases, the parties may determine the applicable law by the inclusion of a choice of law provision in the partnership agreement or the trust instrument (see Ontario PPSA, ss. 7(3)(b) (if the debtor is a general partnership) and 7(3)(g)(i) (if the debtor is one or more trustees acting for a trust). The CCPPSL Report is critical of this approach, primarily because it may disadvantage third parties who do not have access to the partnership agreement or trust instrument. This and other arguments are set out in Part II(12)(a)(ii) of the CCPPSL Report. The CCPPSL Report proposes instead that for partnerships (other than limited partnerships) and for trusts with two or more trustees, the location of the partnership's or trustees' chief executive office should continue to be the determining factor. It is acknowledged in the CCPPSL Report that this approach may create uncertainty to the extent that the meaning of "chief executive office" is unclear, but it is argued that the costs of this uncertainty are outweighed by the benefits of the rule as outlined in the CCPPSL Report.

We take a different view of the costs and benefits of the chief executive office test relative to the current Ontario approach, but we acknowledge that, in the absence of empirical evidence, it is impossible to be sure either way. Ultimately, the most important consideration is that the PPSA choice of law provisions should be uniform across the country so as to avoid forum shopping. Saskatchewan has already amended its PPSA to implement the CCPPSL Report's recommendations in full, (including the conflict of laws recommendations)[3] while the Alberta Law Reform Institute, in a recently released report, has recommended that Alberta should do likewise.[4]

[3] Bill 151, *An Act to Amend The Personal Property Security Act, 1993*, enacted and assented to on May 15, 2019 and proclaimed to commence on June 22, 2020.
[4] Alberta Law Reform Institute, *Personal Property Security Law: Final Report* (October 2021), Chapter 2 available at https://www.alri.ualberta.ca/wp-content/uploads/2021/09/FR116.pdf.

Given these developments, and in the interests of uniformity, we believe that Ontario should adopt the changes to the debtor location rules in s. 7(3), as well as the changes proposed in the CCPPSL Report with respect to the other PPSA conflict of laws provisions and that s.7(3) and related provisions should be amended to bring them into line with proposed provisions in the CCPPSL Report.

IV. Other Proposed Amendments

The CCPPSL Report makes a number of other recommendations for changes to improve and clarify the PPSA conflict of laws provisions, apart from its recommendations relating to s. 7(3). These proposed other changes are identified and explained in Part II(12)(b) - (e) of the CCPPSL Report. We agree with all these proposed changes and we have nothing further to add to the discussion in the CCPPSL Report.

V. Conclusion

In closing, we believe that the above recommendations will help improve the Ontario PPSA and enhance efficiency in its use.

Thank you for taking the time to review the submission. We would be happy to discuss any of the foregoing in greater detail and look forward to continuing to work with the government to strengthen the PPSA.

Report
to the
Canadian Conference on Personal Property Security Law
on
Proposals for Changes
to the
Personal Property Security Acts

(prepared by a Working Group of the Canadian Conference on Personal Property Security Law (CCPPSL) and ratified at the CCPPSL Annual Meeting in Edmonton, Alberta, 21-23 June, 2017)

Part II(12)

(12) Conflict of Laws

(a) Debtor Location Rules

(i) Background

Overview of PPSA Choice of Law Rules

The PPSAs set out choice of law rules for determining the law applicable to the validity, perfection, and effects of perfection of a security interest. For security interests in ordinary goods, the law of the location of the collateral generally applies. For security interests in intangibles (for example, accounts receivable and intellectual property), the law of the jurisdiction in which the debtor is located applies. That is also the applicable law for security interests in mobile goods (goods such as road vehicles that by virtue of their normal function are used in more than one jurisdiction) where they are held by the debtor as equipment or as inventory for lease. For security interests in money, an instrument (for example, a cheque), a negotiable document of title (for example, a bill of lading) and chattel paper (for example, rights to payment under a lease of goods), the applicable law varies depending on whether the collateral is in the possession of the secured creditor (law of the location of the collateral) or the debtor (law of the location of the debtor). While the choice of law rules for security interests in investment property depart

from this general pattern in important respects, the law of the debtor's location also determines whether a security interest in investment property is perfected by registration.[15]

The Non-Ontario PPSA Debtor Location Rules

The PPSAs contain "debtor location rules" for the purposes of determining the applicable law where, under the choice of law rules summarized above, the location of the debtor is the relevant connecting factor. The rules in the initial PPSAs – still in effect in all PPSA jurisdictions other than Ontario – were derived from the 1972 version of Article 9 of the Uniform Commercial Code. Under these rules:[16]

> A debtor is located at the debtor's place of business.
>
> A debtor who has no place of business is located at the debtor's principal residence.
>
> A debtor that has a place of business in more than one jurisdiction is located in the jurisdiction where it has its chief executive office.

The application of these rules can occasionally give rise to difficulty. It is not always easy to determine, particularly for third party searchers, whether an individual debtor operates a place of business, and if so whether it is located in a different jurisdiction than the one in which she maintains her principal residence. Where an enterprise debtor has places of business in multiple jurisdictions, the determination of which of these places constitutes its "chief executive office" can also be problematic. The term "chief executive office" is not defined in the PPSAs and there is no PPSA case law on its interpretation. In practice, it is generally understood, in line with the official comment in UCC Article 9 from which the term is derived, to refer to "the place from which the debtor manages the main part of its business operations or other affairs. This is the place where persons dealing with the debtor would normally look for credit information."[17] In what is regarded as the leading U.S. decision on the issue, *Mellon Bank, N.A. v. Metro Communications Inc.*, the Third Circuit Court of Appeals emphasized the practical nature of the test and the need to adopt the perspective of third party searchers:

> The Official Comment envisions a realistic test asking simply 'where does the debtor manage the main part of its business' because that is where creditors are likely to search for information. To

[15] For a detailed analysis and statutory references, see Ronald C.C. Cuming, Catherine Walsh and Roderick J. Wood, *Personal Property Security Law* (2nd ed., Irwin Law, 2012), Chapter 3, "Conflict of Laws".
[16] See, e.g., Saskatchewan PPSA, s.7(1).
[17] See Official Comment to Uniform Commercial Code, s.9-307.

> artificially break down that question into rigidly applied tests violates the practical nature of the inquiry as envisioned by the Uniform Commercial Code.[18]

The Court went on to caution against "an irrelevant inquiry as to the internal balance of power between corporate executives."[19] Rather, the emphasis should be on "evidence readily available to creditors and of a more objective nature" such as the location of the principal office set out in the company's contracts with its creditors and customers and the location of third party dealings with the debtor. Subsequent cases confirm this approach, also emphasizing that the chief executive office is not commensurate with the location of the company's principal assets: "the question is not where the main part or main asset of the debtor's business is located, but rather, from where the main part of the debtor's business is managed."[20]

Nonetheless, where a debtor conducts the "main part" of its affairs may be difficult to ascertain in exceptional scenarios. In the U.S. case law, the most troublesome cases have usually involved situations where the company moves its chief executive office from one jurisdiction to another and it then becomes necessary to ascertain precisely when that move occurred.[21] If there is any doubt, a prudent secured creditor can protect itself only by perfecting under the law of each possible jurisdiction, and taking account of the legal risk posed by any substantive differences between the potentially applicable laws.

In addition to the *Mellon* case above, see also *Chase Manhattan Bank v. Nemko, Inc. (In re Nemko, Inc.),* 209 B.R. 590, 602–603 (Bankr.E.D.N.Y.1997).

Reform of the Debtor Locations Rules in the Ontario PPSA

The transaction costs sometimes occasioned by the fact-based "place of business" and "chief executive office" tests prompted Ontario, in 2006, to enact legislation amending the debtor location rules in its PPSA.[22] Proclamation was delayed in the expectation (or hope) that the other PPSA jurisdictions would enact parallel reforms. Saskatchewan and British Colombia did so.[23]

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[18] 945 F2d 635 (3rd Cir. 1991), para. 47.
[19] *Ibid*, para. 52.
[20] See *In re IT Group, Inc., Co.*, 307 B.R. 762 (2004) at 767.
[21] In addition to the *Mellon* case above, see also *Chase Manhattan Bank v. Nemko, Inc.* (*In re Nemko, Inc.*), 209 B.R. 590, 602–603 (Bankr.E.D.N.Y.1997).
[22] See Ministry of Government Services Consumer Protection and Service Modernization Act, 2006, S.O. 2006, c. 34.
[23] See Finance Statutes Amendment Act, Bill 6, 2010, ss. 43 to 47 (BC); An Act to amend The Personal Property Security Act, 1993, Bill 102, 2009, ss. 5, 6 (SK.).

Both provinces, however, also delayed proclamation pending broader take-up. Under Ontario law, unproclaimed statutory provisions are repealed if they are not proclaimed 10 years after being enacted.[24] With that deadline looming, Ontario proclaimed the 2006 amendments in force effective 31 December 2015.

Summary of the New Ontario Rules

Under the new Ontario rules set out in OPPSA section 7(3), the location of a debtor differs depending on the type of debtor.

A debtor who is an "individual" is located, under section 7(3)(a), in the jurisdiction where she has her "principal residence" regardless of whether or not she operates a business.

Section 7(3)(b) provides a special rule if the debtor is a partnership, other than a limited partnership, and the partnership agreement states that the agreement is governed by the laws of a province or territory of Canada. If this condition is met, the debtor is located in that province or territory.

Section 7(3)(c) provides that a corporation, a limited partnership or an organization is located in the Canadian province or territory under the laws of which it is incorporated, continued, amalgamated or organized, provided that law requires its incorporation, continuance, amalgamation or organization to be disclosed in a public record.

Section 7(3)(d) provides a similar rule for determining the location of a corporation incorporated, continued or amalgamated under a law of Canada. Provided that law requires its incorporation, continuance or amalgamation to be disclosed in a public record, the corporation is deemed to be located in the province or territory where its "registered or head office" is located as set out in: (i) the relevant constating instrument, or (ii) its by-laws if (i) does not apply.

If the debtor is organized under a state or federal law of the United States, section 7(3) seeks to replicate the debtor location rules applicable to "registered organizations" in UCC § 9-307 effective as of 2001. In line with UCC § 9-307(e), section 7(3)(e) deems a "registered organization" organized under the law of a state of the United States to be located in the state under which it is organized. In line with UCC § 9-307(f), section 7(3)(f) deem a "registered organization" organized under federal law to be located in

[24] See Legislation Act, 2006, SO 2006, c 21, Sch F., s.10.1.

the state within the United States that the relevant federal law designates, or the state designated by the organization if that law authorizes the organization to designate a state of location, or if these two possibilities do not apply, in the District of Columbia. Note that, as explained in the comments section below, section 7(3)(f) does not include clarifying language added to UCC§ 9-307(f) in 2010 and the definition of "registered organization" in section 7(4) uses the initial 2001 UCC definition as opposed to the amended 2010 definition.

If the debtor is a trustee or trustees acting for a trust, section 7(3)(g) provides a similar rule to the rule for non-limited-liability partnerships in section 7(3)(b) explained above. If the trust instrument states that it is governed by the laws of a province or territory of Canada, the trustee or trustees are deemed to be located in that province or territory. In the absence of a governing law clause, the relevant location is the jurisdiction where the administration of the trust is principally carried out.

Debtors not covered by the above rules are deemed to be located, under section 7(3)(h), in the jurisdiction where they maintain their chief executive office.

Comparison with Traditional PPSA, UCC Article 9 and Quebec Civil Code Rules

The new Ontario rules are sometimes presented as harmonizing the PPSAs with the debtor location rules in UCC Article 9 and the Civil Code of Quebec. This is true only to a very limited extent.

The new Ontario rules replicate the approach in UCC § 9-307 only if the debtor is an "individual" or a "registered organization" organized under the law of a U.S. state or under U.S. federal law (and achieve this harmonization in the latter case only if sections 7(3)(f) and 7(4) are updated to conform to the 2010 UCC amendments as explained below). In the case of a debtor that is a trustee or a corporation or other organization incorporated or organized under non-U.S. law (including Canadian provincial or federal law), § 9-307 retains the "chief executive office" approach. As well, the place of perfection under § 9-301 is generally at the location of the debtor regardless of the nature of the collateral whereas under the PPSAs, perfection of security interests in ordinary goods and documentary collateral is governed by the law of the location of the collateral as opposed to the law of location of the debtor (see summary of PPSA choice of law rules, above).

The Civil Code of Quebec uses domicile to locate a debtor for the purposes of the Code choice of law rules that refer to the location of the debtor to determine the law applicable to the validity and publication

(perfection) of movable securities.[25] For natural persons, the Civil Code concept of domicile[26] typically will coincide with her "principal residence" in line with the new Ontario rules (though there may be exceptional cases at the margin). The domicile of a legal person under the Code is the place where it has its registered head office.[27] This approach is generally equivalent in the result to the new Ontario rules for corporations organized under a law of Canada or of a province or territory of Canada or under a law of the United States or of a state of the United States. However, whereas the Ontario rules locate any other corporation or organization in the place where it has its chief executive office, the Quebec "head office" rule applies to all legal persons and entities including those constituted under the law of a jurisdiction outside the United States and Canada. Presumably the Ontario drafters were reluctant to wholly adopt the Quebec approach for corporations and organizations constituted under a law other than that of Canada or the United States because of the risk of prejudice to third parties in situations, for example, where an entity is formed under foreign law for taxation, accounting or other instrumental reasons but establishes its de facto headquarters in Canada or the United States and conducts the main part of its business from that location. The Code location rule also differs from the Ontario approach for trustees and partnerships since the domicile of an organization that is not a legal person under the Code is at the place of its principal establishment.[28]

If a transaction has a factual connection to the United States or Quebec, a prudent secured creditor will need to take account of these differences since a court in these jurisdictions will apply its own debtor location rules, not those of the PPSA, for the purposes of determining the applicable law. This limits the certainty and reduced transaction costs sought to be achieved by the new rules.

For ease of reference, the following table sets out the differences between the old and new PPSA debtor location rules and those of the Civil Code and UCC Article 9:

[25] See article 3105.
[26] See articles 76-83.
[27] See article 307.
[28] See article 75.

Debtor type	Location under traditional PPSA rule	Location under new Ontario rule	Location under Civil Code of Quebec rule	Location under UCC Article 9 rule
individual	place of business; if no place of business, principal residence; if places of business in multiple jurisdictions, chief executive office	principal residence	domicile (generally equivalent to principal residence)	principal residence
corporation, limited partnership or organization incorporated, continued, amalgamated or organized under the law of a province or territory of Canada that requires the organization, continuation, amalgamation or organization to be disclosed in a public record	place of business or chief executive office if there are places of business in more than one jurisdiction	province or territory under the law of which the debtor is incorporated, continued, amalgamated or organized	domicile (location of registered or head office if the debtor is a legal person; otherwise location of "principal establishment")	place of business or chief executive office if there are places of business in more than one jurisdiction
corporation incorporated, continued or amalgamated under a law of Canada that requires the incorporation, continuance or amalgamation to be disclosed in a public record	place of business or chief executive office if there are places of business in more than one jurisdiction	province or territory designated as the registered or head office in the corporation's constating instrument or by- laws	domicile (registered or head office)	place of business or chief executive office if there are places of business in more than one jurisdiction
"registered organization" organized under a law of a state of the United States	place of business or chief executive office if there are places of business in more than one jurisdiction	state under which the organization is organized	domicile (registered or head office if the debtor is a legal person; otherwise "principal establishment")	state under which the organization is organized

Debtor type	Location under traditional PPSA rule	Location under new Ontario rule	Location under Civil Code of Quebec rule	Location under UCC Article 9 rule
"registered organization" organized under a law of the United States	place of business or chief executive office if there are places of business in more than one jurisdiction	state that the relevant law of the United States designates, or the state designated by the organization if the relevant United States law authorizes the organization to designate a state of location, or the District of Columbia if the first two do not apply	domicile (registered head office if the debtor is a legal person; otherwise "principal establishment")	state that the relevant United States law designates, or the state designated by the organization, if the relevant United States law authorizes the organization to designate a state of location, or the District of Columbia if the first two do not apply
partnership, other than a limited partnership	place of business or chief executive office if there are places of business in more than one jurisdiction	if the partnership agreement states that it is governed by the laws of a province or territory, that province or territory; otherwise, chief executive office	domicile ("principal establishment")	place of business or chief executive office if there are places of business in more than one jurisdiction
one or more trustees acting for a trust	place of business or chief executive office if there are places of business in more than one jurisdiction	if the trust instrument states that it is governed by the law of a Canadian province or territory, that province or territory; otherwise, the jurisdiction in which the administration of the trust is principally carried out.	domicile ("principal establishment")	place of business or chief executive office if there are places of business in more than one jurisdiction
any other debtor	place of business or chief executive office if there are places of business in more than one jurisdiction	chief executive office	domicile (registered or head office if the debtor is a legal person; otherwise "principal establishment")	place of business or chief executive office if there are places of business in more than one jurisdiction
exception if debtor is not located under the above rules in a jurisdiction whose law generally requires non-possessory-security interests to be disclosed in a public filing	no equivalent exception	no equivalent exception	no equivalent exception	District of Columbia in the United States

(ii)Comments

S. 7(3)(a): individual

As noted above, the traditional PPSA rules locate a debtor in the first instance at its place of business. For individual debtors, this requires a determination as to whether they have a place of business, and if so whether it is located in a different jurisdiction from the one in which they maintain their principal residence. In substituting a "principal residence" rule for all individual debtors, regardless of whether or not they operate a business, section 7(3)(a) enables the applicable law to be determined with greater certainty and at lower cost.

S. 7(3)(b): partnership if the partnership agreement states that it is governed by the laws of a province or territory of Canada

As noted above, OPPSA section 7(3)(b) addresses the location of a debtor that is a partnership (other than a limited partnership). If the partnership agreement designates the law of a province or territory of Canada as the law governing the agreement, the debtor is deemed to be located in that province or territory. This rule is intended to reduce uncertainty for prospective secured creditors in cases where the partners conduct business in different jurisdictions, thereby sometimes making it difficult to determine the location of the partnership's "chief executive office" (i.e. the place from which the main part of the affairs of the partnership is carried out).

From the perspective of third parties, however, this rule has significant disadvantages.

First, there is a lack of transparency. While a potential secured creditor or transferee usually will be given access to the partnership agreement so as to be able to determine the governing law, this is not the case for competing claimants who lack leverage over the debtor (for example, the partnership's creditors and trustee in bankruptcy).

Second, while a party autonomy approach may be appropriate for designating the law applicable to the internal administration of a partnership, the PPSA debtor location rules are concerned with determining the law applicable to the perfection and priority of security interests in partnership assets. These are matters which are of prime concern to third parties and the new Ontario rule gives rise to the potential for unfair surprise where the place of business of a partnership and the partnership assets are located a

different province or territory than the province or territory whose law is designated as the law governing the partnership agreement. Indeed, the place of business and assets of the partnership may even be located outside Canada altogether since the scope of this rule is not limited to partnerships doing business in Canada.

Third, a location test based on the law designated in the partnership agreement as governing that agreement is potentially less stable since it can more easily be changed.

Finally, as explained above, the new Ontario location rules do not necessarily reduce uncertainty in cases where the perfected or priority status of a PPSA security interest is litigated in Quebec or in the United States or another foreign State. Since the courts in these jurisdictions will apply their own choice of law rules, a prudent secured creditor will still need to perfect in accordance with the law designated as applicable under those rules. While this is true in all cases where the PPSA location rules point to a different governing law than the choice of law rules of the non-PPSA litigation forum, the risk of a 'conflict' between the PPSA 'conflict-of-law' rules and those of a non-PPSA litigation forum is greater here since this location rule is predicated on party autonomy.

Section 7(3)(b) does not apply to a partnership that is a limited partnership. This exclusion is presumably based on the assumption that limited partnerships organized under the law of a province or territory of Canada would instead fall within the location rule in section 7(3)(c), and those organized under the law of a state of the United States within the location rule in section 7(3)(e). However, as explained in the comments on these sections below, this assumption is correct only if the limited partnership is formed or organized under the relevant law by the filing or issuance of a public record, as opposed to it merely being required to file a public record of its organization. In addition, there may potentially exist forms of partnerships other than limited partnerships that are likewise formed by the filing or issuance of a public record and that could therefore potentially also fall within the scope of these other rules. For these reasons, it would have been clearer if section 7(3)(c) had instead simply excluded from its scope partnerships within the scope of these other rules. (This comment is somewhat superfluous since it will be seen that it is recommended not to adopt section 7(3)(b) in any event.)

S. 7(3)(c): Corporation or organization organized under Canadian provincial or territorial law

As noted above, section 7(3)(c) of the Ontario Act provides that that "a corporation, a limited partnership or an organization" that is incorporated, continued, amalgamated or otherwise organized under the law

of a Canadian province or territory is deemed to be located in that province or territory, if that law requires the incorporation, continuance, amalgamation or organization to be disclosed in a public record. Compared to the traditional PPSA 'place of business' and 'chief executive office' approach, this rule is thought to offer a more objective, stable and certain connecting factor.

That said, the scope of the location rule in section 7(3)(c) is unclear. It applies only if the provincial or territorial law under which an organization is incorporated, continued, amalgamated or otherwise organized "*requires the incorporation, continuance, amalgamation or organization to be disclosed in a public record*." The meaning of the italicized words is ambiguous. Is the scope of the rule meant to be limited to organizations whose formation emanates from the filing or issuance of a record with or by the province or territory that is required to be disclosed in a public record? Or is it sufficient that the formation of the organization is required be disclosed in a public record? And is the wording sufficiently clear to capture corporations created by legislation, for example, Crown corporations or a corporation created by a special Act granting or confirming letters patent that has not been continued under general corporate legislation?

The italicized wording appears to have been transplanted from the initial 2001 definition of "registered organization" in UCC Article 9. As explained in the comments on section 7(3)(e) and (f) below, UCC Article 9 was amended in 2010 to confirm that this term is generally limited to organizations whose "birth" emanates from the enactment of legislation or the filing or issuance of a record with or by a public official that is then made available to the public for inspection. Given that the Ontario drafters derived the italicized wording from the 2001 version of UCC article 9, they presumably intended the scope of section 7(3)(c) to be similarly understood and the balance of the comments on this rule are based on that assumption.

Under Canadian provincial and territorial legislation, a business corporation is incorporated, continued or amalgamated only upon the filing or issuance of a record with or by a public official[29] who must make that record available to the public for inspection.[30] The same applies to the constitution, continuance or amalgamation of other types of corporations or legal persons, namely, cooperatives, credit unions and

[29] See, e.g.: (ON) Business Corporations Act, RSO 1990, c B.16, ss. 4-7, 178-180; (BC) Business Corporations Act, SBC 2002, c 57, ss. 10-13, 275-281, 302-305; (QC) Business Corporations Act, CQLR c S-31.1, ss. 3-10, 283-286, 288-291.
[30] See, e.g.: (ON) Business Corporations Act, RSO 1990, c B.16, s. 270; (BC) Business Corporations Act, SBC 2002, c 57, s. 416; (QC) Business Corporations Act, CQLR c S-31.1, ss. 9, 285, 292, and see also An Act Respecting the Legal Publicity of Enterprises, CQLR c P-44.1, ss. 3(3), 21(4), 21(6), 30, 31, 99.

condominium associations.[31] Consequently, all corporations or other legal persons organized under provincial or territorial law come within this location rule.

The position with respect to partnerships is more complex. Although partnerships are not legal persons, the legislation in effect in the common law provinces and territories treats limited partnerships in a similar manner to corporations and other legal persons insofar as a limited partnership is formed by the filing or issuance of a record with or by a public official in the province or territory[32] that is available to the public for inspection.[33] Presumably this is why limited partnerships were expressly included in this rule. General partnerships (including limited liability partnerships) are also typically subject to a public filing obligation.[34] However, it is the anterior association of the partners that forms the partnership, not the record required to be publicly filed with the State, thereby excluding them from this rule.[35]

The applicability of section 7(3)(c) to partnerships formed under Quebec law is more uncertain. The Civil Code recognizes three categories of partnerships: general partnerships (including limited liability partnerships), limited partnerships and undeclared partnerships.[36] Both general and limited partnerships are required to file a "registration declaration,"[37] failing which the partnership is deemed to be an undeclared partnership "subject to the rights of third parties in good faith."[38] Under this approach, public registration is arguably a pre-condition to the formation of both general and limited partnerships since

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[31] See, e.g.: (ON) Co-operative Corporations Act, RSO 1990, c C.35, ss. 4-6, 156-160; Credit Unions and Caisses Populaires Act, 1994, SO 1994, c 11, ss. 12-23, 309, 316; Condominium Act, 1998, SO 1998, c 19, ss. 2-6, 120-121; (BC) Cooperative Association Act, SBC 1999, c 28, ss. 10-19, 183-185, 191-192; Credit Union Incorporation Act, RSBC 1996, c 82 ss 6-11, 15.1, 20; Strata Property Act, SBC 1998, c 43, ss. 2, 269-70; (QC) Cooperatives Act, CQLR c C-67.2, ss. 3, 7-14, 152.1 - 176.2; An Act Respecting financial Services Cooperatives, CQLR c C-67.3 ss. 7-16, 271-284; Civil Code of Quebec, arts. 1038-1039, 1059-1060. Note that while cooperatives, credit unions and condominium associations are characterized as specific types of corporations under the legislation in the common law provinces and territories, Quebec law characterizes them as separate types of legal person.

[32] See, e.g.: (ON) Limited Partnerships Act, R.S.O. 1990, c. L.16, s. 3; (BC) Partnership Act, RSBC 1996, c 348, ss. 51, 90.3.

[33] See, e.g.: (ON) General, RRO 1990, Reg 713, s. 3. The British Columbia Partnership Act, RSBC 1996, c 348 is somewhat ambiguous on this point; while the wording of section 90.3 is sufficiently broad to ensure public access to the record of a limited partnership filed with the registrar pursuant to s. 51, section 90.3 appears in Part 4 of the Act entitled "Registration of General Partnerships and Sole Proprietorships."

[34] See, e.g.: (ON) Partnerships Act, R.S.O. 1990, c. P.5, ss. 2, 3, 44.1, 44.3(1), Business Names Act, RSO 1990, c. B.17, ss. 2, 3; (BC) Partnership Act, RSBC 1996, c 348, ss. 2, 4, 80.1, 81,82, 90.3. Note that under the BC Act, registration is required only in respect of "persons associated in partnership for trading, manufacturing or mining purposes."

[35] It is for this reason that the official comments to UCC Art. 9 regard limited liability partnerships formed under U.S. state legislation modelled on the Uniform Partnerships Act not to be "registered organizations." See: Permanent Editorial Board for the Uniform Commercial Code, PEB Commentary No. 17, Limited Liability Partnerships under the Choice of Law Rules of Article 9 (June 29, 2012).

[36] Civil Code, arts. 2186, 2188.

[37] An Act Respecting the Legal Publicity of Enterprises, CQLR c P-44.1, s.21(2), 30, 32, 33.

[38] Civil Code, art. 2189.

otherwise they fall into the distinct category of "undeclared partnerships." On the other hand, the Civil Code provides that a partnership is created upon the conclusion of the contract of partnership if no other date is indicated in that contract,[39] thereby arguably excluding all forms of partnership from the scope of section 7(3)(c). To ensure that the wording of section 7(3)(c) does not pre-empt this interpretive issue, it would have been preferable to have omitted the express reference to "limited partnerships" and to instead simply have referred to corporations or other organizations.

S. 7(3)(d): corporation incorporated under a law of Canada

As noted above, the location rule in section 7(3)(d) of the Ontario Act applies to a corporation incorporated, continued or amalgamated under a law of Canada if that law requires the corporation's "*incorporation, continuance or amalgamation to be disclosed in a public record*." The italicized wording does not create quite the same level of ambiguity in the context of this section as it does in section 7(3)(c) discussed above since its scope is limited to corporations. Nonetheless, it does not precisely capture the intended meaning of the provision as it relates to corporations formed under general federal corporation legislation.

Corporations within the scope of the *Canada Business Corporations Act*,[40] the *Canada Cooperatives Act*,[41] and the *Canada Not-for-Profit Corporations Act*,[42] are incorporated, continued or amalgamated by the issuance of a certificate by the Director appointed under these Acts upon receipt of the relevant articles with effect from the date set out in the certificate.[43] Under all these acts, certificates and related articles must be filed by the Director in a publicly accessible record along with any other document required to be sent to the Director.[44] Corporations within the scope of the *Bank Act*,[45] the *Trust and Loan Companies Act*,[46] the *Insurance Companies Act*,[47] and the *Cooperative Credit Associations Act*,[48] are incorporated, continued or amalgamated by the issuance of letters patent by the Minister of Finance or the Superintendent of Financial Institutions upon receipt of an application with effect from the date set

[39] Civil Code, art. 2187.
[40] RSC 1985, c C-44.
[41] SC 1998, c 1.
[42] SC 2009, c 23.
[43] See, e.g., *Canada Business Corporations Act*, ss. 8-9, 185-187.
[44] See, e.g., *Canada Business Corporations Act*, s. 266.
[45] SC 1991, c 46a.
[46] SC 1991, c 45.
[47] SC 1991, c 47.
[48] SC 1991, c 48.

out in the letters patent.[49] These Acts require the Superintendent to maintain a register containing a copy of the incorporating instrument to which any person is entitled to reasonable access to make copies or take extracts.[50]

To more accurately capture the application of this section to corporations covered by these federal Acts, it would have been preferable (as noted above for corporations incorporated under provincial law) for section 7(3)(d) to have instead referred to corporations incorporated, continued or amalgamated by the filing or issuance of a record with a public official that is available to the public for inspection.

The wording of section 7(3)(d) is also inapposite to cover federal corporations created by legislation, notably federal Crown corporations, a significant number of which are authorized to borrow money for the purposes of their activities. Accordingly, it would have been preferable if this rule had expressly stated that it also applies to corporations incorporated by legislation Although this intent is implicit in the reference to a "special Act" in section 7(3)(d)(i), it is not reflected in the wording of the principal clause of the section. Moreover, the term "special Act" is itself somewhat ambiguous as it is often used to refer to companies historically formed by the statutory grant of special letters patent and may not be considered sufficiently generic to cover contemporary Crown corporations created by legislation.

Section 7(3)(d) deems a federal corporation to which it applies to be located in the jurisdiction where its "registered office or head office" is located:

> "(i) as set out in the special Act, letters patent, articles or other constating instrument under which the debtor was incorporated, continued or amalgamated, or
>
> (ii) as set out in the debtor's by-laws, if subclause (i) does not apply".

The term "registered office" reflects the terminology used in the *Canada Business Corporations Act*, the *Canada Cooperatives Act*, and the *Canada Not-for-Profit Corporations Act*. The term "head office" reflects the terminology used in the *Bank Act*, the *Trust and Loan Companies Act*, the *Insurance*

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[49] *Bank Act*, ss. 22, 35, 229, 671, 809; *Trust and Loan Companies Act*, ss. 21, 24, 30-34, 228-235 ; *Insurance Companies Act*, ss 22, 31, 251-252, 708, 718; *Cooperative Credit Associations Act*, ss. 23, 31, 31, 31.1-31.4.

[50] *Bank Act*, s. 634; *Trust and Loan Companies Act*, s. 501; *Insurance Companies Act*, s. 670; *Cooperative Credit Associations Act*, s. 434. Note that the Superintendent is also required to publish in the Canada Gazette a notice of the issuance of letters patent (*Bank Act*, ss. 30, 229, 679, 686, 809; *Insurance Companies Act*, s. 29, 36, 251, 716;) as well as an annual notice showing the name of every entity incorporated under these Acts and the province in which their head office is situated (*Bank Act*, s. 699. *Insurance Companies Act*, s. 738). In addition, section 14 of the Bank Act requires an up to date list of the names of all banks incorporated under the Act and the province in which their head office is located to be set out in Schedules I and II of the Act. That section also requires the Superintendent to publish a notice in the Canada Gazette showing the amended form of Schedule I or II as of the end of any year in which the Schedules are amended.

Companies Act, and the *Cooperative Credit Associations Act*. The term "head office" is also typically used in federal legislation incorporating Crown corporations.

Sub-paragraph (i) of section 7(3)(d) appears to be directed at corporations governed by the *Canada Business Corporations Act*, the *Canada Cooperatives Act*, and the *Canada Not-for- Profit Corporations Act.* Under these Acts, the province in which the "registered office" of the corporation is located must be set out in its articles[51] and the corporation is required at all times to have a registered office in the province specified in its articles.[52] The corporation's articles may be amended by special resolution to change the province in which the registered office is situated.[53] Public disclosure is assured by the requirement for a notice of registered office to be sent to the Director together with any articles that designate or change the province where the registered office of the corporation is located.[54]

Sub-paragraph (ii) of section 7(3)(d) appears to be directed at corporations governed by the *Bank Act*, the *Trust and Loan Companies Act*, the *Insurance Companies Act*, and the *Cooperative Credit Associations Act.* While these Acts require the province in which the corporation's "head office" is located to be set out in its letters patent,[55] the directors of the corporation may change the province in which its head office is located by by-law. The Superintendent may issue letters patent of amendment accordingly with effect from the day stated in the letters patent[56] but this is not a pre-condition to the effective date of the by-law. This presumably explains why these Acts require the corporation at all times to have a head office in the province specified in its incorporating instrument *or by-laws*.[57] In any event, for the purposes of section 7(3)(d), it would seem that the intention is that the location of the head office designated in the corporation's by-laws controls in cases where it has been changed via by-law from the location initially set out in its letters patent.

The wording of clause 7(3)(i) is unclear for the purposes of determining the location of the head office of a Crown corporation incorporated by federal legislation. This category of federal corporations was presumably meant to be covered by the reference to the jurisdiction in which the corporation's head office is situated as set out in "the special Act or other constating instrument under which the debtor was

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[51] See, e.g., *Canada Business Corporations Act*, s. 6.
[52] See, e.g., *Canada Business Corporations Act*, s. 19(1).
[53] See e.g., *Canada Business Corporations Act*, s. 173.
[54] See, e.g., *Canada Business Corporations Act*, s. 19(2).
[55] See, e.g., *Bank Act* ss. 28, 35, 229, 676, 809; *Insurance Companies Act*, ss. 28, 251.
[56] See, e.g., *Bank Act*, ss. 217, 190.03.
[57] See, e.g., *Bank Act*, ss. 237(1), 814(1); *Insurance Companies Act* ss. 260, 544, 868.

incorporated, continued or amalgamated." This wording covers federal Crown corporations, such as the Canada Mortgage and Housing Corporation, whose head office is set out in the Act under which it is constituted.[58] But it does not cover corporations, such as the Business Development Bank of Canada, whose constituting Act provides for the head office of the corporation to be designated by the Governor-in-Council.[59] To cover the latter situation, it would have been clearer if the rule had referred instead to the head office set out in *or under* the Act under which it was incorporated.

Ss. 7(3)(e)-(f)):"registered organization" organized under U.S. state or federal law

For the purposes of the location rules applicable to "registered organizations" organized under U.S. state or federal law, OPPSA section 7(4) replicates the definition of "registered organization" in the 2001 version of UCC § 9-102:

> "Registered organization" means an organization organized under a law of a U.S. State or of the United States of America that *requires the organization of the organization to be disclosed in a public record*. (Italics added).

Due to uncertainty regarding the meaning of the italicized words, the UCC definition of "registered organization" was amended in 2010 (with effect in most states as of July 2013) in renumbered § 9-102(a)(71) as follows:

> "Registered organization" means an organization organized solely under the law of a single State or the United States by the filing of a public organic record with, the issuance of a public organic record by, or the enactment of legislation by the State or the United States. The term includes a business trust that is formed or organized under the law of a single State if a statute of the State governing business trusts requires that the business trust's organic record be filed with the State.

The term "public record" was used, undefined, in the 2001 definition of "registered organization." The 2010 modified definition of "registered organization" substituted a new term "public organic record" defined in new § 9-102(a)(68) as follows:

> "Public organic record" means a record that is available to the public for inspection and is:
> (A) a record consisting of the record initially filed with or issued by a State or the United States to form or organize an organization and any record filed with or issued by the State or the United States which amends or restates the initial record;

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[58] Section 4 of the *Canada Mortgage and Housing Corporation Act*, R.S.C., 1985, c. C-7 provides that the head office of the Corporation "shall be at the city of Ottawa."

[59] Section 3(2) of the *Business Development Bank of Canada Act*, SC 1995, c 28 provides that the "head office of the Bank must be at a place in Canada that the Governor in Council may designate."

(B) an organic record of a business trust consisting of the record initially filed with a State and any record filed with the State which amends or restates the initial record, if a statute of the State governing business trusts requires that the record be filed with the State; or

(C) a record consisting of legislation enacted by the legislature of a State or the Congress of the United States which forms or organizes an organization, any record amending the legislation, and any record filed with or issued by the State or the United States which amends or restates the name of the organization.

The 2010 amendments confirm that an organization is a "registered organization" only if it is formed or organized by the filing or issuance of a record by or with the U.S. state or the U.S. that is available to the public for inspection, or by the enactment of legislation by a U.S. state or the U.S., as opposed to the law of the U.S. state or the U.S. merely requiring that the existence of the organization be disclosed in a public record.[60] They also extend the term "registered organization" for the first time to include a trust formed under the common law of a U.S. state for a business purpose if a statute of that state governing business trusts requires the filing of a public record of the trust (this aspect of the amendments is directed at so-called Massachusetts business trusts).[61]

Prior to being proclaimed in force in 2016, section 7(4) of the Ontario Act was not updated to reflect the modifications made in 2010 to the definition of "registered organization" in the UCC and the addition of the associated definition of "public organic record." Section 7(4) also omits the definition of "organization" in UCC § 1-201, defining an "organization" to mean, unless the context otherwise requires, "a person other than an individual." Also omitted is the related definition in UCC § 1-201 of a "person", which defines the term in an expansive manner to include various entities as "persons" even though they are not "legal persons":

> "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity.

These omissions are unfortunate. In the absence of commensurate modifications to section 7(4) of the Ontario Act, it is questionable whether sections 7(3)(e) and 7(3)(f) can achieve their presumed goal of uniformity with U.S. law with respect to the location of U.S. "registered organizations."

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[60] See first sentence of the definition of registered organization in § 9-102(a)(71) and paragraphs (A) and (C) of the definition of "public organic record" in § 9-102(a)(68).

[61] See second sentence of the definition of registered organization in § 9-102(a)(71) and paragraph (B) of the definition of "public organic record" in § 9-102(a)(68). This change means that a Massachusetts business trust, for example, will be considered to be a registered organization.

S. 7(3)(f)(ii): "Registered organization" organized under a law of the United States that authorizes the organization "to designate its U.S. State of location" .

As noted earlier, section 7(3)(f)(i) of the Ontario Act deems a "registered organization" organized under a law of the United States to be located in the first instance in the U.S. state that the federal law designates. If that law is silent, section 7(3)(f)(ii) provides that the organization is located in the U.S. state designated by the organization if the law of the United States under which it is organized "authorizes the registered organization to designate its U.S. State of location." These sections replicate the 2001 version of UCC § 9-307(f)(1) and (2). However, the 2001 iteration of § 9-307(f) (2) created some uncertainty since U.S. federal laws, notably with respect to banks, do not typically authorize the organization to designate its "state of location" as such but rather its head office or the like. Accordingly, § 9-307(f) (2) was amended in 2010 to add the words, "including by designating its main office, home office, or other comparable office" so as to confirm that that this constitutes designation of a location. Prior to being proclaimed in force in 2016, OPPSA section 7(3)(f)(ii) was not updated to add this clarification.

S. 7(3)(g): location of one or more trustees if the trust instrument designates the law of a province or territory of Canada as the law governing the instrument

As noted above, OPPSA section 7(3)(g) addresses the location of a debtor that is one or more trustees acting for a trust. If the trust instrument designates the law of a province or territory of Canada as the law governing the instrument, the debtor is deemed to be located in that province or territory. Like the equivalent rule for partnerships in section 7(3)(b) discussed above, this rule is intended to reduce uncertainty for prospective secured creditors, especially in cases where there are multiple trustees located in different jurisdictions, making it difficult to determine the location of the trustees' "chief executive office" (i.e., the place where the main part of the affairs of the trust is carried out). However, section 7(3)(g) suffers from the same significant shortcomings as the equivalent rule for partnerships in section 7(3)(b) noted above – lack of transparency, instability, potential prejudice to third parties who acquire rights in the debtor's assets, and the increased risk of a conflict with the conflict-of-law rules of non-PPSA jurisdictions. Because of these and similar concerns, the Hague Convention on the Law Applicable to Trusts and on their Recognition (1985) provides in article 6 that a "trust shall be governed by the law chosen by the settlor," but also cautions in article 15 that the Convention does not "prevent the application of provisions of the law designated by the conflicts rules of the forum" relating, among other matters, to:

"d) the transfer of title to property and security interests in property; e) the protection of creditors in matters of insolvency; f) the protection, in other respects, of third parties acting in good faith."[62]

If the trust instrument does not designate a governing law or does not designate the law of a province or territory of Canada, section 7(3)(g) deems the trustee or trustees to be located in the jurisdiction where the administration of the trust by the trustees is principally carried out. It is unclear whether this connecting factor is meant to denote something different from the residual chief executive office rule, or whether it provides any greater certainty given that the chief executive office test, as noted earlier, is already understood to refer to the place "where the debtor manages the main part of its business operations or other affairs."

S. 7(3)(h): default "chief executive office rule

A debtor that is not covered by the location rules in sections 7(3)(a) to (g) is deemed to be located in the jurisdiction where its chief executive office is located. It is not clear why the Ontario drafters did not retain the traditional formulation, still used as the residual general rule in UCC § 9-307, locating a debtor that has only one place of business at that place of business, reserving the chief executive office test for a debtor that has multiple places of business in different jurisdictions. Perhaps it was thought that a separate reference to the location of a debtor that has only one place of business was unnecessary since that place would then be its chief executive office. That said, the adjective "chief" implies that the rule is indeed concerned only with a debtor that has more than one place of business so it perhaps would have been less confusing if the traditional formulation had indeed been retained.

UCC § 9-307(a) defines a "place of business" to mean "a place where a debtor conducts its affairs" while the official comments, as noted above, consider the debtor's chief executive office to be the place from which the debtor conducts the main part of its affairs. For greater clarity, it would perhaps have been helpful if the Ontario rules had also incorporated both definitions.

[62] The Convention is in force in most Canadian provinces and territories with implementation pending in Ontario. There is also the ULCC's Conflict of Laws in Trusts Act, in force in a number of Canadian jurisdictions, applicable where the law governing the trust is that of a province of Canada provided that the Hague Convention is inapplicable. Although that Act also provides for party autonomy by the settlor in selecting the applicable law, the issues subject to that law are confined to the existence and validity of a trust, its construction and administration, relations among the beneficiary, trustee and settlor and the assets subject to the trust. It does not purport to recognize the autonomy of the settlor to choose the law governing the rights of third parties who acquire rights in trust assets).

(iii) Recommendation

In a number of respects, the new debtor location rules in the Ontario PPSA provide enhanced certainty and reduced costs for both secured creditors and third parties. While it is recommended that they be adopted by all PPSA jurisdictions, this is subject to the following five qualifications which follow from the detailed comments set out above.

The first qualification relates to the location rules in sections 7(3)(c)-(e). As noted above, the application of these rules to corporations constituted under Canadian law and to corporations and organizations incorporated under provincial or territorial law depends on whether the law under which they are organized requires the "organization" of the organization to be "disclosed in a public record." As discussed in detail in the comments above, this wording gives rise to a number of ambiguities as to the intended scope of these rules as it did in the UCC provision from which the wording was adapted. It is therefore recommended that the wording be similarly modified to address this concern. It is further recommended, for the reasons set out in the comments above, that the reference to "limited partnership" in section 7(3)(c) be deleted, and that the reference to the head office of a corporation as set out in the "special Act" under which it is incorporated in section 7(3)(e)(i) be replaced by a reference to the head office as set out "in or under the legislation" under which it was incorporated.

The second qualification relates to the location rules for United States "registered organizations" in sections 7(3)(e)-(f) of the Ontario Act. If the apparent intent of replicating the UCC location rules is to be realized, section 7(4) should be updated to reflect the 2010 amendments to the definition of registered organization and the addition of the related definition of "public organic record." For greater certainty, a definition of "organization" adapted from the UCC definitions of "organization" and "person" should also be added. It may be noted parenthetically that some consideration was given to also adding a definition of "organization" to section 7(4) for the purposes of the reference to "organizations" formed under Canadian provincial or territorial law in section 7(3)(c). It was ultimately decided that this was unnecessary since the revised wording of the latter section sufficiently clarifies that it refers to any "organization" (whether or not it is a legal person) that is formed by legislation or by the filing or issuance of a record with or by the relevant province or territory.

The third qualification relates to the rules in OPPSA sections 7(3)(b) and (g) for determining the location of a debtor that is a partnership (other than a limited partnership) or one or more trustees acting for a

trust. For the reasons outlined in the comments above, there are concerns that the lack of transparency, potential prejudice to third parties and other costs potentially occasioned by these rules are insufficient to justify the purported benefits, particularly in the case of security interests granted by trustees in trust assets. It is recognized that the retention of the traditional "chief executive office" location rule for these types of debtors means that potential secured creditors in cases of doubt (notably, where the management of the debtor's affairs is dispersed among trustees or partners located in different jurisdictions) will continue to have to perfect under and take account of the laws of all jurisdictions that might qualify as the location of the chief executive office. This burden, however, is a practical consequence of the nature of these forms of business organization. Subject to the qualification for trustees noted in the next paragraph, there is no simple way to reduce that burden. Attempting to do so by reference to an internal governing law clause in the partnership agreement or trust instrument undermines the publicity and other policy objectives of requiring perfection and priority to be governed by the law of the location of the debtor's chief executive office. After all, as noted earlier, the chief executive office rule is understood to refer to the "place from which the debtor manages the main part of its business operations or other affairs" because this is "the place where persons dealing with the debtor would normally look for credit information."

The fourth qualification relates to the possibility of reducing uncertainty in the location rules for trustees (while still maintaining objectivity and transparency in determining the applicable law) by: (1) extending the principal residence location rule in section 7(3)(a) for individual debtors to a debtor that is a trustee if the trust has a single trustee who is an individual; and (2) extending the location rules in sections 7(3)(c) and (e) for corporations organized under Canadian provincial/territorial or federal law to a debtor that is a trustee if the trust has a single trustee that is a corporation.

The fifth qualification relates to the residual "chief executive office" rule in section 7(3)(h). As noted earlier, the word "chief" may be confusing where a debtor organization has only one place of business. In addition, the meaning of the term "chief executive office" is rather ambiguous on its face in its application to all debtors and especially trustees. It is therefore suggested that section 7(3)(h) be modified by: (1) adding a "place of business" location rule for a debtor that has only one place of business and reserving the "chief executive office" location rule for a debtor that has more than one place of business; and (2) defining the term "place of business" to mean "a place from which a debtor conducts or manages

its affairs" and "chief executive office" to mean "the place from which the debtor conducts or manages the main part of its affairs."

(iv) Proposed Provisions

Note: The provisions set out below replicate the OPPSA provisions, with the modifications recommended above reflected in the case of deletions by strike-out and in the case of additions or other changes by underlining.

7(3) For the purpose of this section, a debtor is located,

(a) if the debtor is an individual, in the jurisdiction in which the debtor's principal residence is located;

(b) ~~if the debtor is a partnership, other than a limited partnership, and the partnership agreement governing the partnership states that the agreement is governed by the laws of a province or territory of Canada, in that province or territory;~~

(c) if the debtor is a corporation~~, a limited partnership~~ or an organization and is incorporated, continued, amalgamated or otherwise organized under a law of a province or territory of Canada ~~that requires the incorporation, continuance, amalgamation or organization to be disclosed in a public record~~ by:

(i) the filing of a record with or the issuance of a record by the province or territory that is available to the public for inspection, or

(ii) the enactment of legislation in that province or territory.

(d) if the debtor is a corporation incorporated, continued or amalgamated under a law of Canada ~~that requires the incorporation, continuance or amalgamation to be disclosed in a public record,~~ by:

(i) the filing of a record with or the issuance of a record by Canada that is available to the public for inspection, or

(ii) the enactment of legislation,

in the jurisdiction where the registered office or head office of the debtor is located

~~(i)~~ (iii) as set out in the ~~special Act ,~~ letters patent, articles or other constating instrument, or in or under the legislation, under which the debtor was incorporated, continued or amalgamated, or

~~(ii)~~(iv) as set out in the debtor's by-laws, if clause (iii) does not apply;

(e) if the debtor is a registered organization that is organized under the law of a U.S. State, in that U.S. State;

(f) if the debtor is a registered organization that is organized under a law of the United States of America,

(i) in the state that the law of the United States of America designates, if the law designates a state of location,

(ii) in the state that the registered organization designates, if the law of the United States of America authorizes the registered organization to designate its state of location, including by designating its main office, home office, or other comparable office, or

(iii)in the District of Columbia in the United States of America, if clauses (i) and (ii) do not apply;

(g) if the debtor is a trustee~~s~~ acting for a trust that has only one trustee,

(i)~~if the trust instrument governing the trust states that the instrument is governed by the laws of a province or territory of Canada, in that province or territory, or (ii) in the jurisdiction in which the administration of the trust by the trustees is principally carried out, if subclause (i) does not apply;~~

(i)*if the trustee is an individual who has a principal residence in a province or territory of Canada, in that province or territory;*

(ii)*if the trustee is a corporation to which clauses (c) or (d) would otherwise apply, in the jurisdiction determined by those clauses;*

(h) if none of paragraphs (a) to (g) apply, ~~in the jurisdiction where the chief executive office of the debtor is located~~,

(i)if the debtor has only one place of business, at that place of business;

(ii)if the debtor has more than one place of business, at its chief executive office.

7(4) (a) In ~~this~~ clauses ~~section~~(3) (e) and 3 (f):

"organization" means a corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity.
"public organic record" means a record that is available to the public for inspection and is:

(A) *a record consisting of the record initially filed with or issued by a State or the United States to form or organize an organization and any record filed with or issued by the State or the United States which amends or restates the initial record;*

(B) *an organic record of a business trust consisting of the record initially filed with a State and any record filed with the State which amends or restates the initial record, if a statute of the State governing business trusts requires that the record be filed with the State; or*

(C)*a record consisting of legislation enacted by the legislature of a State or the Congress of the United States which forms or organizes an organization, any record amending the legislation, and any record filed with or issued by the State or the United States which amends or restates the name of the organization.*

"registered organization" means an organization organized solely under the law of the United States of America or solely under the law of a single state of the United States of America by the filing of a public organic record with, the issuance of a public organic record by, or the enactment of legislation by the State or the United States. The term includes a business trust that is formed or organized under the law of a single State if a statute of the State governing business trusts requires that the business trust's organic record be filed with the State ~~under a law of a U.S. State or of the United States of~~ A~~merica that requires the organization of the organization to be disclosed in a public record~~;

"state" means a state of the United States of America, the District of Columbia, Puerto Rico, the United States Virgin Islands or a territory or insular possession subject to the jurisdiction of the United States of America.

(b) In clause 3(h),

"place of business" means "a place from which a debtor conducts or manages its affairs; "chief executive office" means the place from which the debtor conducts or manages the main part of its affairs.

7(5) For the purposes of this section, a debtor continues to be located in the jurisdiction specified in subsection (1.1) despite,

(a) in the case of a debtor who is an individual, the death or incapacity of the individual; and

(b) in the case of any other debtor, the suspension, revocation, forfeiture or lapse of the debtor's status in its jurisdiction of incorporation, continuation, amalgamation or organization, or the dissolution, winding-up or cancellation of the debtor.

7.1(3) For the purposes of this section:

(a) the location of a debtor is determined by subsection 7(1.1).

(v) Transition

As a result of the new debtor location rules, the location of some existing debtors may change. For example, a debtor incorporated in New Brunswick with a chief executive office in Ontario will now be deemed to be located in New Brunswick with the result that the perfection and priority of the security interest would also now be governed by New Brunswick rather than Ontario law. The Ontario PPSA sets out a complex set of transition provisions to address these transition challenges. While the new debtor location rules generally apply to security interests arising under both pre-reform and post-reform new security agreements, a security interest perfected prior to December 31, 2015 in accordance with the law of the jurisdiction determined in accordance with the old rules remains perfected in the eyes of Ontario law for a five year period (until December 31, 2020) unless perfection lapses under the prior applicable law before that deadline. To preserve continuity of perfection after the expiry of the transition period, the security interest must be perfected in accordance with the law of the jurisdiction of the debtor determined in accordance with the new rules.

While it is recommended that all jurisdictions enact similar transition provisions, the current wording of the Ontario version is problematic insofar as it appears to require re-perfection before December 31, 2020 to prevent a lapse of perfection even if the location of the relevant debtor is the same under the old and the new rules (for example, the debtor is an Ontario corporation with a chief executive office in Toronto). The Ontario Business Law Advisory Group has recommended amendments to make it clear that a security interest perfected prior to the effective date of the new debtor location rules remains perfected without the need for any further act on and after the effective date if it was perfected in accordance with the prior applicable law on the effective date and the applicable law has not changed notwithstanding the

enactment of the new rules.[63] This correction is reflected in the proposed transition provisions set out below. Note that the proposed provisions also include transition provisions for s. 7.1 dealing with security in investment property to the extent that the applicable law is also determined by reference to the law of the location of the debtor.

In those cases where the location of a prior debtor changes under the new rules, PPSA jurisdictions should consider requiring re-perfection before December 31, 2020 in line with the Ontario Act so as to simplify the transition complexities, as opposed to each providing a five year transition period after the coming into force of the new rules. Otherwise, the perfected or unperfected status of a particular security interest will continue to vary for a considerable further time after the new rules have been implemented uniformly depending on which jurisdiction the matter is litigated in. This recommendation assumes that the amending legislation is proclaimed in force in sufficient time to allow for at least a one year transition period for re-perfection. If that turns out not to be possible, then enacting jurisdictions should instead stipulate a date that is at least one year after the new location rules come into force.

PPSA jurisdictions may also wish to consider whether it would be advisable for their Personal Property Registries to develop special financing statement forms providing particulars of a prior registration in another jurisdiction which is being continued by a registration in the enacting jurisdiction so as to alert third party searchers that this is not a "new" registration.

(vi) Proposed Section 7 Transitional Provisions[64]

7.2(1) In this section,

"effective date" means the date that this section comes into force.

"prior law" means this Act as it read immediately before the effective date including the applicable law as determined under this Act as it read immediately before the effective date. "prior security interest" means a security interest referred to in subsection 7 (2.1) that arises under a prior security agreement. "prior security agreement" means

(a) a security agreement entered into before the effective date; and

[63] See Business Law Advisory Council, Report to Minister of Government and Consumer Services (Fall 2016, at 2, 12-13.
[64] These transitional provisions are adapted from the transitional provisions in sections 7.2 and 7.3 of the Ontario PPSA.

(b) a security agreement referred to in paragraph (a) that is amended, renewed or extended by an agreement entered into on or after the effective date except to the extent that the amendment renewal or extension adds collateral that was not described in that security agreement.

7.2(2) For the purpose of ascertaining the location of the debtor in order to determine the law governing the validity of a prior security interest, prior law continues to apply and subsections 7 (1), (1.1) and (1.2) do not apply.

7.2(3) Subject to subsections (6) and (7), subsections 7 (1), (1.1) and (1.2) apply for the purpose of ascertaining the location of the debtor in order to determine the law applicable to the perfection of a security interest referred to in subsection 7 (2.1), whether attachment occurs before, on or after the effective date.

7.2(4) A prior security interest that is a perfected security interest under prior law immediately before the effective date continues perfected without any further act if it is a perfected security interest under the applicable law as determined by this Act on or after the effective date.

7.2(5) A prior security interest that is a perfected security interest under prior law immediately before the effective date but is not a perfected security interest under the applicable law as determined by this Act on or after the effective date continues perfected until the beginning of the earlier of the following days:

1. *The day perfection ceases under prior law.*
2. *December 31, 2020.*

7.2(6) If a prior security interest referred to in subsection (5) is perfected in accordance with the applicable law as determined under this Act, on or after the effective date but before the earlier of the days referred to in paragraphs 1 and 2 of subsection (5), the security interest shall be deemed to be continuously perfected from the day of its perfection under prior law.

7.2(7) Subject to subsections (8), (9), and (10), subsections 7 (1), (1.1) and (1.2) apply for the purpose of ascertaining the location of the debtor in order to determine the law governing the effect of perfection or non-perfection, and the priority, of a security interest referred to in paragraph (a) of subsection 7 (2.1) and the perfection of a security interest referred to in paragraph (b) of subsection 7(2.1), whether attachment occurs before, on or after the effective date.

7.2(8) Subject to subsection (11), for the purpose of ascertaining the location of the debtor in order to determine the law governing the effect of perfection or of non-perfection, and the priority, of a prior security interest, in relation to an interest, other than a security interest, in the same collateral arising

before the effective date, prior law continues to apply and subsections 7 (1), (1.1) and (1.2) do not apply, regardless of whether the prior security interest is perfected on or after the effective date in accordance with the applicable law as determined under this Act.

7.2(9) Subject to subsections (10) and (11), for the purpose of ascertaining the location of the debtor in order to determine the law governing the priority of a prior security interest in relation to any other prior security interest in the same collateral, prior law continues to apply and subsections 7 (1), (1.1) and (1.2) do not apply.

7.2(10)Subject to subsection (11), if a prior security interest is not a perfected security interest under prior law immediately before the effective date but is subsequently perfected in accordance with the applicable law as determined under this Act, subsections 7 (1), (1.1) and (1.2) apply for the purpose of ascertaining the location of the debtor in order to determine the

law governing the priority of the prior security interest in relation to any other security interest in the same collateral.

7.2(11)Subsections (8), (9) and (10) do not apply to a prior security interest that is a non- possessory security interest in an instrument, a negotiable document of title, money or tangible chattel paper.

(vii) Proposed Section 7.1 Transitional Provisions

7.3(1) In this section,

"effective date" means the date that this section comes into force.

"prior law"meansthis Act as it read immediately before the effective date including the applicable law as determined under this Act as it read immediately before the effective date. "prior security interest" means a security interest in investment property that arises under a prior security agreement.

"prior security agreement" means, for the purposes of this section,

- *(a) a security agreement entered into before the effective date; and*
- *(b) a security agreement referred to in paragraph (a) that is amended, renewed or extended by an agreement entered into on or after the effective date.*

7.3(2) Subject to subsections (3), (4) and (5) and [insert reference to the equivalent of section 74.1 of the Saskatchewan PPSA, section 84 of the Ontario PPSA], section 7.1 applies for the purpose of determining the law governing the validity, the perfection, the effect of perfection or of non-perfection and the priority of all security interests in investment property, whether attachment occurs before, on or

after the day [insert cross-reference to the equivalent of section 126 of the Ontario Securities Transfer Act, 2006 (transitional provisions)] comes into force.

7.3(3) For the purpose of determining the law governing the validity of a prior security interest, prior law continues to apply.

7.3(4) A prior security interest that was perfected by registration and that is a perfected security interest under prior law immediately before the effective date continues perfected without any further act if it is a perfected security interest under the applicable law as determined by this Act on or after the effective date.

7.3(5) A prior security interest that was perfected by registration and that is a perfected security interest under prior law immediately before the effective date but that is not a perfected security interest under the applicable law as determined by this Act on or after the effective date continues perfected until the beginning of the earlier of the following days:

1. *The day perfection ceases under prior law.*
2. *December 31, 2020.*

7.3(6) If a prior security interest referred to in subsection (5) is perfected in accordance with the applicable law as determined under this Act on or after the effective date but before the earlier of the days referred to in paragraphs 1 and 2 of subsection (5), the security interest shall be deemed to be continuously perfected from the day of its perfection under prior law.

(viii) Application

The proposed provisions are relevant to all jurisdictions. This includes Ontario given that Ontario legislators may wish to consider that further amendments are needed in light of the above comments on the current Ontario provisions. The same applies to British Columbia and Saskatchewan since the legislation enacted in these provinces (not yet proclaimed in force) is based on the current Ontario provisions.

(b) Law Applicable to Validity, Perfection and Priority

(i) Law Applicable to "Priority"

Background

The initial formulation of the general PPSA choice of law rules in sections 5 and 7[65] addressed the law applicable to the "validity, perfection, and the effects of perfection or non-perfection" of security interests. Strictly speaking, the words "effects of perfection or non-perfection" only cover priority issues that turn directly on the perfected or unperfected status of a security interest. They do not cover priority in the sense of rules ranking competing security interests or providing for purchasers to take free of security interests in specified circumstances (for example, the special priority given by the PPSAs to purchase-money financiers as against a prior perfected security interest, ordinary course purchasers of negotiable collateral who take possession and ordinary course buyers and lessees of goods).[66]

As part of the overall revision of UCC Article 9 in 2001, the general choice of law rules in § 9- 301(1)-(3) were revised to add an express reference to the law applicable to "priority." As Official Comment 2 to § 9-301 notes:

> This article follows the broader and more precise formulation in former section 9-103(6) (b) [relating to the law applicable to investment property], which was revised in connection with the promulgation of revised article 8 in 1994: "Perfection, the effect of perfection or nonperfection, and the priority of" security interests. Priority, in this context, subsumes all of the rules in part 3, including "cut off" or "take free" rules such as sections 9-317(b), (c), and (d), 9-320(a), (b), and (d), and 9-332.

When the PPSAs were amended to implement a new regime for security interests in investment property derived from UCC Articles 8 and 9, the new choice of law rules for that category of collateral, also derived from article 9, included an express reference to priority.[67] Unfortunately, the choice of law rules in sections 5 and 7 were not amended at that time to add a similar reference, with the partial exception of subsection 5(1.1) of the Saskatchewan Act. And while the 2006 amendments to section 7 of the Ontario Act to change the debtor location rules added priority to the list of issues governed by the law of the

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[65] See, e.g., Saskatchewan PPSA, ss 5-7.
[66] See Cuming, Walsh and Wood, *supra* note 18 at 192-193.
[67] See, e.g., Saskatchewan PPSA, s.7.1.

debtor's location under section 7(1), the same change was not made to the list of issues in section 5(1) governed by the law of the location of the collateral.

Recommendation

To ensure consistency within and among the various PPSAs, and to provide greater certainty and precision, it is recommended that the general choice of law rules in sections 5 and 7 of the PPSA be amended to add an express reference to the law applicable to "priority."

Proposed Provisions

See proposed subsections 5(1.1) and 7(2.1) below.

Transition

The proposed provisions are primarily intended to clarify rather than change the existing law. They are therefore intended to take effect as of the coming into force of the amendments and to apply to all security interests whether they arise under an agreement made before or after the date of commencement.

Application

The proposed provisions are relevant to all PPSA jurisdictions with the partial exceptions of Saskatchewan and Ontario. In particular, while subsection 5(1.1) of the Saskatchewan Act already refers to the law applicable to priority, that subsection will require further revision to reflect the recommendation made in part (3) below.. The same applies to subsection 7(1) of the Ontario Act which will require further revision to reflect the recommendation immediately, below.

(ii) Effect of Post-Attachment Relocation of the Collateral or Debtor on Applicable Law

Background

Under article 3102 of the Civil Code of Quebec, the validity of a security covering tangible movable assets is governed by the law of the jurisdiction where the collateral is situated when the security is created, whereas publication (perfection) and its effects are governed by the law of the jurisdiction where the collateral is *currently* situated. Where the location of the grantor is the relevant connecting factor (i.e., where the security charges an intangible movable or a tangible movable ordinarily used in more

than one State), article 3105 makes the same temporal distinction. Under this formulation, a post-attachment change in the location of the collateral or the grantor does not affect the law applicable to validity — thus avoiding the risk of retroactive invalidation of the security interest — but it does bring about a change in the law applicable to publication (perfection).

The choice of law rules in UCC, Article 9 do not address the law applicable to validity and creation issues. However, issues of perfection, the effects of perfection or non-perfection, and priority are similarly governed by the law of the jurisdiction in which the collateral or the debtor, as the case may be, is located "while [the debtor or collateral] is located in a jurisdiction."[68] Thus, if the debtor or collateral is relocated to a new jurisdiction, the applicable law also changes to that jurisdiction.

The PPSA choice of law rules for security interests in investment property draw a like temporal distinction.[69] However, with the partial exception of subsections 5(1)-(1.1) of the Saskatchewan Act, the general choice of law rules in sections 5 and 7 of the PPSAs provide that validity, perfection, and the effects of perfection or non-perfection are governed by the law of the jurisdiction where the collateral is situated at the *time of attachment* of the security interest.

The type of problem to which this formulation potentially gives rise is illustrated by the following scenario:

> [C]onsider a priority conflict between the original secured party and the holder of a security interest granted in the goods following their relocation. If the effects of perfection of the first security interest are governed by the original *lex rei sitae*, and the effects of perfection of the second security interest are governed by the new *lex rei sitate,* which *lex rei sitae* goberns a priority dispute between them?[70]

At common law, the law of the jurisdiction in which the goods were situated when the security interest was created applied to priority contests involving interests acquired prior to the relocation of the goods but would be displaced in favour of the law of the new location of the goods in a priority competition with a rights acquired after the goods were relocated. Under this approach, priority between the competing security interests in the above scenario would be governed by the law of the jurisdiction to which the goods were relocated, consistent with the Article 9 and Civil Code approaches (and the PPSA

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[68] § 9-301(1)-(3), § 9-305(a)(i).
[69] See, e.g., Saskatchewan PPSA, ss.7.1(1)-(2).
[70] See Cuming, Walsh and Wood, *supra* note 18, at 198.

approach in the context of investment property pursuant to section 7.1). In the few cases in which the issue has arisen, the results, though not necessarily the reasoning, are consistent with this approach.[71]

Recommendation

In light of the earlier recommendation to add an explicit reference to "priority" in sections 5 and 7 of the PPSA, it becomes all the more pressing to also amend the Acts to expressly and comprehensively address the effect of a post-location change in the relevant connecting factor on the law applicable to perfection and priority.

In principle, a third party acquiring a right in collateral would reasonably expect the law applicable to perfection and priority to be the law designated by the relevant connecting time at the time its right arises. Accordingly, it is recommended that sections 5 and 7 be revised to confirm that while the validity of a security interest is governed by the designated law at the time the security interest attaches, issues relating to perfection and priority are determined by the law of the current location of the collateral or the debtor, as the case may be. Under this formulation, a post-attachment change in the relevant connecting factor brings about a change in the law applicable to the perfection and priority of the security interest with respect to competing rights that arise after the change but not with respect to rights that arose before the change in the applicable law. In other words, consistent with the common law approach, the previously applicable law continues to apply unless and until it is displaced by a right acquired after a change in the relevant connecting factor. (It is noted that this qualification appears in article 91(2) of the UNCITRAL Model Law on Secured Transactions:

> 1. Except as provided in paragraph 2, references to the location of the encumbered asset or of the grantor in the provisions of this chapter refer:
>
> (a) For creation issues, to the location at the time of the putative creation of the security right; and
>
> (b) For third-party effectiveness and priority issues, to the location at the time when the issue arises.

[71] *Ibid.* at 198-199.

2. If the right of a secured creditor in an encumbered asset is created and made effective against third parties and the rights of all competing claimants are established before a change in the location of the asset or the grantor, references in the provisions of this chapter to the location of the asset or of the grantor refer, with respect to third-party effectiveness and priority issues, to the location prior to the change.

Proposed Provisions

See proposed subsections 5(1), 5(1.1), 7(2), 7(2.1) and 8.2 below.

Transition

The proposed provisions are intended to clarify rather than change the existing law. They are therefore intended to take effect as of the coming into force of the amendments and to apply to all security interests whether they arise under an agreement made before or after the date of commencement.

Application

The proposed provisions are relevant to all PPSA jurisdictions with the partial exception of Saskatchewan. While subsections 5 and 5(1.1) of the Saskatchewan Act already incorporate the proposed provisions, it still remains to revise section 7 in a like manner and to add the qualification set out in proposed section 8.2 below.

(iii) Law Applicable to Priority between Possessory and Non-Possessory Security Interests in an Instrument, a Negotiable Document of Title, Money or Chattel Paper; Distinction between Tangible and Electronic Chattel Paper

Background

The PPSA choice of law rules governing the validity, perfection, effect of perfection and priority of security interests in an instrument, a negotiable document of title, money or chattel paper differ depending on whether the security interest is possessory or non-possessory (i.e., whether the collateral is in the possession of the secured creditor or the debtor). For possessory security interests, the law of the location of the collateral applies pursuant to section 5. For non-possessory security interests, the law of the location of the debtor applies pursuant to section 7. This bifurcated approach is problematic in the

event of a priority conflict between the holder of a non-possessory security interest and a competing secured creditor who has taken possession of the collateral. If the priority rules of the law applicable to the competing rights are not the same, which should prevail?

Recommendation

Commentators take the view that the law of the location of the collateral should apply on the basis that this reflects the reasonable expectations of a party taking possession of an instrument, a negotiable document of title, money or chattel paper in view of the negotiable or quasi- negotiable character of these types of collateral.[72] This approach would be consistent with the approach in UCC Article 9, § 9-301(3) and with the existing PPSA approach to security interests in certificated securities.[73]

In light of the recommendation above to add an explicit reference to "priority" in sections 5 and 7 of the PPSA, it becomes all the more pressing to set out an explicit rule to this effect in those sections. The most straightforward approach would be to adapt the existing PPSA approach in the case of certificated securities. Under this approach, only the validity and perfection of a non- possessory security interest in an instrument, a negotiable document of title, money or chattel paper would be governed by the law of the location of the debtor under section 7; the effect of perfection or non-perfection and priority would be governed by the law of the location of the collateral under section 5.

If the recommendation to amend the internal law provisions of the PPSAs to address electronic chattel paper is accepted, it would then also become necessary to distinguish between the law applicable to tangible and electronic chattel paper. Since it is not possible to take physical possession of electronic chattel paper, the approach suggested in the preceding paragraph should be expressly limited to "*tangible* chattel paper" and section 7 should be revised to refer the perfection and the priority of security interests in "*electronic* chattel paper" to the law of the location of the debtor.

Proposed Provisions

See subsections 5(1)(b) ("tangible chattel paper"), 5(1.1)(b), 7(2) ("electronic chattel paper" and "tangible chattel paper") and 7(2.1) (b) below.

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[72] See Cuming, Walsh and Wood, *supra* note 18 at 295.
[73] See, e.g., Saskatchewan PPSA, s.7.1(2)(a) and (5)(a).

Transition

The proposed provisions are intended to clarify rather than change the existing law. They are therefore intended to take effect as of the coming into force of the amendments and to apply to all security interests whether they arise under an agreement made before or after the date of commencement.

(iv) Renvoi

Background

Under the *renvoi* doctrine, a choice of law rule referring to the law of X jurisdiction does not refer only to the internal rules that the courts in X jurisdiction apply in domestic cases. The forum court also takes account of the choice of law rule that the courts in jurisdiction X apply to cases having the same connections to other jurisdictions that are presented by the relevant scenario. If the choice of law rule of X jurisdiction points to the application of a law other than X law, the forum court applies that other law.

The *renvoi* doctrine has attracted criticism. First, the applicable law ultimately depends not on the forum's own choice of law rules but on those of a foreign jurisdiction. From a policy perspective, this amounts to an abdication by the forum of the policy underpinning its own choice of law rule. Second, if the forum court employs total *renvoi* – which is the only logically defensible approach — the analysis does not yield an applicable internal law if the other legal system also employs total *renvoi*. For these reasons, *renvoi* is generally rejected in modern choice of law regimes, including those applicable to secured transactions.[74]

The non-Ontario PPSAs contain an exception to the modern trend. Where the law of the jurisdiction in which the debtor is located applies, these Acts state that this includes the choice of law rules of that jurisdiction. The reason goes back to the early days of PPSA reform in Canada. At its inception, the PPSA debtor location rule for mobile goods and accounts was somewhat novel, and there was a perceived need to respect the fact that other jurisdictions might continue to apply a different choice of law rule based on assigning an artificial *situs* to these types of collateral.[75]

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[74] See, e.g.: article 3080 of the Civil Code of Quebec; §9-301–§ 9-306 of UCC Article 9, all of which expressly refer to the 'local law' of the jurisdiction whose law is designated as applicable; article 98 of the UNCITRAL Model Law on Secured Transactions.

[75] See Cuming, Walsh and Wood, *supra* note 18 at 214.

Recommendation

The Uniform Law Conference of Canada has adopted recommendations calling for the abolition of the *renvoi* rule in the non-Ontario Acts.[76] It is unfortunate that this reform was not implemented when the new choice of law rules for investment property were adopted, particularly since these new rules expressly confirmed the inapplicability of the *renvoi* doctrine to the choice of law rules for that category of collateral. Indeed, the limited scope of this new provision introduced a new potential source of confusion insofar as it could be taken to imply that the doctrine of *renvoi* remained applicable even in relation to the choice of law rules in the non-Ontario PPSAs for which the location of the collateral is the relevant connecting factor.

Accordingly, it is recommended that the non-Ontario PPSAs be amended in section 7 by striking out the words "including the conflict of laws rules" and in section 8.1 by striking out "section 7.1" and substituting "sections 5 to 8."

Proposed Provisions

See proposed section 7(2) below (striking out the reference to "conflict of laws") and proposed section 8.2 below (extending the abolition of the *renvoi* doctrine to sections 5-8).

Transition

In practice no real interests are apt to be prejudiced by the abolition of the *renvoi* doctrine given the long-standing substantial harmony in the choice of law rules of all of the Canadian provinces and territories. The proposed provisions are therefore intended to take effect as of the coming into force of the amendments and to apply to all security interests whether they arise under an agreement made before or after the date of commencement.

Application

The proposed provisions are relevant to all PPSA jurisdictions, other than Ontario, subject to the following qualifications:

[76] See Reform of the Law of Secured Transactions — Report of the Working Group 2002–2003, available at www.ulcc.ca.

(i) While section 8.1 of the Saskatchewan Act has already been revised in line with proposed section 8.1 below, it remains necessary to strike out ", including the conflict of laws rules," in subsection 7(2);

(ii) the proposed provisions are already anticipated in the case of the British Columbia PPSA by the amendments set out in subsections 43(b) and section 47 of the British Columbia Finance Statutes Amendment Act, 2010, Bill 6, 2010, not yet proclaimed in force.

(v) Proposed Provisions

5(1) Subject to sections 6 to 8, the validity of

(a) a security interest in goods, and

(b) a possessory security interest in a negotiable document of title, tangible chattel paper, an instrument and money,

is governed by the law of the jurisdiction where the collateral is situated when the security interest attaches.

5(1.1) Except as otherwise provided in sections 6 and 7, while the collateral is situated in a jurisdiction, the law of that jurisdiction governs

(a) perfection, the effect of perfection or non-perfection, and the priority of a security interest referred to in subsection (1);

(b) the effect of perfection or non-perfection and the priority of a non-possessory security interest in a negotiable document of title, tangible chattel paper, an instrument and money.

7(2) The validity of

(a) a security interest in

(i) an intangible,

(ii) goods that are of a type that are normally used in more than one jurisdiction, if the goods are equipment or are inventory leased or held for lease by the debtor to others, and

(iii) electronic chattel paper

(b) a non-possessory security interest in an instrument, a negotiable document of title, money and <u>tangible</u> chattel paper,

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is governed by the law of the jurisdiction where the debtor is located when the security interest attaches.

7(2.1) While the debtor is located in a jurisdiction, the law of that jurisdiction governs:

(a) perfection, the effect of perfection or non-perfection, and the priority of a security interest referred to in paragraph (2)(a);

(b) perfection of a security interest referred to in paragraph 2(b).

8.1 For the purposes of sections 5 to 8, a reference to the law of a jurisdiction means the internal law of that jurisdiction excluding its conflict of law rules.

8.2 If a security interest is perfected and the rights of a competing claimant arose before a change in the applicable law in accordance with sections 5(1.1), 7(2.1) or 7.1(2), perfection, the effects of perfection or non-perfection, and priority continue to be governed by the previously applicable law.

(c) Preserving Continuity of Perfection after a Change in the Applicable Law

(i) Background

As explained above, a post-attachment change in the location of the collateral or the debtor, as the case may be, may bring about a change in the law applicable to the perfection and priority of a security interest. However, this does not necessarily mean that a security interest perfected under the previously applicable law becomes unperfected. Provided the security interest is "re- perfected" in accordance with the new applicable law before the expiry of the "grace period" specified in the relevant PPSA, continuity of perfection is preserved.[77] However, there is a difference in the formulation of the rule depending on whether the relevant connecting factor is the location of the goods or the location of the debtor.

In respect of security interests in goods governed by the law of the location of the goods, the grace period for re-perfection applies only where the goods are relocated to the enacting province or territory. In respect of security interests in collateral governed by the law of the location of the debtor, the security interest must be re-perfected before the expiry of the grace periods specified in the enacting jurisdiction's PPSA, even if the debtor relocates to some other jurisdiction and even if that other jurisdiction is not a PPSA jurisdiction and has a different grace period (or no grace period). As explained by commentators,

[77] See, e.g., Saskatchewan PPSA, ss 5(3) and 7(3).

this latter formulation may give rise to complexity and produce inconsistent outcomes depending on where the perfected status of the security interest is litigated:

> Where the debtor relocates to another PPSA jurisdiction, the difference [in the formulation] is inconsequential since the grace periods will be identical under both the law of the forum and the law of the new location. However, the debtor may relocate to a province or country where the grace periods for preserving perfected status are different. Consider the following scenario.
>
> SP grants a security interest in mobile goods and intangibles while located in Saskatchewan. D later relocates to the state of New York. Three months later, SP finds out about the relocation and perfects its security interest in accordance with the New York version of UCC Article 9.
>
> Article 9 of the UCC gives the secured party a grace period of four months to reperfect upon a change in the location of the debtor. Consequently, continuity of perfection is preserved in the above scenario as a matter of New York law. However, in litigation in Saskatchewan, the Saskatchewan court will apply the shorter time periods prescribed by the Saskatchewan PPSA with the result that the security interest loses continuity of perfection.
>
> The converse situation can also arise. Suppose that instead of changing location to New York, the debtor moves to Quebec and the secured party reperfects in Quebec within forty-five days of the relocation. So far as Quebec law is concerned, perfected status is lost since the Civil Code provides a maximum grace period of only thirty days for reperfection where a debtor relocates to that province. However, in litigation in Saskatchewan, perfected status would be preserved by virtue of the lengthier sixty-day grace period recognized by the Saskatchewan PPSA.[78]

The location of the debtor can change indirectly as a result of a transfer of the collateral to a transferee located in a different jurisdiction. The following scenario illustrates this possibility:

> D, located in Province X, grants a security interest in mobile goods and intangibles to SP1 who registers in Province X's registry. In breach of the security agreement between D and SP1, D transfers an interest in the assets to T, located in Province Y. T then grants a security interest in the same assets to SP2 who registers in Province Y's registry because this is where T is located.

In this scenario, section 7 of the non-Ontario PPSAs obliges SP1 to reperfect in accordance with the law of the jurisdiction where T is located (Province Y) naming T as a new debtor in order to preserve the perfected status of its security interest under D's home law (province X). The applicable grace periods are the same ones that apply in the case of a change in the location of the debtor. If the security interest is perfected in the new jurisdiction before the expiry of the grace period, it is deemed to be continuously perfected. If it is not, the security interest becomes unperfected. This reperfection requirement is intended

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to protect persons in the position of SP 2 in the above scenario who would reasonably expect that a search of the registry in the jurisdiction where T is located would disclose any security interests granted by T. It is *not* intended for the benefit of T who ought to have verified the status of D's ownership by searching the registry in Province X in advance of her purchase. Consequently, failure to reperfect before the expiry of the relevant grace period does not cause the security interest to become unperfected as against T but only as against a party taking from T such as SP2 in this scenario.[79] In addition, a *transfer* of ownership or title is necessary to trigger the reperfection obligation. Thus, for example, delivery of possession of mobile goods to a consignee in another jurisdiction under a consignment for sale does not prejudice the perfected status of the security interest.[80]

Saskatchewan has proposed deleting the requirement for a secured creditor to reperfect following a transfer of the collateral to a transferee located in a different jurisdiction in order to maintain continuity of perfection. Two justifications may be given for this proposal. First, under the substantive provisions of the PPSA, a secured creditor is obligated to amend a registration to disclose the name of a transferee of the collateral as a new debtor only after it finds out about the transfer and the name of the transferee.[81] It is incongruous to impose a more onerous reperfection obligation on a secured creditor in the cross-border scenario compared to the domestic context. Second, under the substantive provisions of the non-Ontario PPSAs, failure to register the name of the transferee as a new debtor before the expiry of the grace period does not cause the security interest to become wholly unperfected but only subordinates it against interests arising after the transfer: see again section 51 of the Saskatchewan PPSA. Adoption of this proposal would have the additional benefit of harmonizing the other PPSAs with the Ontario Act on this point.

Finally, it should be noted that the formulation of the rule governing continuity of perfection in section 7(6) of the Ontario Act differs from the formulation in section 5(2). Whereas continuity of perfection is preserved under section 7(6) for the duration of the grace period even if the secured creditor does not re-perfect before the grace period expires, continuity of perfection under section 5(2) is conditional on reperfection before the grace period expires. It is recommended that section 7(6) of the Ontario Act be

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[79] *Northwest Equipment Inc. v. Daewoo Heavy Industries America Corp.*, [2002] 6 W.W.R. 444 (Alta. CA).
[80] *Canadian Imperial Bank of Commerce v. A.K. Construction (1988) Ltd.* (1996), 186 A.R. 1 at 6 (Q.B.), aff'd (1998), 223 A.R. 115 (C.A.)
[81] See, e.g., Saskatchewan PPSA, s.51.

revised to conform to the approach taken in section 5(2). This reform would have the added advantage of also conforming the Ontario Act to the other PPSAs.

(ii) Recommendation

In principle, an enacting jurisdiction should determine the appropriate grace period and any other conditions governing continuity of perfection only where the change in the relevant connecting factor results in the law of that jurisdiction becoming the applicable law. Otherwise, this would defeat the general rule under which perfection, the effects of perfection or non-perfection and priority are governed by the law of the jurisdiction where the collateral or debtor as the case may be is located at the relevant time (since the law governing perfection surely includes the law governing continuity of perfection in that jurisdiction).

Accordingly, it is recommended that the PPSA rules governing continuity of perfection in section 7 be aligned with those in section 5 to ensure that they apply only where the application of the law of the enacting jurisdiction is triggered by the change in the location of the relevant connecting factor. A similar change is recommended for the conflicts provisions governing continuity of perfection for security interests in investment property following a change in the relevant connecting factor.[82]

It is further recommended that the wording of the PPSA rule governing continuity of perfection in section 5(3) be revised to refer to a security interest in goods "perfected under the law of the jurisdiction designated in subsection 5(1)" as opposed to the "law of the jurisdiction in which the goods are situated when the security interest attaches." This additional change is necessary to align the wording of subsection 5(3) with the recommendation above that section 5 be amended to confirm that the law of the location of the goods applies to perfection, the effect of perfection or non-perfection and priority only while the goods are located in that jurisdiction (as opposed to from the time of initial attachment).

Finally, for the reasons given above, we recommend deleting the words "or transfers an interest in the collateral to a person located in another jurisdiction" from section 7(3), a change that will bring the other PPSAs in line with the Ontario Act.

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[82] See, e.g., Saskatchewan PPSA, s.7.1(6).

(iii) Proposed Provisions

5(3) If goods are relocated to the [enacting Province or Territory], a security interest in the goods perfected in accordance with the applicable law as provided in subsection (1) continues perfected in [the enacting Province or Territory] if it is perfected under this Act

(a) not later than 60 days after the day on which the goods are brought into [the enacting Province or Territory];

(b) not later than 15 days after the day on which the secured party has knowledge that the goods have been brought into [the enacting Province or Territory]; or

(c) before perfection ceases under the previously applicable law

whichever is earliest, . . .

7(3) If a debtor relocates to [the enacting Province or Territory] a security interest perfected in accordance with the applicable law as provided in subsection (2), continues perfected in [the enacting Province or Territory] if it is perfected under this Act:

(a) not later than 60 days after the after the day on which the debtor relocates or transfers an interest in the collateral to a person located in [the enacting Province or Territory];

(b) not later than 15 days after the day on which the secured party has knowledge that the debtor has relocated or transferred an interest in the collateral to a person located in the [the enacting Province or Territory]; or

(c) prior to the day that perfection ceases pursuant to the previously applicable law; whichever is the earliest.

7.1(6) A security interest perfected in accordance with the applicable law as provided in subsection (5) remains perfected [in the enacting Province or Territory] until the earliest of

(a) 60 days after the day the debtor relocates to [the enacting Province or Territory]

(b) 15 days after the day the secured party knows the debtor has relocated to [the enacting Province or Territory], and

(c) the day that perfection ceases under the previously applicable law.

7.1(7) A security interest in investment property that is perfected under the law of the issuer's jurisdiction, the securities intermediary's jurisdiction or the futures intermediary's jurisdiction, as applicable, remains perfected [in the enacting Province or Territory]until the earliest of

(a) 60 days after a change of the applicable jurisdiction to [the enacting Province or Territory],

(b) 15 days after the day the secured party knows of the change of the applicable jurisdiction to [the enacting Province or Territory] and

(c) the day that perfection ceases under the previously applicable law.

(iv) Transition

The proposed changes to subsections 5(3) and 7.1(6) and (7) are intended to clarify rather than change the current law. The proposed change to subsection 7(3) does change existing law. However, in practice, the change only affects continuity of perfection for security interests with a connection to a jurisdiction with a different grace period than the PPSAs (for example, as noted above, Quebec or a state in the United States) and prudent secured creditors are likely to have already taken account of this risk. Accordingly, all the proposed provision are intended to take effect as of the date of coming into force of the amendments and to apply to all security interests whether they arise under an agreement made before or after the date of commencement.

(v) Application

The proposed provisions are relevant to all PPSA jurisdictions with the exception of the deletion in section 7(3) of the words "or transfers an interest in the collateral to a person located in another jurisdiction" which are applicable only to the non-Ontario PPSAs.

(d) Security Interests in Goods Intended to be Relocated within Thirty Days

(i) Background

The PPSAs contain a special choice of law rule for goods intended to be removed from the jurisdiction within thirty days after the security interest attaches.[83] The law of the jurisdiction where the goods are intended to be kept applies to validity, perfection, and the effects of perfection or non-perfection if the goods are actually relocated to that jurisdiction within thirty days. The aim of this exception is to relieve the secured party from the cost and expense of having to comply with the perfection rules of both jurisdictions.

[83] See, e.g., Saskatchewan PPSA, s.6.

The current formulation of section 6 is problematic at two levels. First, the current wording of subsection 6(1) implies that a security interest is valid and perfected only if the validity and perfection requirements of the law of the intended location of the goods are satisfied. In principle a secured creditor should have the option of either complying with that law or complying with the validity and perfection rules of the law of the location of the collateral at the time of attachment and then taking whatever steps are needed under the law of the intended location of the collateral to preserve the continuity of its perfected status.

Second, the current wording of subsection 6(2) does not fit easily with the distinction, reflected in proposed subsections 5(1)-(1.1) and 7(2)-(2.1) in section (b) above, that while validity is governed by the law of the jurisdiction where the goods are located when the security interest attaches, perfection, the effects of perfection or non-perfection, and priority is governed by the law of the current location of the goods. That is, as currently formulated, subsection 6(2) may be taken to imply that even if the goods are later removed from the jurisdiction to which they were initially removed, the law of the first jurisdiction continues to apply except where the goods were located in the enacting jurisdiction at the time of attachment and are subsequently brought back into the enacting jurisdiction.

(ii) Recommendation

To address the problems noted above, it is recommended that section 6 be reformulated along the lines set out below.

(iii) Proposed Provision

6(1) Subject to section 7, if the parties to a security agreement that creates a security interest in goods in one jurisdiction understand at the time the security interest attaches that the goods will be kept in another jurisdiction, and the goods are removed to the other jurisdiction for purposes other than transportation through the other jurisdiction not later than 30 days after the security interest attaches, the security interest

(a) is valid if it is valid under either the law of the jurisdiction where the goods are located when the security interest attaches or the law of the other jurisdiction; and

(b) may be perfected under the law of either jurisdiction.

6(2) If a security interest referred to in subsection (1) is perfected in accordance with the law of the jurisdiction to which the goods are removed, the effects of perfection and the priority of the security interest are governed by that law:

(a) before the goods are removed to that jurisdiction; and

(b) while the goods are located in that jurisdiction.

(iv) Transition

The proposed provision is intended to clarify the wording of section 6 to bring it into line with the wording of proposed subsections 5(1)-(1.1) which likewise are intended to clarify rather than change the current law. Accordingly, the proposed provision is intended to take effect as of the coming into effect of the amendments and to apply to all security interests whether they arise under an agreement made before or after the date of commencement.

(v) Application

The proposed provision is relevant to all PPSA jurisdictions.

(e) Effect on Applicable Law of Absence of Public Registry in Jurisdiction Where Debtor is Located

(i) Background

The non-Ontario PPSAs set out an exception to the application of the law of the jurisdiction where the debtor is located to issues otherwise governed by that law if it does "not provide for public registration or recording of the security interest or a notice relating to it."[84] The exception applies where the transaction involves collateral in the form of an account payable in the enacting jurisdiction or a non-possessory security interest in chattel paper, a negotiable document of title, an instrument or money acquired when the collateral was located in the enacting jurisdiction. In this scenario, the security interest also must be perfected in accordance with the perfection requirements of the enacting jurisdiction. Otherwise, the security interest is subordinated to any competing third party interests acquired in the collateral.

[84] See, e.g., Saskatchewan PPSA, s.7(4).

All jurisdictions in Canada and the United States now have public registration systems for security interests in the types of collateral covered by the exception. Thus, the 'mischief' sought to be addressed by the exception is no longer a practical problem in the vast majority of transactions to which the PPSA choice of law rules apply. Moreover, in the case of security interests in accounts, there is not much practical scope for the exception to apply. After all, the potential application of the exception is triggered only if the account is payable in the enacting jurisdiction. Assuming that an account is normally payable in the jurisdiction where the creditor on the account - the grantor of the security interest - is located, it follows that the applicable law under section 7 will normally be that of the enacting PPSA jurisdiction in any event, and since that jurisdiction's PPSA clearly will have a public registry system, the exception will be inapplicable. In the case of non-possessory security interests in chattel paper, documents of title, instruments or money located in the enacting jurisdiction, while the enacting jurisdiction may not always coincide with the jurisdiction of the location of the grantor, the super-priority generally accorded to possessory security interests in these forms of collateral means that third parties generally cannot place full reliance on the ability to search the registry in the grantor's location in any event. Furthermore, given the universal establishment of public registries throughout Canada and the United States noted above, the likelihood of the exception being triggered is virtually non-existent.

(ii) Recommendation

In view of the very limited practical relevance of the exception set out in subsection 7(4) of the Saskatchewan PPSA and its equivalent in other PPSAs, its repeal is recommended. Repeal would have the additional virtue of bringing the non-Ontario PPSAs into line with the Ontario PPSA and the choice of law rules for movable security in the Civil Code of Quebec, neither of which contains any equivalent exception.

(iii) Proposed Provision

7(4) [Delete]

(iv) Transition

The scenario contemplated by subsection 7(4) is unlikely to pose a practical problem in practice. Accordingly, the proposed repeal of this provision is intended to take effect as of the coming into force

of the amendments and to apply to all security interests whether they arise under an agreement made before or after the date of commencement.

(v) Application

The proposed repeal is relevant to all PPSA jurisdictions other than Ontario.