Changes to Personal Property Security Act - Report 2007

CIVIL LAW SECTION

REPORT ON THE ULCC PROJECT FOR CHANGES TO PERSONAL PROPERTY SECURITY ACTS

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I. BACKGROUND

[1] The Uniform Law Conference promulgated a Uniform Personal Property Security Act in the early 1980s. While features of the Uniform Act were later included in the provincial Acts, it never served as a model. The principal reason for this is that events overtook it. A period of rapid development of Canadian secured financing law occurred in the 1990s. The new Acts passed in the western provinces during this time contained innovative features not included in the ULC Act and were more accommodating to the developments in computer technology that were occurring during that period. The Ontario Legislature replaced the original Ontario PPSA with a new Act in 1989. This *Act* incorporated a few of the features contained in the Uniform Act; however, in many matters of detail, it departed from that model.

[2] In 1989 government representatives and academic experts in the five western Canadian jurisdictions formed the Western Canada Personal Property Security Act Committee. The goal of the Committee was to prepare a model PPSA for implementation in western Canadian jurisdictions and the Committee eventually approved a model Western Canada Personal Property Security Act (later to be called the CCPPSL Model). All of the current provincial and territorial Acts except those of Ontario, Yukon and Quebec were patterned on this Model. In June 1991 the Western Canada Personal Property Security Acts Committee was dissolved and replaced by the Canadian Conference on Personal Property Security Law (CCPPSL). This is a national organization with official representatives from all provinces and territories. The initial goal of the CCPPSL was two fold: (1) to encourage the maintenance of uniformity of personal property security legislation throughout Canada; and (2) to exchange information on personal property registry design and operation. In recent years the latter goal has taken on primary significance.

[3] In summary, it is fair to conclude that the CCPPSL has been very successful in inducing substantially uniform secured transactions law in Canada. However, it failed to bring Ontario into the fold. While Quebec representatives actively participate in the activities of the CCPPSL, it is understandable that the structure of the CCPPSL Model could not be replicated in the secured transactions chapter of the Civil Code. However, there is considerable conceptual similarity between the two systems.

[4] However, the CCPPPSL cannot be viewed as the principal actor in pursuing the goal of uniformity of secured transactions legislation in Canada. Most of the provincial and territorial representatives who attend its meetings are registrars or registry staff. Unlike some former representatives, they are not directly involved in legislative changes in their jurisdictions except to the extent those changes accommodate new registry features.

[5] This being the case, the Uniform Law Conference of Canada continues to have an important role in future development of Canadian secured transactions law.

[6] Currently, the Personal Property Security Acts of all jurisdictions other than Ontario, Yukon and Quebec are 99% uniform. While some differences have developed as a result of disparate judicial interpretations of the legislation, uniformity has been a very important feature of this area of the law in Western and Atlantic Canada. Recent amendments to the substantive provisions of the Ontario Act have brought it closer to the CCPPSL Model is a few important respects.

[7] This being the case, any efforts to improve the existing CCPPSL Model must be undertaken with care so as not to threaten this uniformity. A uniform secured financing law, albeit not perfect in every respect, is more important than having a patchwork of acts, some of which might have new features not found in the Model

II. PAST ATTEMPTS

[8] In 2002 Professor Walsh and the author of this report prepared and presented to the ULC a *Discussion Paper on Potential Changes to the Model Personal Property Security Act of the Canadian Conference on Personal Property Security Law*. This involved an extensive report and drafted provisions dealing with changes to the CCPPSL Model that, at the time, were thought to be warranted. This did not induce legislative changes (or, for that matter, much interest) in any province or territory. http://www.chlc.ca/en/poam2/index.cfm?sec=2002&sub=2002ia

[9] In 2002 the ULC, as part of the Commercial Law Strategy, created the Study Committee on the Reform of Personal Property Security Law and Hypothecs on Movable Property. The Study Committee held meetings over the following two years. Its work focused on amendments to the PPSA required to accommodate changes in the law resulting from the enactment of the Uniform Securities Transfer Act. This aspect of its activities can be treated as a success since its recommendations, for the most part, have been or will soon be enacted in all provinces and territories.

[10] A second aspect of its work focussed on a few areas of PPSA law in which there are substantial differences among the various Acts, particularly between the OPPSA and the Acts based on the CCPPSL Model. In a series of meetings, the Study Committee examined the issues involved and reached tentative consensus as to what approaches should be recommended. It prepared a set of questionnaires that were widely circulated among practitioners throughout the country seeking their reaction to the tentative conclusions of the Study Committee. Very little response was received. In a final report presented to the ULC in 2004, the Study Committee recommended changes in the PPSAs based on its conclusions. To date, only those changes associated with the Uniform Securities Transfer Act have received attention of legislative drafters. (Changes

in the conflict of laws rules proposed by the Study Committee were picked up but subsequently re-considered in the light of the developments described later in this report).

http://www.chlc.ca/en/poam2/CLS2004_Secured_Transactions_Working_Group_Rep_En.pdf

[11] It would be fair to conclude that, on the whole, and apart from changes designed to accommodate the Securities Transfer Act, recent ULC efforts to secure uniform, modernized secured transactions law have been unsuccessful. There may be several explanations for this including: (i) the low quality of the proposals; (ii) the lack of any appetite for legislative change; (iii) the inadequacy of the approach; or (iv) the lack of a mechanism to ensure that changes would not result in destroying the high level of uniformity that now exists.

[12] Since the author was personally involved in these undertakings, he is not in a position to pass judgment on (i). As to (ii), the author is aware that at least two provinces are interested in “modernizing” their Acts. The author’s constant exposure to this area of the law as a teacher and researcher (supplemented by the experience of co-authoring a book on Canadian PPSA law) has convinced him that, while change is not urgent, there is scope for improvement of the CCPPSL Model. Some jurisdictions may not be particularly interested in significant changes at this time since they have recently enacted their PPSAs. However, this may change if other jurisdictions are implementing amendments to their Acts. Recent amendments to the Ontario Act indicate a renewed interest in that province in updating the OPPSA in order to incorporate a few features of the CCPPSL Model Act.

[13] As to (iii), experience demonstrates that, in this context, the usual ULC structure of a representative working group of named persons who meet occasionally and prepare a report is not an appropriate way to proceed.

[14] As to (iv), it is the author’s strongly-held view that reform measures undertaken in the future must not threaten the very substantial uniformity that now exists. Clearly, any proposals for change must be approached in a manner through which implementation will be substantially contemporaneous in all common law jurisdictions.

III. A NEW APPROACH

[15] The Steering Committee of the Civil Section has approved the implementation of a new approach to law reform in this area:

· Discrete areas of PPSA law that require attention would be identified by the director of the project through consultation with practitioners, government solicitors, provincial PPSA committees and academics.

· Where appropriate, the director would prepare or obtain from other sources study papers dealing with these areas.

· With the assistance of the ULC, a contact person in each provincial and territorial government who is prepared to particulate would be identified. Initially this person would have two roles. One would be to assess proposals for change in the PPSA set out in study papers and provide reaction. The other would be to “shop” the proposals among practitioners, academics and other interested groups in her or his jurisdiction. In Ontario, this would directly involve the Ontario Bar Association PPSL Subcommittee.

· Reactions to the proposals would be returned to the director who would prepare recommended changes in the CCPPSL Model or Ontario Act on the basis of this reaction and the consensus that has been identified through this process.

· The recommended changes would be placed before the ULC for consideration. If accepted, they would be presented to the provincial and territorial contact persons.

· At this point, the provincial and territorial government contacts would have the role of convincing their client (their provincial or territorial government) to enact the recommended changes in a manner that facilitates a common approach to implementation.

· Special arrangements would be made to bring Quebec into the discussion so as to seek to minimize basic differences between the Civil Code and the PPSAs.

IV. IMPLEMENTATION OF THIS APPROACH

[16] Full implementation of this approach has not yet occurred. However, as described in the following paragraphs, aspects of it have.

V. PROPOSED CHANGES TO THE PPSA CONFLICT OF LAWS PROVISIONS

[17] In late 2005, the author of this report was informed by, Mr. John Cameron, Chairperson of the Ontario Bar Association Personal Property Law Subcommittee that the Ontario government had announced its intention to modernize business laws in the province. One phase of this undertaking would involve changes to the Ontario PPSA. In later correspondence, the author was informed that a working group had been formed to consider whether the Ontario PPSA conflicts of laws rules should be revised further than is already proposed in Ontario's Bill 41 (which contains Ontario's Securities Transfer Act and related amendments to the PPSA and OBCA).

[18] Mr. Cameron pointed out that the Working Group recognized the desirability of each

Canadian common law jurisdiction having the same conflicts of laws rules. He proposed the creation of an expanded working group with the goal of developing a common understanding as to the most appropriate approach to this issue. As a result the author and Professor Tamara Buckwold (a member of the ULC Study Committee) were invited to work with Group.

[19] In a series of telephone meetings held over a period of three months a set of revised conflict of laws rules were developed by the expanded Working Group. The recommended provisions were presented to the Ontario Government and enacted by the Ontario Legislature as the *Ministry of Government Services Consumer Protection and Service Modernization Act, 2006*, chapter 34, Schedule E. However, they have not been proclaimed in force. Set out as an Appendix to this report is a generic version of the recommended provisions as they would appear in a CCPPSL Model Act.

[20] The following is an excerpt from a transmittal letter dated May 19, 2006 sent by Mr. Cameron to the Ontario Minister of Government Services explaining the proposed changes:

“All Canadian PPSAs contain conflict of laws rules which point to the “location of the debtor” to determine the validity, perfection and priority of security interests in some types of collateral. Under these rules, a debtor is deemed to be located at its place of business. Where the debtor has two or more places of business, the rules define the “location of the debtor” by reference to the debtor’s chief executive office. In practice, lawyers often cannot easily determine the location of a debtor’s chief executive office, which often results in additional expense to ensure that a security interest is perfected and searches are carried out in, and legal opinions obtained from, every jurisdiction which might possibly contain the debtor’s chief executive office.

To avoid this additional expense, we recommend that all of the Canadian PPSAs be amended to define “location of the debtor” by reference to, in the case of an individual, his or her residence and, in the case of an organization, the jurisdiction in which the debtor is organized. This new approach as it applies to organizations is consistent with the recommendations of the Study Committee on Reform of Canadian Secured Transactions Law, which recommended to the Uniform Law Conference of Canada (“ULCC”) that the location of a Canadian organized debtor be defined by reference to its place of organization. In addition, this new approach is consistent with the recent amendments contained in Revised Article 9 of the Uniform Commercial Code in the United States. However, our proposal goes further by (among other things) creating specific rules to address the location of trusts and general partnerships. Frequently in Canada, income trusts (including REITs, oil and gas trusts and other business trusts) are used as vehicles to raise funds for business, often creating security interests in personal

property. It is often difficult to determine the location of a trust -- particularly in the case of income trusts in which the trustees are individuals and the trust has no business office. The proposed new rules would address this problem."

[21] The author has taken steps through CCPPSL contacts and directly with legislative counsel in various provinces to bring to the attention of legislators in their jurisdictions the recommended changes to the CCPPSL Model Act. Mr. Allen Doppelt, Senior Counsel, Legal Services Branch, Ontario Ministry of Government Services (who was a member of the Work Group) has undertaken to contact his counterparts in other Canadian jurisdictions in order to facilitate contemporaneous or substantially contemporaneous implementation of these changes in all common law jurisdictions.

VI. CONCLUSION AND RECOMMENDATION

[22] In view of the fact that the ULCC Model Personal Property Security Act is no longer of significance in the development of this area of the law in Canada, there is little point in recommending that the Model Act be amended to incorporate the changes set out in the Appendix to this report. However, it is recommended that the ULCC to recommend to the common law provinces and territories (other than Ontario) amendment of their PPSAs to incorporate the proposed conflict of laws provisions.

APPENDIX

[the section numbering is that found in the British Columbia Personal Property Security Act]

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

(a) a security interest in goods, or

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

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

(1.1) Except as otherwise provided in sections 6 and 7, while the collateral is situated in a jurisdiction, perfection, the effect of perfection or non-perfection, and the priority of a security interest described in subsection (1) is governed by the law of that jurisdiction.

(2) Repealed.

(3) A security interest in goods perfected under the law of the jurisdiction in which the goods are located at the time the security interest attaches, but before the goods are

brought into [this jurisdiction] continues perfected in [this jurisdiction] if it is perfected in [this jurisdiction]

(a) not later than 60 days after the goods are brought into [this jurisdiction],

(b) not later than 15 days after the day the secured party has knowledge that the goods have been brought into [this jurisdiction],

(c) before the date that perfection ceases under the law of the jurisdiction in which the goods were located when the security interest attached,

whichever is the earliest, but the security interest is subordinate to the interest of a buyer or lessee of the goods who acquires his or her interest without knowledge of the security interest and before it is perfected in [this jurisdiction] under section24 or 25.

(4) A security interest that is not perfected as provided in subsection(3) may be otherwise perfected in [this jurisdiction] under this Act.

(5) If a security interest referred to in subsection (1) is not perfected under the law of the jurisdiction in which the collateral was located when the security interest attached and before the collateral was brought into [this jurisdiction], it may be perfected under this Act.

6 (1) Subject to section 7,

(a) 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

(b) if the goods are removed to the other jurisdiction, for purposes other than transportation through the other jurisdiction, not later than 30days after the security interest attaches,

the validity, perfection and effect of perfection or non-perfection, and the priority of the security interest are governed by the law of the other jurisdiction.

(2) If the goods are removed out of [this jurisdiction], but are later brought into [this jurisdiction], the security interest is deemed to be a security interest to which subsection 5(3) applies if it was perfected under the law of the jurisdiction to which the goods were removed.

7(1) The validity, perfection, the effect of perfection or non-perfection, and the priority of:

(a) a security interest in

(i) an intangible, or

(ii) goods, other than a foreign registered ship, 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

(b) a non-possessory security interest in an instrument, a negotiable document of title, money or chattel paper,

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

(2) If the debtor relocates to another jurisdiction, a security interest perfected in accordance with the law applicable as provided in subsection(1) continues perfected until the earliest of:

(a) 60 days after the day the debtor relocates to another jurisdiction,

(b) 15 days after the day the secured party has knowledge that the debtor has relocated to another jurisdiction, and

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

(3) If the law governing the perfection of a security interest referred to in subsection(1) or (2) does not provide for public registration or recording of the security interest or a notice relating to it and the collateral is not in the possession of the secured party, the security interest is subordinate to:

(a) an interest in an account payable in [this jurisdiction], or

(b) an interest in goods, an instrument, a negotiable document of title, money or chattel paper acquired when the collateral was located in [this jurisdiction],

unless it is perfected under this Act before the interest referred to in paragraph(a) or(b) arises.

(4) A security interest referred to in subsection(3) may be perfected under this Act.

(5) The validity, perfection, effect of perfection or non-perfection and priority of a security interest in a foreign registered ship is governed by the law of the jurisdiction where the ship is registered at the time that the security interest attaches.

(6) Despite section 6 and subsection (1) or (2) of this section, the validity, perfection, effect of perfection or non-perfection and priority of a security interest in minerals or hydrocarbons or in an account resulting from the sale of the minerals at the minehead or the hydrocarbons at the wellhead

(a) that is provided for in a security agreement executed before the minerals or hydrocarbons are extracted, and

(b) that attaches to the minerals or hydrocarbons upon extraction or attaches to an account upon sale of the minerals or hydrocarbons,

is governed by the law of the jurisdiction in which the minehead or wellhead is located.

(7) Despite subsection (2) or (3), the validity, perfection, effect of perfection and non-perfection and priority of a security interest in a licence is governed by this Act.

(8)For the purposes of this section, a debtor is located,

(a) if the debtor is an individual, in the jurisdiction where 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, 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, in the jurisdiction where the registered office or head office of the debtor 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;

(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 the law of the United States of America,

(i) in the U.S. State that the law of the United States of America designates, if the law designates a U.S. State of location,

(ii) in the U.S. State that the registered organization designates, if the law of the United States of America authorizes the registered organization to designate its U.S. State of location, or

(iii) in the District of Columbia in the United States of America, if subclause (i) or (ii) does not apply;

(g) if the debtor is one or more trustees acting for a trust,

(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;

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

(9)In subsection (8),

"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;

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

(10)For the purposes of this section, a debtor continues to be located in the jurisdiction specified in subsection (8) 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 **[this provision will be enacted and proclaimed along with the Securities Transfer Act]**

7.2*(1)In this section,*

"prior law" means the Personal Property Security Act, as it reads immediately before this provision comes into force, including the applicable law as determined under that Act;

"prior security interest" means a security interest described in subsection 7 (2) of prior law that arises under a prior security agreement.

(2)For the purposes of this section, but subject to subsection (3), a "prior security agreement" is security agreement entered into before this section comes into force.

(3)If a security agreement described in subsection (2) is amended, renewed or extended by agreement entered into on or after the day this provision comes into force, subject to subsection (4), the security agreement as amended, renewed or extended is a prior security agreement,

(4)If the security agreement as amended, renewed or extended includes additional

collateral that was not previously described in the agreement, it is not a prior security agreement with respect to the additional collateral.

(5)For the purpose of ascertaining the location of the debtor in order to determine the law governing the validity of a prior security interest, subsection 7(1) of prior law continue to apply and subsections 7 (8), (9) and (10) do not apply.

(6)Subject to subsections (7) and (8), subsections 7 (8), (9) and (10) apply for the purpose of ascertaining the location of the debtor in order to determine the law governing the perfection of a security interest described in subsection 7 (1), whether attachment occurs before, on or after the day this provision comes into force.

(7)A prior security interest that is a perfected security interest under prior law immediately before the day this provision comes into force continues perfected until the beginning of the earlier of:

(a) The day perfection ceases under prior law, and

(b) The fifth anniversary of the day this provision comes into force.

(8)If a prior security interest referred to in subsection (7) is perfected in accordance with the applicable law as determined under this Act, on or after the day this provision comes into force but before the earlier of the days referred to in paragraphs (a) and (b) of subsection (7), the security interest shall be deemed to be continuously perfected from the day of its perfection under prior law.

(9)Subject to subsections (10), (11) and (12), subsections 7 (8), (9) and (10) 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 subsection 7 (1), whether attachment occurs before, on or after the day this provision comes into force.

(10)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 this provision comes into force, prior law continues to apply and subsections 7 (8), (9) and (10) do not apply, regardless of whether the prior security interest is perfected, on or after this provision comes into force, in accordance with the applicable law as determined under this Act.

(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, subject to subsection 12, prior law continues to apply and subsections 7 (8), (9) and (10) do not apply.

(12)If a prior security interest is not a perfected security interest under prior law immediately before the day this provision comes into force but is subsequently perfected in accordance with the applicable law as determined under this Act, subsections 7 (8), (9) and (10) 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.

***7.3*(1)In this section,**

"prior law" means the Personal Property Security Act, as it reads immediately before the day this provision comes into force, including the applicable law as determined under that Personal Property Security Act;

"prior security interest" means a security interest in investment property that arises under a prior security agreement.

(2)For the purposes of this section, but subject to subsection (3), a "prior security agreement" is security agreement entered into before this section comes into force.

(3)If a security agreement described in subsection (2) is amended, renewed or extended by agreement entered into on or after the day this provision comes into force, the security agreement as amended, renewed or extended is a prior security agreement.

(4)Subject to subsections (5), (6) and (7) and section 79, 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 the Securities Transfer Act, 2006 comes into force.

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

(6)A prior security interest that was perfected by registration and that is a perfected security interest under prior law immediately before the day this provision comes into force continues perfected until the beginning of the earlier of:

(a) The day perfection ceases under prior law, and

(b) The fifth anniversary of the day this provision comes into force.

(7)If a prior security interest referred to in subsection (6) is perfected in accordance with the applicable law as determined under this Act, on or after the day this provision comes into force but before the earlier of the days referred to in paragraphs (a) and (b) of subsection (6), the security interest shall be deemed to be continuously perfected from the day of its perfection under prior law.

Subsection 8 (1) of the Act is amended by striking out "Despite sections 5 to 7 at the beginning and substituting "Despite sections 5 to 7.3".

Subsection 8(2) of the Act is amended by striking "For the purposes of sections 5 to 7" at the beginning and substituting "For the purposes of sections 5 to 7.3.

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