

Where Oh Where Is My Debtor? Recent Changes to the Ontario Personal Property Security Act

Introduction

There is an old expression that “the more things change, the more they stay the same”. This could apply to some recent amendments to the Ontario *Personal Property Security Act* R.S.O. 1990 c.P.10 (the “Ontario PPSA”) that came into force on December 31, 2015. The amendments are intended to bring certainty to the rules for determining the location of the debtor for the purpose of registering and searching under the Ontario PPSA when a secured party takes security over certain kinds of collateral. It could be argued that these amendments merely substitute one set of uncertain rules for another set of uncertain rules.

First – A Little Bit of History about the Old Rules

Before these new amendments came into force, the old rules (the “Old Rules”) under the Ontario PPSA stated that the laws of the jurisdiction where the debtor is located govern the validity, perfection and priority of a security

interest in certain kinds of collateral, including intangibles (such as accounts receivable) and mobile goods of a type that are normally used in more than one jurisdiction if such goods are equipment or inventory leased by a debtor to others, such as motor vehicles.

The Old Rules provided that a debtor was deemed to be located at the debtor’s place of business (if there is one), at the debtor’s chief executive office (if there is more than one place of business), and, otherwise, at the debtor’s principal place of residence. Unfortunately, the Old Rules did not define the terms “chief executive office” and “principal place of residence”. As a result of this uncertainty, where a secured party was dealing with a debtor incorporated in one province but with a place of business in another province, the secured party would often search and register against the debtor under the personal property security legislation in both provinces in order to protect its security interest in the debtor’s



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intangible collateral, such as accounts receivable.

In 2006, the Province of Ontario passed certain amendments to the Ontario PPSA which were intended to clarify the rules for determining the location of a debtor. These amendments were not proclaimed in force for almost ten years until the end of 2015. This delay was done in the hope that the other provinces

would enact similar legislation and make their rules uniform under the personal property security legislation across Canada. For whatever reason, the Province of Ontario stopped waiting for the other provinces to legislate these changes and decided to “go it alone” by bringing these amendments into force. As discussed below, this has resulted in a continued uncertainty in the rules for determining the debtor’s location for

the purposes of the Ontario PPSA.

So, What’s New? A Summary of the New Rules

Under the new rules (the “New Rules”), the location of the debtor depends on the type of debtor and on information available in the public records or in the debtor’s constating documents. The following chart summarizes the New Rules for determining the debtor’s location:

Type of Debtor	Jurisdiction for Registration
individual	where the individual’s principal residence is located
partnership (which is not a limited partnership) whose partnership agreement states that the agreement is governed by the laws of a province or a territory of Canada	that province or territory whose law governs the partnership agreement
corporation, limited partnership, or organization incorporated, continued, amalgamated, or organized under the law of a province or territory of Canada, which law requires the incorporation, continuance, amalgamation, or other organization to be disclosed in a public record	that province or territory where the incorporation, continuance, amalgamation, or other organization occurred
corporation incorporated, continued or amalgamated under the federal law of Canada, which law requires the incorporation, continuance or amalgamation to be disclosed in a public record	(a) the jurisdiction of the registered or head office of the federal corporation as set out in its incorporating instrument; or (b) as set out in the federal corporation’s by-laws if (a) does not apply
organization organized under the law of a U.S. state, which law requires the disclosure of the organization of the debtor in a public record	the U.S. state where the organization is organized
organization organized under U.S. federal law, which law requires disclosure of the organization of the debtor in a public record	(a) the U.S. state designated by U.S. federal law as the debtor’s location; (b) the U.S. state that the organization designates as its location if the U.S. federal law authorizes the organization to designate its location in a U.S. state; or (c) District of Columbia if neither (a) nor (b) applies

trustees acting for a trust where the instrument governing the trust states that the trust is governed by the laws of a province or territory of Canada	that province or territory whose law governs the trust
trustees acting for a trust where the instrument governing the trust does not state that the trust is governed by the laws of a province or territory of Canada	that province or territory where the administration of the trust by the trustee is principally carried out
debtor does not fall within any of the foregoing categories	where the debtor’s chief executive office is located

What Does It All Mean? A Simple Example of the New Rules

The debtor is a corporation incorporated under the laws of the Province of Alberta with a small office in Edmonton, but with all of its senior management in a Toronto office. The Alberta corporation has granted to the secured party a security interest in all of its accounts receivable from its customers located all across Canada. The Old Rules (based on the location of the chief executive office) required the secured party to register its financing statement and to search against the Alberta corporation under the Ontario PPSA. Under the New Rules (based on the province where the debtor was incorporated), the secured party is only required to register against the Alberta corporation and to search under the personal property security legislation in the Province of Alberta in order to protect its security interest in the Alberta corporation’s accounts receivable. However, for the reason discussed below, the secured party may also want to register and search against the Alberta corporation under the Ontario PPSA.

“Lost in Transition”: The Transitional Rules

What if you are a secured party who has a security agreement that was entered into before December 31, 2015? What if you registered a financing statement against the debtor under the Ontario PPSA before December 31, 2015 with respect to collateral covered by the New Rules, such as accounts receivable? What are you supposed to do in order to protect your security interest in this collateral?

The amendments to the Ontario PPSA contain a number of transitional rules (the “Transitional Rules”) that apply to the above situations, including the following:

1. There is a Transitional Rule for determining the validity of a security agreement. If the security agreement was entered into before December 31, 2015 (the “Prior Agreement”), then the Old Rules continue to apply to the Prior Agreement, including to any amendment, renewal or extension of the Prior Agreement made on or after December 31, 2015, provided that the

amendment does not add new classes of collateral to the Prior Agreement. For example, if an Alberta corporation having a chief executive office in Ontario entered into a security agreement before December 31, 2015 that granted a security interest in intangible collateral (such as accounts receivable), then the validity of the Prior Agreement is governed by the Old Rules under the Ontario PPSA based on the location of the debtor’s chief executive office. If the Alberta corporation entered into a new security agreement after December 31, 2015 (or if intangible collateral was added as a new class of collateral to the Prior Agreement), then the New Rules would apply and the validity of the agreement under the Ontario PPSA would be governed by the Alberta personal property security legislation based on the corporation’s jurisdiction of incorporation.

2. There is also a Transitional Rule relating to the perfection of a security interest by the registration of a financing

statement. After December 31, 2015, the New Rules will determine the law that governs the perfection of a security interest in intangible collateral (such as accounts receivable), no matter when the security interest was created. According to the Transitional Rule, a security interest that was perfected under the Old Rules before December 31, 2015, will cease to be perfected on December 31, 2020 (or earlier, if the registration expires), and even if the term of the existing registration extends beyond December 31, 2020. In effect, this means that a secured party has five years from December 31, 2015 to make sure that its financing statement is registered against the debtor in accordance with the New Rules. Using the earlier example of the Alberta corporation with all of its senior management in Toronto, suppose the secured party had registered a financing statement in Ontario against the Alberta corporation under the Old Rules on December 31, 2014 for a period of ten years to expire on December 31, 2024. Based on the New Rules, the location of the debtor for the purposes of perfection is based on the debtor's jurisdiction of incorporation, which means that the financing statement is required to be registered against the debtor in Alberta. In order to protect its security interest against the debtor's intangible

collateral, the secured party needs to register a new financing statement against the debtor in Alberta before December 31, 2020 even though the Ontario PPSA registration does not expire until December 31, 2024.

Ontario "Goes it Alone": The Conflict of Law Problem

There is no uniform personal property security law across Canada. Each of the provinces (except for Quebec) has its own personal property security legislation and all of this legislation is different. Instead of waiting for all of the other provinces to enact the same amendments to their legislation, the Province of Ontario decided to go it alone and proclaim these new amendments into force on December 31, 2015. Until the other provinces amend their legislation to harmonize their law with the Ontario PPSA, there will be ambiguity and uncertainty under the Ontario PPSA on account of the "conflict of laws" provisions in the legislation across Canada. Using the earlier example of the Alberta corporation with its senior management located in its Toronto office, the New Rules under the PPSA deem the debtor's location to be in Alberta and Alberta law to be the applicable law. However, the "conflict of laws" provisions in the Alberta legislation still refer to the location of the debtor's chief executive office, which is in Ontario. As a result of this uncertainty, the safest course of action for a secured party would be to search and register against

the Alberta corporation under the personal property security legislation in both Ontario and Alberta.

Where Do We Go from Here? What To Do about the New Rules

There are a number of practical implications and steps that a secured party needs to consider as a result of these amendments to the Ontario PPSA:

1. It should be emphasized that the New Rules do not apply to all kinds of collateral under the Ontario PPSA. They only apply to specified classes including intangible collateral (such as accounts receivable) and mobile goods used in more than one jurisdiction and leased by the debtor to others. For other kinds of collateral (such as inventory and equipment in Ontario that is not leased by the debtor to others), the Ontario PPSA states that the validity and perfection of a security interest is governed by the laws of the jurisdiction in which the collateral is situated at the time that the security interest attaches. This means that the security interest in the debtor's inventory and equipment should be registered in the province where the goods are geographically situated when the security agreement is signed by the debtor and the debtor has rights in the goods. If the debtor has goods located in more than one province, then the secured party should register its security interest against the debtor in all

provinces where the goods are located.

2. Following December 31, 2015, all security interests in intangible collateral and mobile goods must be perfected in accordance with the New Rules.
3. Following December 31, 2015, it is recommended that a secured party who wishes to take a security interest in intangible collateral and mobile goods consider searching and registering under both the Old Rules and the New Rules on account of the uncertainty that continues under the Ontario PPSA as a result of these amendments on December 31, 2015.
4. The secured party should review all of its PPSA registrations with respect to intangible collateral

and mobile goods that were made prior to December 31, 2015 and that expire after December 31, 2020. In order to maintain perfection, the secured party must ensure that each of these financing statements is registered in the appropriate jurisdiction under the New Rules prior to December 31, 2020. The secured party should identify those debtors that were incorporated or organized outside of the Province of Ontario and determine in which jurisdiction the secured party needs to search and register outside the Province of Ontario.

5. If a security agreement entered into prior to December 31, 2015 is subsequently amended to add new classes of collateral (such as intangible collateral), the

secured party needs to follow the New Rules in order to perfect its security interest in such new collateral.

6. The secured party should review the representations and warranties in its standard form of security agreement, so that they are consistent with the New Rules. In addition to representations and warranties regarding the debtor's chief executive office and places at which its assets are located, there should be representations and warranties regarding the jurisdiction of organization of the debtor or, where applicable, the jurisdiction of the governing law of the debtor's organizational documents.