THE BASICS OF PERSONAL PROPERTY SECURITY ACT (ONTARIO)

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Introduction

• Personal Property Security Act (Ontario) ("PPSA") provides a comprehensive set of rules to govern the rights of creditors and debtors when personal property is used as collateral to secure payment of debt
Scope of PPSA

- Applies to every transaction that in substance creates a security interest in personal property
- "Personal Property" is defined as chattel paper, documents of title, goods, instruments, intangibles, money and investment property
- In general, PPSA does not apply to the creation or assignment of an interest in real property
Valid and Enforceable Security Interest

• A security interest is not valid and enforceable against a third party unless following two PPSA requirements have been satisfied:
  • *Attachment* – the security interest has "attached" to the collateral
  • *Perfection* – the attached security interest in the collateral has been "perfected"
Attachment

• Value must be given by the secured party to the debtor
• The debtor must have rights in the collateral
• The debtor must sign a security agreement that contains a description of the collateral sufficient to enable it to be identified, or the secured party must have possession or control of the collateral
Perfection

• Registration by filling a PPSA financing statement
• Possession of the collateral
• Control of the collateral
Collateral Perfected by Registration

- Perfection of security interests in any type of collateral can be achieved by registering a financing statement in accordance with PPSA.
- Registrations are normally made by the secured party or its counsel.
- A secured party must deliver a copy of the verification of registration statement to the debtor within 30 days of effecting the registration.
Information Required to Register a Financing Statement
Place of Perfection

• PPSA contains conflict of law rules, which determine the laws that govern the perfection of security interests in personal property. Under these rules, the jurisdiction whose laws will govern perfection is either:
  • jurisdiction where the collateral is located; or
  • jurisdiction where the debtor is located
• Which test applies depends on the nature of the collateral
Priority

• General priority rules under PPSA for personal property are based on a first-in-time system
• Must consider special priority rules, i.e. PMSI, deemed trusts under taxation laws, landlord’s right of distress, etc.
Dealing with Priority Issues

- Discharges
- Estoppel Letters ("No Interest Letter")
- Priority Agreements (i.e. Intercreditor Agreement)
Maintaining Perfection Post-Closing

• Lender should ensure that its security interest in the collateral remains perfected

• Must monitor for, and respond to, post-closing events that change the information contained in the financing statement:
  • changes to the debtor's name
  • changes to the location of the debtor
  • changes to the location of the collateral
  • transfers or sale of the collateral
  • extending the term of the secured obligation
  • changes in the law applicable to the perfection of security interests

• Failure to respond promptly to any of these post-closing events can result in the security interest becoming unperfected, and the secured party losing its priority to the collateral
Renewal

- Renewals extending the term of a financing statement may be filed at any time prior to expiry of a financing statement.
- Financing statements cannot be renewed after they have expired.
Location of Debtor

- Amendments to the PPSA that became effective on December 31, 2015 made changes to the location of the debtor rule
- Applies to the perfection of a security interest in all collateral that is:
  - an intangible
  - mobile goods
  - non-possessory security interests in securities, instruments, negotiable documents of title, money and chattel paper
Location of Debtor (cont'd)

- Amendments simplify the test for determining the location of the debtor by replacing the current rules under the PPSA with the following rules:

<table>
<thead>
<tr>
<th>Debtor type</th>
<th>Jurisdiction for location of debtor</th>
</tr>
</thead>
<tbody>
<tr>
<td>Individual</td>
<td>Principal residence</td>
</tr>
<tr>
<td>Partnership, other than a limited partnership, with a partnership agreement stating that the agreement is governed by the laws of a province or territory in Canada.</td>
<td>Province or territory stated in the partnership agreement</td>
</tr>
<tr>
<td>Debtor type</td>
<td>Jurisdiction for location of debtor</td>
</tr>
<tr>
<td>----------------------------------------------------------------------------</td>
<td>------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Corporation, limited partnership or organization incorporated, continued,</td>
<td>Province or territory of Canada as disclosed in a public record.</td>
</tr>
<tr>
<td>amalgamated or otherwise organized under the laws of a province or territory</td>
<td></td>
</tr>
<tr>
<td>in Canada, which requires disclosure in a public record.</td>
<td></td>
</tr>
<tr>
<td>Corporation incorporated, continued or, amalgamated under Canadian federal</td>
<td>Registered office or head office as set out in its constating documents</td>
</tr>
<tr>
<td>law, as disclosed in a public record.</td>
<td>or by-laws, as applicable.</td>
</tr>
<tr>
<td>Organization registered under the laws of a U.S. state.</td>
<td>U.S. state where organization is registered.</td>
</tr>
</tbody>
</table>
## Location of Debtor (cont'd)

<table>
<thead>
<tr>
<th>Debtor type</th>
<th>Jurisdiction for location of debtor</th>
</tr>
</thead>
<tbody>
<tr>
<td>Organization registered under U.S. federal law.</td>
<td>The U.S. State that U.S. law designates, or the U.S. State designated by the organization, if U.S. law authorizes the organization to designate its U.S. State of location, or the District of Columbia, if the first two do not apply.</td>
</tr>
<tr>
<td>Trustee(s) acting for a trust.</td>
<td>If the trust instrument states that it is governed by the laws of a province or territory of Canada, that province or territory. Otherwise, in the jurisdiction in which the administration of the trust by the trustees is principally carried out.</td>
</tr>
<tr>
<td>If none of the above applies.</td>
<td>Jurisdiction where the chief executive office of the debtor is located.</td>
</tr>
</tbody>
</table>
Location of Debtor (cont'd)

- New transition rule provides for a five-year "grace" period for existing registrations (e.g. December 31, 2020)
- Recommended that all registrations made before December 31, 2015 with an expiration date after December 31, 2020 be "re-registered"
- Where perfection is governed by the laws of the debtor's location and a debtor relocates outside of Ontario, a secured party will lose perfection under the Ontario PPSA on the earlier of:
  - 60 days after the debtor relocates
  - 15 days after the secured party receives notice of the change of location
- A secured party can lose perfection if it fails to make this filling even if it is not aware that the debtor's location has moved!
Change in Debtor's Name

- A security interest perfected by registration becomes unperfected 30 days after the secured party learns both:
  - that the debtor has changed its name
  - the new name of the debtor
- To avoid losing perfection, the secured party must, within this 30-day period, either
  - file a financing change statement adding the new debtor name
  - take possession of the collateral
Change in Location of the Collateral

• Action is only required if the collateral consists of:
  • tangible goods, other than mobile goods
  • possessory security interest in instruments, negotiable documents of title, money or chattel paper
• Collateral is moved from another jurisdiction to Ontario
• Collateral is moved from Ontario to another jurisdiction
• A secured party can lose perfection in this situation even if it is not aware that the collateral has moved!
Transferred Assets

• Sale of inventory in the normal course of business will normally be permitted by the secured party and no action is generally required

• In other circumstances, however, collateral will be transferred either without consent of the lender or with the intention that the new owner of the asset will take title to the collateral subject to the prior security interest

• In these situations, the secured party must file a financing change statement naming the transferee as an additional debtor:
  • within 15 days of the transfer, if the transfer is made with the consent of the secured party
  • if the transfer is made without the consent of the secured party, within 30 days of the time that the secured party learns the information required to file the financing change statement
Changes to Loan Documents

- Amendments to the Loan Agreement
- Amendments to the Security Agreement
How to Monitor Material Changes

• Monitoring material changes is as much about reacting appropriately to information that it receives about a debtor as it is about ongoing due diligence

• A secured party is deemed to have acquired knowledge of matters pertaining to its security interest when the information comes to the attention of a senior employee of the secured party with responsibility for matters relating to the debtor in circumstances where a reasonable person would take notice of the change

• Training and Policies for Employees
Language in Loan Documents

- Ensure that loan and security agreements include necessary covenants and representations
- Include covenants in both the loan agreement and the security agreement requiring the debtor to notify the secured party if certain events occur, or are about to occur, relating to itself or the collateral
- Require a Compliance Certificate to be delivered by the borrower
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