

# AMENDMENTS TO BRITISH COLUMBIA'S PPSA

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## AMENDMENTS TO BRITISH COLUMBIA'S PPSA

On May 16, 2019, British Columbia proclaimed into force<sup>1</sup> amendments to the conflict of laws rules in the *Personal Property Security Act* (the "PPSA").<sup>2</sup> These rules determine which jurisdiction's laws will govern perfection and priority of security interests, where a secured party must register to be perfected, and the effect of the debtor or the collateral moving from one jurisdiction to another. Effective June 1, 2019, British Columbia also amended the PPSA rules for determining the location of a debtor.

These changes were first introduced in 2010<sup>3</sup>, but were not brought into force at that time, due to the desire to retain harmonization of the Acts amongst the Canadian provinces.<sup>4</sup> Ontario brought its amendments into force on December 31, 2015. Saskatchewan has also recently enacted similar amendments.

These amendments clarify the laws that secured parties will need to take into account when creating and perfecting their security interests, particularly in regards to the location of the debtor for security agreements involving mobile goods, intangibles, and non-possessory documentary collateral.

### THE OLD PPSA RULES

#### **Location of the Debtor**

Under the *PPSA* enacted in each Canadian province (except Quebec), the law of the jurisdiction where the debtor is located governs the validity and perfection of:

1. intangibles (e.g., Accounts Receivable);
2. goods of a type that are normally used in more than one jurisdiction (mobile goods); and
3. non-possessory security interests in an instrument, negotiable document of title, money, and chattel paper.

Prior to the recent amendments, a debtor was typically "located" at its place of business. If the debtor had more than one place of business, the debtor was deemed to be "located" at its chief executive office. However, "chief executive office" was not defined in the *PPSA*, creating uncertainty in determining the jurisdiction(s) in which to register security interests when lending

<sup>1</sup> Bill 29, *Miscellaneous Statutes Amendment Act, 2019*, 4th Sess, 41st Parl, 2019 (assented to 16 May 2019), SBC 2019, c 11.

<sup>2</sup> *Personal Property Security Act*, RSBC 1996, c 359.

<sup>3</sup> British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 41st Parl, 4th Sess, No 241 (29 April 2019) at 8470 (Hon D Eby).

<sup>4</sup> British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 39th Parl, 2nd Sess, Vol 12, No 7 (29 March 2010) at 3795 (Hon C Hansen).

to debtors with places of business in multiple jurisdictions. In practice, this led to secured parties registering a financing statement in each province where the debtor had operations.

### Priority Issues

Prior to the recent amendments, the *PPSA* set forth rules to determine which jurisdiction's laws applied to the "validity, perfection and effect of perfection or non-perfection" of a security interest in personal property. This wording technically only covered priority issues that turned directly on the perfected or unperfected status of a security interest. The rules did not provide a mechanism for ranking multiple perfected security interests, other than with respect to investment property.<sup>5</sup>

## THE PPSA AMENDMENTS

### Location of the Debtor

The recent amendments in respect of the location of the debtor were intended to provide more certainty in determining the location of the debtor, thereby removing the previous need to register in multiple jurisdictions.<sup>6</sup> As well, the recent amendments clarify rules surrounding the location of the debtor for secured creditors dealing with U.S. organizations.

As demonstrated in the table below, British Columbia has now set objective standards for the location of the debtor, using information that is easily ascertainable by secured creditors.

Type of Debtor	Deemed Location of Debtor
Individual	Jurisdiction of principal residence
Corporation, limited partnership, or other organization organized under provincial law	Province of incorporation, amalgamation or organization
Federal corporation	Registered or head office as set out in constating documents (e.g., Articles) or, if not in constating documents, its Bylaws
Partnership, other than a limited partnership	Province specified in the partnership agreement as the governing law
Trustees acting for a trust	Province specified in the trust deed as the governing law or, if not applicable, the jurisdiction where the administration of the trust is principally carried out
U.S. organization registered under laws of a U.S. state	U.S. state of registration

<sup>5</sup> Canadian Conference on Personal Property Security Law, "Report to the Canadian Conference on Personal Property Security Law on Proposals for Changes to the Personal Property Security Acts" (23 June 2017) at 112, online (pdf): *Canadian Conference on Personal Property Security Law* < [https://marketing.thomsonreuterscanada.ca/acton/attachment/13742/f-10e4/1/-/-/-/CBLJ-CCPPSL\\_Draft\\_Report.pdf](https://marketing.thomsonreuterscanada.ca/acton/attachment/13742/f-10e4/1/-/-/-/CBLJ-CCPPSL_Draft_Report.pdf)>.

<sup>6</sup> British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 39th Parl, 2nd Sess, Vol 13, No 2 (30 March 2010) at 3885 (Hon C Hansen).

Type of Debtor	Deemed Location of Debtor
U.S. organization registered under U.S. federal laws	U.S. state designated by U.S. federal law, or the U.S. state designated by the organization if permitted to make such designation under U.S. federal law or, if the foregoing are not applicable, the District of Columbia
None of the above	Jurisdiction where the debtor's chief executive office is located

Unlike Saskatchewan, British Columbia has not defined "chief executive office". Therefore, if the debtor does not fall into any of the specified types of debtors, there could still be uncertainty surrounding the location of its chief executive office, resulting in an ongoing need to register in multiple jurisdictions.

### Priority Issues

The recent amendments add the word "priority," to certain sections, thereby explicitly ensuring that the same conflict of laws rules that previously applied to perfection of a security interest also apply in regards to priority issues.

The explicit inclusion of the word "priority" in sections 5 – 7 of the *PPSA* simply reflects how the courts have been interpreting these sections prior to the amendments.<sup>7</sup> This provides increased certainty in determining which jurisdiction's law applies. This is particularly important to secured creditors when determining in which province they must register.<sup>8</sup> The clarification of these sections promotes consistency within the *PPSA* by bringing them in line with the wording of section 7.1(2), a newer section that includes the priority rules in respect of investment property.<sup>9</sup>

Although most priority disputes are determined based on perfection status (i.e., perfected versus non-perfected security interests), there are instances where the issue must be determined solely based on priority. For instance, priority between two perfected security interests cannot be determined based on perfection, as the perfecting steps taken by the secured creditors would generally be treated equally. Instead, priority between two perfected security interests is given to the first to become perfected in the applicable jurisdiction.

## TRANSITIONAL RULES

### Location of the Debtor

Due to the recent amendments to the *PPSA*, the deemed "location" of many debtors will change. In order to ease secured parties' compliance requirements with respect to pre-existing security interests, the following transitional rules were adopted:

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<sup>7</sup>British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 41st Park, 4th Sess, No 251 (8 May 2019) at 9072 (Hon D Eby).

<sup>8</sup>British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 41st Park, 4th Sess, No 251 (8 May 2019) at 9072 (Hon D Eby).

<sup>9</sup>*Personal Property Security Act*, RSBC 1996, c 359, s 7.1(2).

- / a security interest perfected prior to June 1, 2019 (i.e., under the previous rules) will remain perfected until the earlier of (i) the date the security interest ceases to be perfected under the previous rules, and (ii) June 1, 2024;
- / a security interest perfected prior to June 1, 2019 (i.e., under the previous rules) will be deemed continuously perfected if the security interest is subsequently perfected under the new rules before the earlier of (i) the date the security interest ceases to be perfected under the previous rules, and (ii) June 1, 2024;
- / if a security interest is perfected after June 1, 2019, the new rules will apply;
- / if a security agreement that was perfected prior to June 1, 2019 (i.e., under the previous rules) is amended after June 1, 2019 to add additional collateral, the previous rules regarding perfection will apply to the original collateral, but the new rules will apply to the additional collateral.

### Priority Issues

The amendments related to priority issues are primarily intended to clarify rather than change the existing law. Therefore, they will apply to all security interests, regardless of the dates of the agreements that created the security interests.<sup>10</sup>

## OTHER PROVINCES

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Ontario and Saskatchewan have also amended their corresponding *PPSA* conflict of laws sections to clarify the deemed location of the debtor and priority issues. British Columbia's amendments are virtually identical to those enacted by Ontario in 2015. They are also very similar to Saskatchewan's more recent amendments.

However, inconsistencies may still remain amongst the other provinces in terms of mobile goods, intangibles, and non-possessory documentary collateral, since the proper jurisdiction of registration is the location of the debtor. Although British Columbia, Ontario, and Saskatchewan have amended their rules surrounding the deemed location of the debtor, the remaining provinces have not. The debtor location rules for these other provinces correspond closely to British Columbia's old debtor location rules.

Until the laws of all provinces of Canada are harmonized, secured creditors should be aware that they may have to register their security interests in more than one province. For instance, a British Columbia corporation with operations solely in Alberta would be "located" in both Alberta under Alberta's existing rules, and British Columbia under the new British Columbia deeming rules. In

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<sup>10</sup> Canadian Conference on Personal Property Security Law, "Report to the Canadian Conference on Personal Property Security Law on Proposals for Changes to the Personal Property Security Acts" (23 June 2017) at 114, online (pdf): *Canadian Conference on Personal Property Security Law* < [https://marketing.thomsonreuterscanada.ca/acton/attachment/13742/f-10e4/1/-/-/-/CBLJ-CCPPSL\\_Draft\\_Report.pdf](https://marketing.thomsonreuterscanada.ca/acton/attachment/13742/f-10e4/1/-/-/-/CBLJ-CCPPSL_Draft_Report.pdf)>.

such cases, a security interest would need to be registered in both British Columbia and Alberta to ensure proper perfection.

The expectation is that the other provinces will follow British Columbia, Ontario and Saskatchewan in adopting similar amendments in order to avoid unnecessary registration duplication.

For a discussion of the deemed location of a debtor in Ontario, see our EKB article about Ontario's amendments to its *PPSA*.

## NEXT STEPS FOR SECURED CREDITORS

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Secured creditors should take the following steps to ensure compliance with the new rules in British Columbia:

- / discuss the new rules, their applicability and best practices going forward with legal counsel;
- / conduct *PPSA* registry searches with consideration to both the British Columbia rules and the rules of any other province that may be applicable to a particular debtor in respect of the "location" of such debtor;
- / review security interests that were perfected before June 1, 2019 and diarize the need to perfect such security interests before the earlier of (i) the date the security interest ceases to be perfected under the previous rules, and (ii) June 1, 2024;
- / watch out for future harmonizing amendments by the other provinces.

EKB's Commercial Lending and Finance team is knowledgeable and experienced in these areas and can assist you further.

# ABOUT THE AUTHOR



## ALAN L. MONK / ASSOCIATE COUNSEL, BUSINESS LAW

Alan Monk has practiced corporate/commercial law, securities/corporate finance, mergers and acquisitions and mining law for over 20 years. He has a broad-based corporate & commercial practice which includes the preparation and negotiation of a variety of commercial contracts (including option agreements, joint venture agreements and royalty agreements for the junior exploration sector), corporate compliance, and transactions including the purchase and sale of companies and assets.

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Alan was recognized as "repeatedly recommended" by the Canadian Legal Lexpert Directory (2019) in the area of Mining Law.

Prior to joining EKB, Alan was a partner at national and international law firms.

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