



The Canadian Institute

Taking Security Against Debtors or Assets Located Outside Québec

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The Canadian Landscape for Taking Security



Secured transactions are governed at the provincial level because the provinces have constitutional authority over matters related to property and civil rights (s. 92(13) of the BNA Act).

Every Canadian province and territory other than Québec has a PPSA.

Québec is the only Canadian jurisdiction with a distinct personal property security regime which is enshrined in the Civil Code of Québec.

The Ontario *Personal Property Security Act* (“PPSA”)



The purpose of the PPSA is to establish a framework for the taking of security in personal (movable) property and the priority between creditors.

Scope of the PPSA

The PPSA looks to the substance of the transaction, and not the form:

“Subject to subsection 4 (1), this Act applies to, (a) every transaction without regard to its form and without regard to the person who has title to the collateral that in substance creates a security interest (...).”

The transfer of an account or chattel paper is covered by the PPSA even though the transfer may not secure payment or performance of an obligation.

The Ontario *Personal Property Security Act*



Exclusions from the Scope of the PPSA

Liens given by statute or rule of law (e.g. *Construction Lien Act*).

An interest in a policy of insurance or contract of annuity, except for an assignment of the monies payable thereunder.

A conveyance or assignment of interest in real property.

The creation or transfer of an interest in land, including under a lease.

Attachment under the PPSA



A security interest is not enforceable against the debtor or a third party unless it has attached.

Criteria – s. 11(2) of the PPSA

- (a) Debtor signs a security agreement containing a description of the collateral capable of allowing it to be identified or for possessory security interests, the secured party of a person on their behalf obtains possession of the collateral;
- (b) Value is given; and
- (c) Debtor has rights in the collateral.

Perfection under the PPSA



Perfection consists in the publication of the creditor's security interest.

Security interests can be perfected in 3 ways:

Registration of a financing statement;

Actual possession of the collateral;

By way of control.

Conflicts of Laws under the Québec Civil Code (“CCQ”) – § 2. – General Rule



Art. 3102 CCQ

“The validity of a movable security is governed by the law of the country in which the property charged with it is situated at the time of the creation of the security. Publication and its effects are governed by the law of the country in which the property charged with the security is currently situated.”

Art. 3103 CCQ

“Any movable that is not intended to remain in the country in which it is situated may be charged with a security according to the law of the country for which it is destined; the security may be published according to the law of that country, but publication has effect only if the property actually reaches the country within thirty (30) days of the creation of the security.”

Conflicts of Laws under the CCQ – Transfer of property into Québec.



.Art. 3104 CCQ

“A security published according to the law of the country where the property was situated at the time of creation of the security will be deemed to be published in Québec, from the first publication, if it is published in Québec before any of the following events, whichever occurs first:

- (1) the cessation of effect of publication in the country where the property was situated at the time of the creation of the security;
- (2) the expiry of thirty (30) days from the time the property reaches Québec; and
- (3) the expiry of fifteen (15) days from the time the creditor is advised that the property has arrived in Québec.

However, the security may not be set up against a buyer who has acquired the property in the ordinary course of the activities of the grantor.”

Conflicts of Laws under the CCQ – § 2. Intangibles and property used in more than one jurisdiction



.Art. 3105 CCQ

“The validity of a security charged on a corporal movable ordinarily used in more than one country or charged on an incorporeal movable is governed by the law of the country where the grantor was domiciled at the time of creation of the security.”

Publication and its effects are governed by the law of the country in which the grantor is currently domiciled.

However, the provisions of this article do not apply to a security encumbering an incorporeal movable established by a title in bearer form or to a security published by the holding of the title.”

.Art. 307 CCQ

“The domicile of a legal person is at the place and address of its head office.”

Conflicts of Laws under the CCQ – § 2.

– Grantor moves to Québec



.Art. 3106 CCQ

“A security which, when it is created, is governed by the law of the country where the grantor is then domiciled and which has been published will be deemed to have been published in Québec, from the first publication, provided it is published in Québec before any of the following events, whichever occurs first:

(1) the cessation of effect of publication in the country where the grantor was formerly domiciled;

(2) the expiry of thirty (30) days from the time the grantor established his new domicile in Québec; and

(3) the expiry of fifteen (15) days from the time the creditor was advised of the new domicile of the grantor in Québec.

However, the security may not be set up against a buyer who has acquired the property in the ordinary course of the activities of the grantor.”

Conflicts of Laws under the PPSA

General rule



Conflict of law rules are found in ss. 5, 6, and 7 of the PPSA.

Location of collateral at the time of attachment

Generally, the validity, perfection and effect of perfection or non-perfection of a security interest will be determined by the law of the jurisdiction where the collateral is situated at the time the security interest attaches.

Conflicts of Laws under the PPSA

Transfer of property into Ontario



Relocation of Goods in Ontario

s. 5(2): Security interest that attached in the other province continues to be perfected in Ontario when goods are brought in provided that perfection in Ontario occurs within the earliest of certain events:

- (a) within sixty (60) days after the goods are brought in;
- (b) within fifteen (15) days after the day the secured party receives notice that the goods have been brought in; or
- (c) before the date that perfection ceases under the law of the jurisdiction in which the goods were situated at the time the security interest attached.

Conflicts of Laws under the PPSA

Intangibles and property used in more than one jurisdiction



General Rule

s. 7 (1) The validity, the perfection, and the priority, of a security interest in an intangible or goods that are of a type that are normally used in more than one jurisdiction, are governed by the law of the jurisdiction where the debtor is located at the time the security interest attaches.

Location of Debtor

A debtor shall be 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.

The criteria may change to the jurisdiction of incorporation as in the United States.

Transfer of Accounts and Chattel Papers – Enforceability against Transferor and Transferee



Under the PPSA

A transferee must register a security interest under the PPSA even if the transfer does not create a security interest (s. 2(b) of the PPSA).

Under the CCQ

An assignment only has to be registered if a universality of claims is being transferred to be set up against third parties (Art. 1641 CCQ).

Transfer of Accounts and Chattel Papers - Enforceability against Account Debtors



Under the PPSA

An account debtor is compelled to pay the assignee of the account if the assignee provides to it evidence of the assignment (s. 40(2) of the PPSA).

Under the CCQ

An assignment of accounts may be set up against debtors and third persons by registering the assignment in the register of personal and movable real rights and if the debtor has acquiesced or received notice of the assignment (Art. 1642 and 1641 CCQ).

Conclusion



Taking security of debtors when its assets are located outside Québec requires careful review of:

- (a) the personal (movable) property security regime of the province where the assets are located;
- (b) the type of collateral being charged; and
- (c) the location of the debtor.



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