The Conflict in Conflicts: Choice of Law in Canada – U.S. Secured Financing Transactions

By: Tamara M. Buckwold

College of Law, University of Saskatchewan

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Tamara M. Buckwold
College of Law, University of Saskatchewan

The secured credit and lending transactions of today routinely involve parties and collateral so located as to potentially invoke the law of two or more jurisdictions in the determination of legal rights arising from or in connection with those transactions. The significant integration of the credit economies of Canada and the United States makes it particularly important that market participants are able to identify the source and content of the law that will, to a large extent, determine the cost and the risk of their dealings with parties or collateral located in a Canadian or American jurisdiction other than their own. Ideally, all potentially relevant Canadian and United States law would be so fully harmonized as to lead to substantially the same outcomes regardless of locale. However, while the broad conceptual and structural similarity of the secured financing law of our two countries is such that trading relationships involving only Canadian and American jurisdictions are likely to be considerably simpler than those involving other legal regimes, significant differences remain. In fact, recent reforms in the United States have increased rather than diminished those differences.

The legal picture is further complicated by the fact that in both Canada and the United States, secured financing law is not, for the most part, federal law. In Canada, the governing law is that of each of the ten provinces and three territories while in the United States it is that of each of the fifty states. It is particularly significant that the registry systems integral to the functioning of those laws are local to each province, territory and state. Fortunately, the complexity produced by this profusion of jurisdictions is considerably reduced by the fact that state law resides primarily in Article 9 of the Uniform Commercial Code (hereafter Article 9), which has been adopted with relatively few variations across the United States. Although Canadian law boasts rather less homogeneity as among provinces and territories, the governing law in all jurisdictions but Quebec is a Personal Property Security Act (hereafter PPSA) that is substantially uniform across the country in fundamental respects. Nevertheless, given the great number of potential permutations in the transactional linkages among these jurisdictions and the reality of their substantive legal differences, particularly as between Canadian and U.S. jurisdictions, a clear understanding of the choice of law rules that will identify the jurisdiction or jurisdictions whose laws and registry systems will determine legal rights is of critical importance to a Canadian or American commercial lawyer.

1 In the Canadian context, the form of security created and governed by the federal Bank Act represents an exception to the general rule stated. However, Bank Act transactions represent a much less significant dimension of the secured credit market than do transactions governed by provincial or territorial law, and the unique issues presented by the Bank Act are beyond the scope of this paper. Notably, recommendations contained in a 2004 Report of the Law Commission of Canada advance the most recent and perhaps most forceful of the repeated calls for abolition of Bank Act security.

2 References hereafter are to the Uniform Commercial Code Revised Article 9 (2000), adopted by the American Law Institute and the National Conference of Commissioners on Uniform State Laws effective July 1, 2001.
This paper is addressed primarily to the provisions of the Canadian Personal Property Security Acts relevant to the choice of law governing the exercise of rights associated with a security interest. It accordingly begins with an overview of those provisions, identifying certain aspects of their operation in transaction bridging the Canada – U.S. border. For purposes of this discussion, references to the PPSA will generally be to the Saskatchewan Personal Property Security Act, 1993, which is representative of the model that, with variations not relevant to this subject, is in effect in all common law jurisdictions except Ontario and the Yukon. The pertinent provisions of the Ontario and Yukon statutes are virtually identical to those of the Saskatchewan Act, subject to exceptions that will be noted as relevant. Although the limits of space and the author’s expertise preclude a comparably extensive examination of the choice of law rules introduced in the United States by Revised Article 9, the significant differences between those provisions and the PPSA choice of law rules will be reviewed following the introductory survey of the latter.

**CHOICE OF LAW UNDER THE PPSA**

The subject of choice of law presents many complexities, not least of which is the fact that no single rule governs all dimensions of a given transaction or relationship. In the context of secured financing, the pivotal transaction is the contract under which money or credit is advanced to a debtor and an interest in identified property is given to the creditor to secure payment of the debt. The PPSA, following the revolutionary precedent set by the first version of Article 9, characterizes the property interest involved as a “security interest”, regardless of the form of the contract or the manner in which it designates ownership of or title to the collateral. Where the parties to the contract are located in different jurisdictions or the collateral is located in a jurisdiction other than that of the debtor, it is necessary to identify the law applicable to a number of distinct issues. Some of these issues have exclusively inter partes relevance while others are exclusively referable to third party disputes. However, a number can arise in either context.

The primary issues calling for a choice of law in the context of inter partes rights include; the validity of the contract per se, the characterization of the contract as one giving rise to a security interest, the validity of a security interest purportedly created by the contract and the procedural and substantive law governing realization of the security interest through resort to the collateral (typically by way of seizure and sale) in the event of the debtor’s default.

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3 The unique regime of the Quebec Civil Code is not considered.
The fact that property rights are involved in the transaction means that third party rights may also arise as a result of other transactions involving the same res. That is, a transaction or legal relationship between the debtor and a person other than the secured party may result in the conferral of a property interest on that person, whether by way of contract or through operation of law. Typically, the property interest of such a third party will compete with the initial security interest, in that two or more persons may potentially claim to be entitled to the property or its value.

The primary determinant of the rights of the secured party relative to such a competitor is the question of whether the security interest is “perfected.” A perfected security interest is simply one with respect to which the relevant legal requirements for assertion of the interest as against a judgment creditor of the debtor and potentially against other persons have been satisfied. The potential for third party claims to property subject to a security interest thus calls for identification of the law determining whether the security interest is “perfected,” the consequences of perfection or non-perfection in terms of assertion of the security interest against competing third party claimants and the priority of competing claims to the property. The issues of characterization and validity of a security interest may also arise in connection with a third party dispute.

Characterization

The issue of characterization is foundational to the application of the PPSA, including its choice of law rules. Before one can determine what law applies to the rights associated with a “security interest”, it is necessary to establish that a contracting party in fact has such an interest within the meaning of the Act. For the most part, choice of law is not a concern in the context addressed in this paper, since the same basic definition of “security interest” will determine characterization under all versions of the PPSA and Article 9; that is, a security interest is an interest in personal property that secures payment or performance of an obligation. Thus it matters not which law is invoked to determine whether a security interest exists. Further, the fact that this most fundamental conceptual construct is shared by the PPSAs and Article 9 and is the reference point of their choice of law rules permits the interface of these systems of law in a manner that, in spite of its challenges, is much less difficult than is the interface of either system with the laws of virtually any other country.

Both the PPSAs and Article 9 employ a substance test in the determination of whether a contract creates a security interest. That is, a functional approach is taken to determine whether the object and result of the contract is to confer on one party rights in or to property designed to secure a monetary obligation owed by the other. However

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6 The relevant competing interests are typically those of another secured creditor, the debtor’s trustee in bankruptcy or unsecured creditors pursuing judgment enforcement measures.
7 PPSA s. 2(1), UCC 1-201(b)(37).
8 The Personal Property Security Act of New Zealand employs the same conceptual structure as do the Canadian PPSAs and Article 9. In addition, law reform initiatives in a number of countries around the world whose economies are relatively less developed than those of North America and Europe are increasingly bringing that generic structure, or one resembling it, to other legal systems.
9 PPSA s. 3(1), UCC 9-101, 9-202.
beyond this basic generic concept, all jurisdictions have adopted extended definitions of
the term security interest that, for policy reasons that need not be considered here, bring
within the scope of their statutes transactions that in fact do not create interests satisfying
the substance test. The content of these extended definitions differs as among
jurisdictions. Since the transactions falling within these definitions fall within the scope
of the respective statutes for purposes of determining third party rights but not for
purposes of *inter partes* rights under the contract,\(^\text{10}\) the issue of characterization raised by
them is of significance in the context of Canada – United States transactions only in
relation to competing third party claims.

The extended definitions of all Canadian PPSAs other than Ontario’s define
“security interest” to include the interest of (a) a transferee pursuant to a transfer of an
account or a transfer of chattel paper, (b) a consignor who delivers goods to a consignee
pursuant to a commercial consignment and (c) a lessor pursuant to a lease for a term of
more than one year, notwithstanding that that interest does not secure payment or
performance of an obligation.\(^\text{11}\) The Ontario Act captures non-security transfers of
accounts and chattel paper, but not commercial consignments or leases for a term of more
than one year. Article 9 falls between the two, in that it covers commercial
consignments\(^\text{12}\) and non-security transfers of accounts and chattel paper,\(^\text{13}\) but not true
leases.

The characterization question that arises from these definitional differences is
whether, in the determination of whether a transaction creates a “security interest” for
purposes of the application of the statute’s choice of law rules, a court should apply the
law of its own jurisdiction or the law of another jurisdiction. This question was presented
to the Ontario Court of Appeal in the case of *GMAC Commercial Credit Corp. Canada v.
TCT Logistics Inc.*\(^\text{14}\) The equipment in dispute was leased by an Alberta company from
an Ontario company. Under the Alberta PPSA, the lessor’s interest fell within the
definition of “security interest;” hence the lessor was a “debtor” for purposes of that Act.
However, the lessor’s interest was not a “security interest” as defined by the Ontario
PPSA. Under the Ontario PPSA, the law governing perfection and priority of a security
interest in certain types of mobile goods is the law of the jurisdiction where the debtor is
located at the time the security interest attaches.\(^\text{15}\) The Court of Appeal concluded that
this choice of law rule applied to determination of the rights of the lessor as against the
lessee’s trustee in bankruptcy. Thus the Court applied Alberta law to the question of
characterization of the interest as a “security interest” for purposes of application of that
rule. In the result, the lessor’s failure to perfect its interest by properly registering a
financing statement in the Personal Property Registry of Alberta resulted in subordination

\(^\text{10}\) PPSA s. 55(2) provides, in effect, that Part V of the Act, which governs *inter partes* rights, does not
apply to a transaction that does not secure payment or performance of an obligation.
\(^\text{11}\) PPSA s. 2(1)(qq).
\(^\text{12}\) Though Article 9 does not employ the PPSA term “commercial consignment”, its definition of
“consignment” amounts to substantially the same thing. See PPSA s. 2(1)(h), Article 9-102(a)(20).
\(^\text{13}\) Article 9 differentiates between “accounts” (9-103(a)(2)) and “payment intangibles” (9-102(a)(61)), both
of which would fall within the more general PPSA definition of “accounts” (s. 2(1)(b)).
\(^\text{15}\) Ontario PPSA s. 7.
of its interest to that of a competing secured party holding a perfected security interest, and to the lessee’s trustee in bankruptcy.

Notably, none of the PPSAs explicitly address choice of law for purposes of characterization. In GMAC Commercial Credit, the Ontario Court of Appeal inferentially applied the choice of law rule referable to validity and perfection to the foundational question of characterization. At least one commentator argues that the Court reached the right result, but on the basis of untenable reasoning. However, a recommendation adopted by the Uniform Law Conference of Canada in 2003 proposes that the PPSAs be amended to confirm explicitly that the term “security interest,” for the purposes of applying their choice of law provisions, means a “security interest” as defined by statute of the enacting jurisdiction. If adopted, such an amendment would reverse the approach taken by the Court in this case, since the Ontario rule determining the law relevant to perfection and priority of an interest would not apply to the interest of a lessor under a true lease.

The issue that arose in GMAC Commercial Credit could easily arise in the context of a lease of goods involving a cross-border dimension; that is, where either the debtor or the goods leased are located in a jurisdiction other than that of the deciding court. If the lessor’s interest were characterized in accordance with a non-Ontario PPSA, the PPSA choice of law rule relevant to a security interest in the leased goods would apply. In contrast, a court applying Article 9 (or the Ontario PPSA) to the question of characterization would conclude that the transaction did not create a security interest, with the result that Article 9 would not be relevant. The amendment proposed by the ULCC on this point is consistent with the relatively minimal body of case law that exists on the question of characterization. The cases arising under the PPSA generally address the question in connection with collateral brought into the jurisdiction of the deciding court, in circumstances in which the location of the collateral is the determinant of perfection and priority. Though they are therefore not directly on point, they indicate the general propensity of the courts to apply the PPSA of their own jurisdiction to the question of characterization.

Validity of Security Interest

The primary choice of law rules of the PPSA partner the issue of validity with those of perfection and the effect of perfection or non-perfection; that is, the same law applies to all of them. As will be seen shortly, the meaning of the legally distinctive terminology of “perfection” is implicitly established by the PPSA’s internal usage, which

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follows that inaugurated by the first Article 9. However, the Act does not employ the terminology of “validity” in reference to a security interest in any explicit way.

Notably, the statute speaks not to contractual validity in general, but to the validity “of a security interest”. Hence it is clear that the choice of law rules do not purport to supplant the proper law of the contract, which is left to govern issues associated with the existence and enforceability of the contract qua contract. The question, then, is whether a contract that is extant and enforceable under its proper law creates an interest that, under the law determined by the PPSA choice of law rule, is a valid security interest. The expression relates only to that dimension of the parties’ contractual relationship that involves the property interest, where the preliminary exercise of characterization discussed previously would identify that interest as a security interest.

A security interest recognized by the PPSA as valid is necessarily one carrying rights that may be asserted either against the opposite contracting party, against third parties or both, depending on the nature of the dispute. Accordingly, the PPSA choice of law rules identifying the law determining validity of a security interest raise this question; under that law, is the interest held by the party identified as the secured party enforceable against the opposite contracting party (i.e. the “debtor”) and, if the dispute involves a competing third party claimant, against third parties?

If the law identified as the applicable law is that of a PPSA or Article 9 jurisdiction, the answer is easy to determine. Under both systems, a security interest is recognized for purposes of the application of the statute’s *inter partes* and priorities provisions, respectively, when it has “attached”. Under the PPSAs, a security interest has “attached” for purposes of *inter partes* enforcement when the person holding the interest has given consideration for that interest amounting to “value” as defined by the Act, and the contracting party identified as the “debtor” has a property interest amounting to “rights” in the subject property.\(^\text{18}\) A security interest recognized by the Act as one enforceable against third parties has “attached” only when a third requirement is satisfied; namely, that the party holding the interest is in possession of the subject property or the debtor has signed an agreement describing the property in prescribed fashion.\(^\text{19}\)

Unlike Article 9, the PPSAs append a temporal qualification to the choice of law determining validity, perfection and the effect of perfection or non-perfection of a security interest. Section 5 refers to the law of the jurisdiction where the collateral is situated when the security interest attaches. Similarly, section 7 refers to the law of the jurisdiction where the debtor is located when the security interest attaches. Because the PPSAs and Article 9 share the concept and terminology of attachment, this is unlikely to present difficulties in cases involving only those systems. A Canadian court called upon to apply the rule would almost certainly interpret it as referring to the time at which the

\(^{18}\) PPSA s. 12.

\(^{19}\) PPSA ss. 12, 10. Article 9 employs the same basic criterion of attachment, except that the requirement of possession or a written agreement applies in the context of both *inter partes* and third party enforcement. Article 9 additionally provides for automatic attachment in relation to security interests falling within certain limited categories. UCC 9-203.
security interest attaches in accordance with the requirements of the law identified as the governing law, as opposed to the requirements of the PPSA.

Consider, for example, a case involving a debtor located in Montana, where section 7 is the relevant rule. That section provides that the validity, the perfection and the effect of perfection or non-perfection of a security interest in an intangible or in certain mobile goods are governed by the law of the jurisdiction where the debtor is located when the security interest attaches. Accordingly, the court would look to Article 9 to determine when (and if) the security interest attached in accordance with its attachment provisions, not to the attachment provisions of the PPSA.

Although the appropriateness of this approach seems clear in this context, it is less obvious in cases in which the choice of law rule identifies a jurisdiction that does not share the concept and terminology of “attachment”. That being the case, the ULCC has recommended that the PPSAs be amended to clarify that the term “attachment” as used in this context does not refer to the domestic attachment rules of the PPSA, but to the rules governing the creation of a security interest under the applicable law.²⁰ In such a case, the inquiry would revert to the generic terminology of enforceability of the property interest, whether inter partes or as against third parties.

The analysis to this point may be summarized as follows: a Canadian court faced with a conflict of laws question falling under the PPSA would first look to general conflicts doctrine to identify the proper law of the contract relevant to the transaction in question in order to determine whether any enforceable rights arise under that law. Assuming that a valid and enforceable contract is found to exist, the court must then determine whether that contract creates a “security interest”. In so doing, it would most likely apply the definition of security interest set out in its own PPSA. If the contract does give rise to a security interest as so defined, the court will identify the law of either the place in which the collateral was located or the place in which the debtor was located at the time the security interest “attached”, depending on the type of property involved, as the law determining the validity of the security interest. If that location is an American state, the question will be whether the interest is an “attached” security interest in accordance with the provisions of Article 9 relevant to attachment of the type of security interest in question.²¹ Unlike the PPSA, Article 9 contains special provisions under which security interests falling within identified categories attach automatically. Hence resort to Article 9 for purposes of determining validity may invoke not only the generic attachment rules paralleling those of the PPSA, but the automatic attachment rules.

Perfection and the Effect of Perfection or Non-Perfection

The PPSA choice of law rules identify the law applicable to “the perfection and the effect of perfection or non-perfection” of a security interest. As was mentioned earlier, the term “perfection”, which first appeared in this context in the first version of Article 9, is used in the same distinctive fashion by Article 9 and the PPSA.

²⁰ Supra note 5 at para. [27].
²¹ UCC 9-203.
Accordingly, its import is unproblematic in the context of disputes involving a Canadian PPSA jurisdiction and an American state. Within those legal systems, perfection is uncontroversially understood to mean satisfaction of the statutory requirements designed to publicize the existence of the security interest and hence entitle it to a defined status vis-à-vis competing third party claimants, determined by application of the statutory priority rules. The primary means of perfecting a security interest under both systems are notification of the secured party’s interest by way of registration (under the PPSA) or filing (under Article 9) in a searchable public registry or, with respect to tangible collateral, possession by the secured party, the former being the method employed in the vast majority of cases.

The phrase “the consequences of perfection or non-perfection” refers to the consequences of the application of the legal rules directed by their terms to a security interest that is or is not perfected at the relevant time. Under the PPSA and Article 9, those rules address the relative status of the rights of the holder of the security interest to appropriate the property or its value to satisfaction of the obligation secured as against the rights of a third party asserting a proprietary claim to that property (i.e., the collateral). In simplistic terms the question is who, as between two or more competing claimants, gets the property.

The PPSA choice of law language is cast in terms of “the consequences of perfection or non-perfection” because certain of the provisions of the Act refer to the rights of a competing party in terms that are not explicitly referable to the “priority” of the security interest relative to the interest of that party. For example, the Act provides

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22 The matter is more complicated when a PPSA choice of law rule points to a jurisdiction that does not share that terminology. In such a case, perfection should be understood to refer to the satisfaction of the legal requirements of that jurisdiction, if any, that must be fulfilled in order for the interest to be asserted as against competing third party claimants. This is specifically addressed by s. 8(2), which provides:

(2) For the purposes of sections 5, 6 and 7, a security interest is perfected pursuant to the law of a jurisdiction if the secured party has complied with the law of the jurisdiction with respect to the creation and continuance of a security interest with the result that the security interest has a status in relation to other secured parties, buyers and judgment creditors and a trustee in bankruptcy of the debtor similar to that of an equivalent security interest created and perfected pursuant to this Act.

The correlative provision of the Ontario PPSA is worded slightly differently, in that it refers to compliance with the law of the relevant jurisdiction such that the security interest is “enforceable against the debtor and third parties.” Ontario PPSA s. 8(2).

Like those of Article 9, the priority rules of the PPSA are addressed to the perfected or unperfected status a security interest on the primarily policy basis that an interest that has been publicized in appropriate fashion deserves a level of protection against competing claimants. Accordingly, the PPSA offers special protection to domestic interests that come into competition with a security interest with respect to which the PPSA choice of law rule would refer perfection to a legal system that does not provide for public registration or recording of the security interest or a notice relating to it. PPSA s. 7(4).

23 Under the PPSA, a security interest is perfected when it has attached and the steps required for perfection under a provision of the Act have been completed (s. 19). The requisite steps are, alternatively, registration of a financing statement in the manner prescribed (s. 25), possession of identified types of tangible collateral by the secured party (s. 24(1)), or the existence of certain limited circumstances in which the Act deems the interest to be perfected for a temporary period. If the recommendations of the ULCC PPSA working group corollary to the enactment of the proposed Uniform Securities Transfer Act are adopted, the concept of “control” will be introduced as a method of perfection in connection with investment property.
that “a buyer of goods sold ... in the ordinary course of business of the seller ... takes free of any perfected or unperfected security interest that is given by the seller”, rather than that the interest of the buyer “has priority” over the security interest.\(^{24}\) By way of comparison, the default rule applicable to competing security interests in the same collateral states that “priority” between conflicting perfected security interests in the same collateral is determined by the earliest of [certain identified events]”.

It is apparent and generally understood by the courts and others that both forms of expression are referable to the same question; that is, the ranking of a security interest that is either perfected or unperfected, as the case may be, relative to a competing property interest in the collateral. Hence the phrase “the consequences of perfection or non-perfection” is invariably taken to embrace issues defined in terms of “priority”. Conversely, the word “priority” when used in reference to competing interests in collateral is generally intended to embrace all statutory rankings of competing interests and, for purposes of the remainder of this paper, should be understood in that manner. Nevertheless, the point was explicitly clarified by a 1994 amendment of Article 9’s choice of law rules expanding the phrase to “the effects of perfection or nonperfection, and the priority of a security interest”.\(^{25}\) The ULCC has recommended amendment of the PPSAs to like effect.\(^{26}\)

By way of conclusion on this point, it is worth emphasizing that, under the PPSA, the law that determines whether a security interest is perfected is also the law that determines the priority of that interest. Although this was also the case under earlier versions of Article 9, Revised Article 9 takes a different approach. This point is discussed further below.

Special Provision when Choice of Law results in Application of the Law of a Jurisdiction lacking a Registration Requirement

As was intimated earlier, the concept of perfection and the corollary priority rules of both the PPSA and Article 9 are addressed to the perfected or unperfected status of a security interest on the primarily policy basis that an interest that has been publicized in appropriate fashion deserves a defined level of protection against competing claimants. If a PPSA choice of law rule applied in the context of a dispute spanning a PPSA and an Article 9 jurisdiction points to Article 9 as the law governing perfection and priorities, the determination of whether the security interest is perfected in accordance with Article 9 will in most cases involve consideration of roughly the same factors as would determine that question under the PPSA. That is, the security interest will be perfected if the secured party has made an appropriate filing in the registry of the relevant state\(^{27}\) or, in the case of tangible collateral, has taken possession.\(^{28}\)

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\(^{24}\) PPSA s. 30(2).
\(^{25}\) See UCC 9-301 and Official Comment 2. The Comment notes that “priority”, in this context, subsumes all of the rules in Part 3, including “cut off” or “take free” rules.
\(^{26}\) Supra note 5 at para. [27].
\(^{27}\) UCC 9-310(a).
\(^{28}\) UCC 9-313(a).
The PPSA, other than that of Ontario, offers special protection to domestic interests that come into competition with a security interest with respect to which the PPSA choice of law rule would refer perfection to a legal system that does not provide for public registration or recording of the security interest or a notice relating to it.\(^\text{29}\) That protection is directed to those jurisdictions that, unlike the United States and Canada, do not offer public registration of security interests. Subsection 7(4) of the PPSA provides in effect that a security interest that may be regarded as perfected by the law of such a jurisdiction is nevertheless subordinated to specified domestic interests unless the security interest is perfected in accordance with the PPSA.

While this provision is aimed primarily at foreign jurisdictions other than the United States, it has been suggested that it may apply in some instances in which the PPSA choice of law rule refers perfection to the law of an American state.\(^\text{30}\) The potential for such application arises from the fact that the perfection rules of Article 9 are not in all respects the same as those of the PPSA. In particular, Article 9 provides that a security interest in investment property, deposit accounts, electronic chattel paper, electronic documents and letter-of-credit rights may be perfected by control.\(^\text{31}\) In fact, with limited exceptions, control is the exclusive method of perfection for deposit accounts and letter-of-credit rights.\(^\text{32}\) The PPSA does not presently recognize control as a method of perfection. The question, then, is whether a Canadian court in a PPSA jurisdiction would or should treat a security interest perfected by control under Article 9 (i.e. without public registration) as perfected for purposes of a competition with a competing domestic interest. Put differently, is the secured party required to perfect in accordance with the PPSA to avoid subordination to a competing domestic interest of the kind protected by subsection 7(4)?

It may be argued that the policy of ensuring public disclosure or discoverability of a security interest through public registration dictates the conclusion that a domestic interest should be protected when it is impossible to determine whether a competing security interest exists by resort to a registry, the location of which can be determined by application of the relevant choice of law rule.\(^\text{33}\) On the other hand, the concept of control as a perfection device is comparable to perfection by possession of collateral, which is accepted as an alternative to registration. Essentially, a secured party who has assumed control of collateral is in a position to prevent the debtor from dealing with it without the secured party’s knowledge or consent.\(^\text{34}\) On this view, where the PPSA choice of law rule selects Article 9 as the law governing perfection, re-perfection in the PPSA jurisdiction in which a competing interest arises should not be required of a security interest.

\(^{29}\) PPSA s. 7(4).

\(^{30}\) R.C.C. Cuming, Roderick J. Wood and Catherine Walsh, Personal Property Security Law (Irwin Law, forthcoming), Chapter 3. I am indebted to the authors for allowing me to read the manuscript of their chapter on Conflict of Laws. Needless to say, I take full responsibility for any misstatement of their views on the subject.

\(^{31}\) UCC 9-314.

\(^{32}\) UCC 9-312.

\(^{33}\) This conclusion is advanced by Cuming et al, supra note 30.

\(^{34}\) For example, a secured party has control of a deposit account, \textit{inter alia}, if the secured party becomes the bank’s customer with respect to the account. UCC 9-104.
interest perfected by control under Article 9. Although the security interest could not be
discovered by the competing claimant through a registry search, the same is true of a
security interest perfected by possession of the collateral in an Article 9 jurisdiction.
Subsection 7(4) would not apply in the latter context.\(^\text{35}\)

**Enforcement: Procedural and Substantive Issues**

In the context of Canada – U.S. transactions, it is the law governing validity,
perfection and priority that is most significant to secured creditors, since that law differs
in appreciable respects as among jurisdictions, and those differences have considerable
impact on transaction costs and risk assessment. Interjurisdictional differences in the law
regulating rights of enforcement as against the collateral are likely to be of lesser
consequence since, as a general principle, all jurisdictions accommodate enforcement
through seizure and sale or retention of the property subject to a security interest to the
extent necessary to satisfy the obligation secured. However, virtually all jurisdictions do
impose some limits on secured creditors’ rights of realization, most often in relation to
consumer goods, by way of exemptions legislation, “seize or sue” laws or otherwise.

Under the PPSA, substantive issues such as those just mentioned are referred to
the proper law of the contract between the secured party and the debtor.\(^\text{36}\) Under general
conflict of law principles, the proper law can be chosen by the parties to a contract,
regardless of whether their transaction is connected in any manner to the jurisdiction
whose law is selected.\(^\text{37}\) It is clear that parties who would otherwise be subject to the law
of their shared jurisdiction cannot evade that jurisdiction’s mandatory law by way of a
contractual election. However, where elements of the transaction are located in multiple
jurisdictions, it is less clear whether a choice of the law clause selecting the law of one of
those jurisdictions can effectively avoid the substantive enforcement law of another.
Although this question has yet to be authoritatively decided in relation to an issue arising
under the PPSA, at least one case addressing the point in an analogous context supports
the conclusion that a choice of law clause will not be given effect in such circumstances.\(^\text{38}\)

The PPSA offers clear guidance with respect to procedural issues associated with
*inter partes* enforcement. With respect to intangible collateral, the governing law is that
of the forum.\(^\text{39}\) With respect to collateral other than intangibles, the law of the

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35 The protection of the provision is available only when “the collateral is not in the possession of the
secured party”.
36 PPSA s. 8(1)(c).
refused to give effect to a contractual choice of law provision that would have avoided the application of
the “seize or sue” provisions of British Columbia’s *Sale of Goods on Condition Act*, R.S.B.C. 28, Eliz. 2,
1979, c. 373 by permitting an Ontario leasing company who had seized a leased vehicle to also sue on the
contract for recovery of damages in Ontario.
38 The point arose but was not definitively resolved in *Alves Worms Ltd. V. Ford Credit Canada Ltd.*
39 PPSA s. 8(b).
jurisdiction in which the collateral is located when the rights are exercised governs. However, in recognition of general conflict of law norms, the Uniform Law Conference of Canada has recommended that the PPSAs be amended to provide that the law of the forum where enforcement is pursued governs enforcement procedure for all forms of collateral.

Location of Collateral as Governing Criteria for Validity, Perfection and Priorities

Having considered the general aspects of the PPSA’s approach to choice of law, we may turn to the actual rules determining the critical question of which law governs the validity of a security interest, its status as perfected or unperfected and its priority as against competing third party interests. The first basis upon which that determination is made is the location of the property subject to the security interest when the interest attaches. The basic rule is found in section 5, as follows:

5(1) Subject to this Act, the validity, the perfection and the effect of perfection or non-perfection of:

(a) a security interest in goods; or

(b) a possessory security interest in a security, an instrument, a negotiable document of title, money or chattel paper [emphasis added];

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

This rule contemplates perfection of a security interest in goods by compliance with the law of their location when the security interest attaches, which inferentially may involve possession of the collateral by the secured party or publication of the security interest through a public registry. With respect to the other types of collateral identified, the rule applies only where the security interest in question is perfected by possession. Accordingly, a court in a PPSA jurisdiction faced with a priority problem involving a security interest in goods located in an American state when the security interest attached will look to Article 9 to determine whether the security interest is valid and perfected, and

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40 PPSA s. 8(a).
41 ULCC PPSA Working Group, supra note 5 at para. [22].
42 This paper does not address the special choice of law rules relating to security interests in minerals or in an account resulting from the sale of the minerals at the minehead. See PPSA ss. 7(6) & (7).
43 It is possible to assume possession of all of the identified types of collateral save one, since all have physical form. The exception is a “security” that is not evidenced by a share certificate or equivalent document (see the definition of “security” in s. 2(1)(oo)). Section 2(5) provides that where collateral is a security the transfer of which may be effected by an entry in the records of a clearly agency, the secured party is deemed to have taken possession when the appropriate entries have been made in the records of the clearly agency. The location of an uncertificated security is specified by s. 5(2) as the location of the transfer agent.
will resolve the priority issue through application of the relevant Article 9 priority rule. A secured party who wishes to enjoy the benefits of perfection must therefore either take possession of the goods, or file in that state’s registry in accordance with the requirements of Article 9.

If collateral falling subject to section 5(1) were located in a PPSA jurisdiction when the security interest attached and subsequently removed to a U.S. jurisdiction, the PPSA prima facie determines the priority outcome. However, an exception is made for goods intended for export. Section 6 provides that when the parties understand at the time of attachment that the goods will be kept in another jurisdiction and they are in fact removed to the intended jurisdiction within 30 days of attachment, the validity, the perfection and the effect of perfection or non-perfection of the security interest are determined by the law of the other jurisdiction. The secured party should therefore perfect its security interest by filing in the registry of the destination state.

Change in Location of Collateral

The choice of law rule based on location of the property at the date of attachment of the security interest in question presumes that the property is located in a single jurisdiction, such that third parties who may acquire an interest in the property can rely on the registry of that jurisdiction to determine whether it is subject to a prior claim. Of course this is not always the case, since collateral is sometimes moved from one jurisdiction to another. Hence the PPSA provides a corollary rule addressing the effect of a change in location of goods used as collateral with respect to a security interest perfected in the appropriate jurisdiction at the time of attachment. Though this is not in itself a choice of law rule, its relevance to transactions involving this sort of interjurisdictional dimension is self-evident.

The rule applies to a security interest in goods subject to the location of the collateral rule in section 5(1), where the security interest is perfected in the jurisdiction in which the goods were located at the time of attachment but the goods are subsequently moved into the enacting jurisdiction. It provides a grace period of 60 days, or 15 days following the date upon which the secured party learns of the move, during which the security interest “continues perfected” in the new jurisdiction for purposes of a priority competition arising in that jurisdiction where the competing interest is a security interest

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44 Since the means by which a security interest in goods may be perfected under Article 9 parallel those provided for by the PPSA, the problem raised earlier in connection with methods of perfection unique to Article 9 does not arise in this context.

45 Transportation of goods through another intended jurisdiction does not invoke the law of that jurisdiction. For the convenience of reference, the section is reproduced in its entirety as follows:

6(1) Subject to section 7, where:
(a) the parties to a security agreement that creates a security interest in goods in one jurisdiction understand at the time when the security interest attaches that the goods will be kept in another jurisdiction; and
(b) the goods are removed to the other jurisdiction, for purposes other than transportation through the other jurisdiction, not later than 30 days after the security interest attaches; the validity, the perfection and the effect of perfection or non-perfection of the security interest are determined by the law of the other jurisdiction.
or the interest of the debtor’s trustee in bankruptcy or enforcing judgment creditors.\textsuperscript{46} This offers the secured party a limited opportunity to reperfect in that jurisdiction and thereby maintain the priority position established by perfection in the original jurisdiction. Implicitly, the security interest loses its perfected status if the secured party fails to re-perfect within the requisite period of time. The rule therefore gives secured parties some degree of protection against the loss of their priority status due to an unauthorized relocation of their collateral, while recognizing the over-riding concern for protection of third parties who will rely on the registry in the new jurisdiction.

Notably, this rule does not supplant the choice of law determining the priority of the security interest, which continues to be the law identified by section 5(1); namely, the law of the jurisdiction in which the goods were located when the security interest attached. Accordingly, if a security interest in goods attaches and is perfected in an American state while the goods are located in that jurisdiction, the Article 9 priority rules will apply notwithstanding the movement of those goods into a PPSA jurisdiction, in the context of a priority dispute litigated in the new jurisdiction.

There is no need for this rule to address a change in the location of property other than goods falling subject to the location of the collateral choice of law established by section 5(1), since the provision applies only to a \textit{possessory} security interest in that property (a security, an instrument, a negotiable document of title, money or chattel paper). Because such an interest is by its nature perfected by the very fact of possession in any PPSA jurisdiction, the perfected status of the interest is not affected by a change in location.\textsuperscript{47} Again, however, it is worth noting that while the security interest will be perfected under the law of a jurisdiction into which the collateral is moved, the law governing priorities will continue to be the law of the jurisdiction in which it was located when the security interest attached.

\textit{Location of the Debtor as Governing Criteria for Validity, Perfection and Priorities}

Under the PPSA, the location of the Debtor at the date of attachment of a security interest is the choice of law alternative to location of the collateral, as discussed in the previous section of this paper. The relevant rule is as follows:

7(2) The validity, the perfection and the effect of perfection or non-perfection of:

(a) a security interest in:

(i) an intangible; or

(ii) goods that are of a type that are normally used in more than one jurisdiction, if the goods are

\textsuperscript{46} The security interest is subordinate to the interest of a buyer or lessee who acquires an interest without knowledge of the security interest during the period of temporary perfection. PPSA s. 5(3).
\textsuperscript{47} PPSA s. 24(1).
equipment or inventory leased or held for lease by a
dealer to others; and

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

are governed by the law, including the conflict of law rules, of the
jurisdiction where the debtor is located when the security interest attaches.

The location of the debtor is defined by subsection (1) as:

(a) the place of business, if any, of the debtor;

(b) the chief executive office of the debtor, if the debtor has more than
one place of business; or

(c) the principal residence of the debtor, if the debtor has no place of
business.

Hence if the security interest in question arises under a contract involving a debtor
located in an American state, a court in a PPSA jurisdiction will resolve a priority
competition in accordance with Article 9, rather than through application of the PPSA.
To protect its position to the maximum possible extent, the secured party should therefore
perfect its security interest by filing in the state in which the debtor is located, as
established by the PPSA rules.

Notably, the PPSA does not locate an incorporated debtor in its jurisdiction of
incorporation. Rather, it focuses on the most important or prominent locus of the
debtor’s operations from a functional point of view. If a debtor company has only one
place of business, that locale is the location of the debtor, notwithstanding that the
company’s registered office may be in another jurisdiction. Similarly, the test
determining the location of an incorporated debtor that carries on business in multiple
locations is the “chief executive office”, not the registered office or place of
incorporation. This test applies equally to foreign and domestic debtors. Since a secured
party dealing with an American corporate debtor should therefore file with respect to a
security interest in collateral subject to section 7(2) in the jurisdiction in which the
corporation actually carries on business or maintains its chief executive office, the
appropriate registry for purposes of potential Canadian litigation could conceivably be
that of a Canadian jurisdiction.

The application of the provisions in sections 7(2)(a)(i) and 7(2)(b) is relatively
straightforward. However, section 7(2)(a)(ii) merits more careful consideration. The
policy supporting the application of a location of the debtor test to intangibles and
documentary collateral also applies to what are often referred to in short-hand as “mobile
goods”. Where collateral is of a type such that its location may not be constant or cannot
be readily fixed, the location of the debtor provides a more stable reference point for
determination of the governing law than does location of the collateral. The rationale
generally supporting the location of the collateral test for goods represented by section 5
does not apply to goods that may be used in more than one jurisdiction, or may frequently
cross borders.

Section 7 applies the location of the debtor test to goods “of a type that are
normally used in more than one jurisdiction” if the goods are held by the debtor either (a)
as “equipment”, or (b) as “inventory” held for purposes of lease.\(^{48}\) The language used in
connection with inventory captures both goods that have actually been leased by the
debtor to another and goods held in anticipation of their lease by the debtor to others.\(^{49}\)

The relevant case law confirms that this test is an objective one. The question is
not whether the goods in question in fact are or have been used in more than one
jurisdiction. Rather, it is whether the goods are the type of goods that are often used in
more than one jurisdiction.\(^{50}\) Though motor vehicles used as equipment (e.g.,
construction vehicles) or held for lease by the debtor (e.g. rental vehicles) are the most
obvious type addressed by the provision, it is not so limited.

The application of the location of the debtor test means that where a secured party
takes a security interest in mobile goods owned by an American debtor, Article 9 will
govern the issues of validity, perfection and priority in relation to those goods, even if
they are in fact located or used exclusively in a Canadian jurisdiction.

*Renvoi under the Location of the Debtor Rule*

The approach to choice of law represented by section 7(2) of the PPSA
incorporates the doctrine known as *renvoi*. That is, the choice of law rule directs the
deciding court to apply not only the local law of the jurisdiction it identifies, but also the
choice of law rules of that jurisdiction. Note that section 7(2) refers to “the law,
including the conflict of law rules,” of the debtor’s location.\(^{51}\)

\(^{48}\) The pertinent definitional provisions of s. 2(1) of the PPSA are as follows:
(x) “inventory” means goods that are:
   (i) held by a person for sale or lease, or that have been leased by that person as lessor;
   (ii) to be furnished or have been furnished pursuant to a contract of service;
   (iii) raw materials or work in progress; or
   (iv) materials used or consumed in a business;
   (i) “consumer goods” means goods that are used or acquired for use primarily for personal,
   family or household purposes.
   (p) "equipment” means goods that are held by a debtor other than as inventory or consumer
   goods.

\(^{49}\) It is clear that the provision applies the qualifying phrase “leased or held for lease by a debtor to others”
to “inventory”, not to “equipment”. Hence the relevant query with respect to goods held by a debtor as
equipment is simply whether they are of a type normally used in more than one jurisdiction. See *Toronto-


\(^{51}\) The corresponding section of the Ontario PPSA differs from that of the other jurisdictions, in that it does
not include the quoted phrase.
The consequences of *renvoi* are illustrated in the following scenarios:

Assume that a priority issue involving mobile goods located in Jurisdiction A, which is a PPSA jurisdiction, is presented for decision to a court in that jurisdiction. The debtor corporation is incorporated in Jurisdiction B, but has its chief executive office in Jurisdiction C. Assume that the law of Jurisdiction C includes a choice of law rule under which perfection and priority of a security interest in goods of all types are determined by the location of the goods – i.e., Jurisdiction A.

Alternatively, assume that the law of Jurisdiction C includes a choice of law rule under which perfection and priority are determined by the law of the debtor’s location, which is defined by that law as its place of incorporation – in this case, Jurisdiction B.

In the first scenario, the law of Jurisdiction A would apply to the priority issue, notwithstanding that Jurisdiction A’s domestic law refers perfection and priority to the law of the location of the debtor, which is Jurisdiction B. In the second scenario, the law of Jurisdiction C would apply, notwithstanding that the law of Jurisdiction A regards the location of the debtor as being Jurisdiction B.

*Renvoi* is generally regarded with disfavour in modern legal discourse. As a matter of principle, the potential that the law applicable to the determination of parties’ rights may be decided by the operation of the conflicts rules of a foreign jurisdiction is unsatisfactory. Further, the potential for the application of the law of multiple jurisdictions to the same legal problem is inconsistent with the general ethos of certainty and predictability associated with this area of law. Accordingly, abolition of *renvoi* through amendment of the non-Ontario PPSAs has been recommended by the Uniform Law Conference of Canada.\(^5\)

*Change in Location of Debtor or Sale of Collateral where Location of Debtor Rule Applies*

When a choice of law for perfection of a security interest is based on the location of the debtor at the time the security interest attaches, a move by the debtor into another jurisdiction is problematic. Those who search the registry of the new jurisdiction for security interests in intangibles or moveable goods owned by the debtor will not discover a registration made in the jurisdiction in which the debtor was previously located. Accordingly, the PPSA contains an important provision that, while not in itself a choice of law rule, is an important accompaniment to the location of the debtor rule.

Section 7(3) provides that where a debtor relocates to another jurisdiction, a security interest perfected in accordance with the law of the location of the debtor at the time of attachment continues perfected in the enacting jurisdiction if it is perfected in the

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\(^5\) ULCC PPSA Working Group, supra note 5 at para. [27].
new jurisdiction not later than 60 days after the date of relocation or 15 days after the day
on which the secured party has knowledge of the relocation, provided that perfection in
the original jurisdiction has not terminated (e.g. through expiry of the registration of a
financing statement). If the security interest is not reperfected in the new jurisdiction
within the requisite period of time, the perfected status acquired in the original
jurisdiction is deemed to have lapsed.

Notably, if the security interest is reperfected in the debtor’s new location as
required by section 7(3), the priority rules of the original jurisdiction continue to apply.
Hence if a debtor who was originally located in Saskatchewan moves to Montana, a
security interest perfected in Saskatchewan will continue perfected if the secured party
files in Montana within the required time period. However, a Saskatchewan court
addressing a priority competition involving the collateral will continue to apply the
priority rules of the PPSA.

The rule governing change in a debtor’s location contained in the Ontario PPSA
departs significantly from the rule just described, which is in effect in the other PPSA
jurisdictions. The Ontario Act applies to a change in the debtor’s location only when the
debtor relocates from another jurisdiction to Ontario. In that instance, a security interest
perfected under the law of the debtor’s previous location continues perfected in Ontario if
it is re-perfected in Ontario within the stipulated grace period, which is the same as that
employed in the non-Ontario Acts.53 Accordingly, in the converse situation of a
relocation by the debtor to another jurisdiction, a security interest that attached and was
perfected in Ontario while the debtor was located there continues perfected for purposes
of litigation in Ontario, regardless of whether it is ever reperfected in the new
jurisdiction.

The approach taken in section 7(3) of the non-Ontario PPSAs is also applied in
those jurisdictions to a transfer of collateral by the debtor to a person located in another
jurisdiction. That is, when a security interest in intangibles or mobile goods is perfected
in the jurisdiction in which the debtor is located and the debtor transfers an interest in the
collateral to a person located in another jurisdiction, the security interest must be re-
perfected in the new jurisdiction within the relevant 60 or 15 day time period in order to
maintain its perfected status for purposes of the law of the enacting jurisdiction.54

To pursue the illustration, if a Saskatchewan debtor sells mobile goods to a person
located in Montana, a security interest perfected in Saskatchewan will continue perfected
under Saskatchewan law only if the secured party files in Montana within the required
grace period. If the secured party fails to do so, the security interest will be treated as
unperfected for purposes of the application of Saskatchewan’s priority rules (which still
apply) in a competition with a third party claimant.

53 Ontario PPSA s. 7(2).
54 The Ontario PPSA is silent with respect to a transfer of collateral to a person located in a jurisdiction
other than that of the debtor.
The obvious disadvantage of this rule in the context of both relocation by the debtor and a sale of collateral is the extent to which secured parties are required to monitor their debtors’ activities in order to preserve their priority position. The counterbalancing advantage, of course, is the protection offered third parties who deal with the debtor after relocation, or with the transferee in the new jurisdiction. In both instances, such persons will rely on the registry in the new location in order to determine whether property of the type governed by the rule is encumbered.\(^{55}\)

It is worth noting that the extent of the risk to which third parties are subjected in these situations depends upon the law of the jurisdiction in which a priority issue is litigated. This point may be demonstrated by reference to the facts employed in the above hypotheticals. Assume that a third party who takes a security interest in the collateral from the debtor after the debtor’s relocation to Montana perfects by filing in Montana. In the absence of the rule contained in section 7(3), that party would be subordinate to the prior perfected security interest created while the debtor was located in Saskatchewan, if the matter is litigated in Saskatchewan. However, if the dispute were litigated in Montana, the third party’s security interest would be subordinate only if Montana law recognizes the prior perfected status of the earlier security interest.\(^{56}\)

The PPSA Working Group of the Uniform Law Conference of Canada reviewed the reperfection requirements of the Ontario and non-Ontario PPSAs in 2003, and advanced a recommendation for harmonization of their currently discordant approaches in the context of a transfer of collateral to a third party located in a jurisdiction other than that of the debtor. The proposed compromise solution is that the Acts be amended to require a secured party to re-perfect in the new jurisdiction within a stipulated grace period that would commence only when the secured party acquires actual knowledge of the transfer.\(^{57}\)

**NOTABLE DEPARTURES: THE PPSA AND CHOICE OF LAW UNDER REVISED ARTICLE 9**

A full discussion the choice of law rules incorporated in Article 9 of the Uniform Commercial Code is beyond the scope of this paper. However, the practical implications of some of the most fundamental differences between those rules and the PPSA choice of law regime demand consideration.

\(^{55}\) The rule is consistent in principle with the PPSA re-registration requirements applicable to a change in debtor name or a transfer of collateral to a third person located in the debtor’s jurisdiction. See PPSA s. 51. As has been observed by Professors Cuming and Wood, the provision is “structurally complex”, due to the fact that it is designed to “limit the loss of priority resulting from non-compliance with the section to interests held by persons who could reasonably be expected to be affected by the non-compliance.” See Ronald C.C. Cuming and Roderick J. Wood, *Saskatchewan and Manitoba Personal Property Security Acts Handbook* (Carswell, 1994) at 384 et seq.

\(^{56}\) See in this connection UCC 9-316.

\(^{57}\) Supra note 5 at para. [21]. The group did not advance a recommendation for harmonization of the rule applicable to relocation of the debtor by amendment of the Ontario PPSA to bring it into conformity with the other jurisdictions, on the view that such a recommendation was unlikely to be implemented.
Before the adoption of the 2000 version of Article 9, or Revised Article 9, as it is generally called, the Article 9 choice of law rules and those of the PPSA were largely consistent. However, the rules in Revised Article 9 depart in important respects from their statutory predecessors and their Canadian counterparts. Among those differences, two in particular stand out; namely the default choice of law rule and the associated rules determining the location of a debtor that is an incorporated or otherwise registered organization. Other deviations from the PPSA merit the comment include Article 9’s bifurcation of perfection and priority with respect to non-possessory security interests in goods, the treatment of renvoi, certificate-of-title goods, deposit accounts held as collateral and investment property and the grace periods for the continuation of perfection applicable to relocation of the debtor or the collateral.

Bifurcation of Perfection and Priority

One of the most significant changes wrought by revised Article 9 was the adoption of a single umbrella choice of law rule to identify the law determining the perfection and priority of security interests in all types of collateral, subject to the exceptions specifically provided for in ancillary provisions. The rule stipulates that “while a debtor is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or non-perfection, and the priority of a security interest in collateral.”58 This marks a radical shift from former Article 9, under which location of the debtor determined the law applicable to intangibles and mobile equipment, but choice of law was otherwise generally determined by the location of the collateral.

While the law of the debtor’s location governs perfection of a security interest in most types of collateral, the law of the location of the collateral governs the priority of a non-possessory security interest in negotiable documents, goods, instruments, money or tangible chattel paper.59 This may be contrasted with the PPSA choice of law rules, all of which relate perfection and priority to the law of the same jurisdiction.

The bifurcation of perfection and priority is explicable and workable in the U.S. domestic context, because the versions of Article 9 that have been adopted by all states are substantially uniform. It matters little whether the applicable priority rules are those of the state whose law governs perfection or those of another state, since those rules are likely to be the same.60 Though the priority rules of the provincial and territorial PPSAs

58 UCC 9-301(1).
59 UCC 9-301(3).
60 Notwithstanding the general consistency of the potentially relevant priority rules, the Official Comment offers by way of explanation for the bifurcated approach the observation that it may be inappropriate for the law of the location of the debtor to determine priorities with respect to certain competing interests arising in the state in which the collateral is located, where that location differs from the location of the debtor. The example given is that of a security interest in equipment in competition with an execution lien on goods arising under the law of the jurisdiction in which the equipment is located. Under 9-301(3), the outcome will be determined by the law of that jurisdiction. Lawrence, Henning and Freyermuth, supra note  at 205, offer a further illustration demonstrating that in some states, an enforcing judgment creditor can only acquire priority over a security interest by seizing the subject property prior to perfection of the security interest, while under the nonuniform provisions in effect in California, a judgment creditor can establish priority by public filing. Accordingly, the application of the priority rule of another state to a judgment lien
are largely the same, Canadian jurisdictions do not enjoy the degree of uniformity in this respect as do their U.S. state counterparts. More notably, PPSA priority rules deviate from those of Article 9 in a number of respects. However, those differences may not be highly significant in the context of the limited types of collateral to which the bifurcated approach applies.

Location of the Debtor as Primary Criterion for Choice of Law

American commentators and others are generally enthusiastic about the move to an umbrella choice of law rule for perfection based on the location of the debtor. Where both debtor and collateral are located in the United States, the rule will often allow for a single filing, notwithstanding that the collateral may be located in several states or moves across state borders. However, as the illustrative scenarios below demonstrate, it does require both U.S. and Canadian lenders to employ a different set of practices for purposes of transactions transcending our national border than those used for purely domestic transactions. Moreover, Article 9’s new approach has clearly defeated any potential for harmonization of Article 9 and PPSA choice of law rules, since it is manifestly unsuited for transplantation into Canadian regimes.

The primary obstacle to adoption of an over-arching location of the debtor choice of law rule in PPSA jurisdictions is that it is unworkable in connection with transactions involving non-inventory collateral designated as serial numbered goods, which account for the vast majority of PPSA registrations. Virtually all motor vehicles, as well as aircraft, boats, trailers, mobile homes and outboard boat motors qualify as “serial numbered goods” under the PPSA regimes. 61

A security interest in serial numbered goods held by a debtor as consumer goods is perfected only if a financing statement is registered including the serial number of the goods, as well as the debtor’s name. Although a security interest in serial numbered goods held by the debtor as equipment may be perfected in some jurisdictions by a registration under the debtor’s name alone, an interest so registered may be subordinated to a security interest perfected by a registration that does include the serial number of the goods, or to the interest of a person who buys or leases the goods from the debtor.

The serial number registration requirement is designed to ensure that security interests in high value durable goods, particularly those that are frequently used as collateral and are readily bought and sold as used goods, are discoverable by third parties. If collateral is sold or transferred after a security interest is created and perfected in circumstances such that the transferee does not take free of the interest, a person who thereafter contemplates purchasing the property, taking a security interest in it or registered under California law in competition with a security interest in goods located in that state could lead to a different result than would California’s domestic law. It is worth noting that most Canadian jurisdictions share this “nonuniform” approach to the priority of a writ of execution that has been registered in the Personal Property Registry of the province or territory in which judgment was issued. See e.g. The Executions Act, R.S.S. 1978, c. E-12, s. 2.2. See Ronald C.C. Cuming, When an Unsecured Creditor is a Secured Creditor (2002), 66(1) Sask. L. Rev. 255.

61 See The Personal Property Security Regulations, R.R.S., c. P-6.2, Reg. 1 as am, s. 2(1)(u).
pursuing judgment enforcement measures against it is unlikely to have access to the name of the original debtor for purposes of a registry search. Even where a third party deals with the original debtor, a reliable registry search using the debtor’s name as the search criterion depends upon entry of the debtor’s exact legal name, or a variant sufficiently close to it to disclose the registration. Since interests acquired after a security interest is perfected are general subordinate or subject to such an interest, a system in which registrations and correlative registry searches are based on debtor name alone entails an unacceptable risk of loss to third parties. In contrast, the serial number of goods used as collateral offers a readily available registration and search criterion, the use of which will generate registry search results that reliably disclose security interests that may affect third party rights. However, this is true only to the extent that the serial number is used to search the proper registry.

If the law governing perfection of a security interest, whether by serial number registration or otherwise, is the law of the jurisdiction in which the debtor is located, then perfection entails registration in that jurisdiction. Correspondingly, the security interest so perfected can be discovered only by a search of that registry. It is obvious, then, that a choice of law rule demanding that registration and registry searches take place in the jurisdiction in which the debtor is located would largely frustrate the policy objective of serial number registration. A person who acquires an interest in property from someone other than the original debtor is not in a position to search the registry in that debtor’s location. Though a person who deals with the original debtor is theoretically able to do so, the reality is that the requisite preliminary ascertainment of the debtor’s location would constitute a major impediment, particularly to consumer and small business purchasers to whom the necessary information is not readily available.

Though no approach to registration can ensure that third parties are never misled, the general PPSA choice of law rule for perfection of a security interest in goods offers the highest possible level of protection to the public in general. Under that rule, a secured party who perfects by registration must use the registry of the jurisdiction in which the goods are located. Since the location of the goods is apparent to anyone dealing with them, the registry of that jurisdiction is not only readily identifiable as the relevant search venue, but would be the natural choice of most searchers.

This discussion may prompt the reader to suppose that the American public either has a remarkably sophisticated understanding of the Article 9 registry system, or is regularly misled by ill-conceived registry searches that fail to disclose properly perfected security interests. Neither supposition is true. At least with respect to motor vehicles and in some jurisdictions boats, mobile homes and other goods as well, the public is protected by an entirely different system of law that achieves essentially the same result as do the serial number registration requirements of the PPSA; namely, the certificate-of-title system.

Almost all U.S. states employ physical certificates of title to record and authenticate not only the ownership of motor vehicles, but security interests as well. Under a certificate-of-title system, security interests are noted on the certificate of title
issued by the state. 62 This system is integrated with Article 9 through section 9-311, which provides in effect that compliance with a certificate-of-title statute with respect to collateral other than inventory held for sale or lease is equivalent to filing a financing statement and as such, constitutes perfection of a security interest in the subject vehicle. Further, section 9-303 supplants the default choice of law rule in this context, providing instead that the local law of the jurisdiction under whose certificate of title the goods are covered governs the perfection and priority of a security interest in goods covered by a certificate of title. The certificate of title itself will both evidence extant security interests and identify the governing law, thereby protecting third parties dealing with collateral subject to the certificate.63

It is evident that the default location of the debtor choice of law rule would not be acceptable in the absence of the state certificate-of-title systems, which are foreign to Canadian jurisdictions. For that reason alone, then, the approach adopted in Revised Article 9 is unsuited to the PPSA.64 There are, however, other reasons for rejection of that approach in the Canadian context.

Although the PPSAs enjoy a substantial degree of uniformity, a few significant differences remain, particularly as between the Ontario and non-Ontario versions of the Act. Notable among these is the difference in scope in the concept of security interest embodied in the in two models. In jurisdictions other than Ontario, a true lease and a true consignment may be characterized as a security interest in circumstances falling within the definitions of “lease for a term of more than one year” and “commercial consignment”, respectively.65 In those jurisdictions, the lessor or consignor must perfect the property interest so characterized in order to ensure the primacy of that interest over competing third parties dealing with the lessee/debtor or consignee/debtor. Were the choice of law for perfection based on the location of the debtor rather than location of the collateral, a person who leases office equipment located in a Saskatchewan branch office to an incorporated debtor whose chief executive office is in Ontario would not be obliged to perfect their property interest by registration in the Saskatchewan personal property registry in order to prevail against competing claimants dealing with the debtor in Saskatchewan. In effect, lessors and consignors dealing with Ontario debtors operating in non-Ontario jurisdictions could subvert application of the law of those jurisdictions that would otherwise govern interests in property located within their geographic

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63 It has been observed that the combined certificate-of-title and Article 9 systems do not operate satisfactorily in all respects, primarily because certificates of title cover certain types of goods in some states but not others. In addition, it is possible in some circumstances to have more than one extant certificate of title issued by more than one jurisdiction with respect to the same goods. See Lawrence, Henning & Wilson, ibid., and the Official Comment to UCC 9-303.
64 There is no evidence of an interest in moving to a certificate-of-title system in any Canadian jurisdiction.
65 PPSA ss. 2(1)(y) and 2(1)(h).
boundaries. The same result would follow in a situation involving a debtor whose chief executive office is located in an American state, at least with respect to a lease of goods.\textsuperscript{66}

Since Article 9 has been adopted with few substantive variations as among states, its default choice of law rule does not present this difficulty in a domestic context. However, it is worth noting that choice of law based on the location of tangible property, or the \textit{lex situs} rule, is the dominant international conflict of laws norm. Thus while the Article 9 approach works well internally, it does not interface particularly well with the choice of law rules employed by other countries, including Canada. The following basic scenario illustrates the point:

A lender advances a loan to a debtor incorporated in Delaware. Debtor operates outlets in several Canadian provinces, including Saskatchewan. To secure its loan, Secured Party takes a security interest in the packing equipment used by Debtor for purposes of its Saskatchewan operation.

If a priority competition involving this security interest were litigated in the United States, the law applicable to perfection would be the law of the debtor’s location as determined by Article 9; namely, the law of Delaware. However, the priority of the security interest would be determined by the law of the location of the collateral, which would be the Saskatchewan PPSA.

If the priority competition were litigated in Saskatchewan, the relevant choice of law rule for perfection \textit{and} priority would be the law of the location of the goods. Accordingly, to fully protect itself, the secured party must perfect its security interest in the registries of both Delaware and Saskatchewan.

The difficulties presented by the lack of interface between Article 9 and the PPSAs are exacerbated when collateral moves across the Canada – U.S. border. Consider the following scenario by way of illustration:

Assume that Secured Party 1 takes a security interest in packing equipment owned by a debtor incorporated in Delaware but carrying on business in several jurisdictions including Montana, where the equipment is located. The equipment is subsequently moved to the debtor’s Saskatchewan business location, where a security interest is given by the debtor to Secured Party 2.

If the priority competition between Secured Party 1 and Secured Party 2 were litigated in Montana under the relevant provisions of Article 9, perfection of both security interests would be determined by the law of Delaware, which is the location of the debtor.

\textsuperscript{66} Article 9 applies to non-security consignments in roughly the same circumstances as do the non-Ontario PPSAs. See UCC 1-201(b)(37). The problem also manifests itself under the PPSA with respect to mobile goods held as equipment or as inventory for lease, since the choice of law rule in s. 7 identifies the law of the location of the debtor as the governing law.
as determined by Article 9. However, their priority would be determined by the law of the jurisdiction in which the goods are located; namely, by the Saskatchewan PPSA.

Assuming that the goods are not mobile goods falling within section 7 of the PPSA, a Saskatchewan court before whom priority were litigated would be directed by the PPSA to determine perfection under the law of the jurisdiction in which the goods were located at the time the security interest in question attached. With respect to Secured Party 1’s security interest, that would be the law of Montana. However, perfection in Montana would be recognized in Saskatchewan only if the security interest were reperfected in Saskatchewan within 60 days of the arrival of the goods in Saskatchewan (or 15 days of Secured Party 1 acquiring knowledge of the removal). With respect to Secured Party 2’s security interest, the governing law would be the law of Saskatchewan.

The question of the law applicable to priority is problematic, since the PPSA would refer priority with respect to Secured Party 1’s security interest to Montana, while the priority rules governing the interest of Secured Party 2 would be that of Saskatchewan. This is the crux of the problem that a conflict of law regime is intended to overcome. If Saskatchewan law were applied to the determination of priorities in this instance, there would be little point in a choice of law rule that purportedly recognizes the law of Montana as the law governing the Montana security interest. Choice of law rules recognize that the law of another jurisdiction should be applied, even if the result is inconsistent with the result that would obtain under domestic law, unless there is a domestic rule that specifically precludes the application of the foreign law in the instance in question.

The Saskatchewan PPSA recognizes that Montana law governs the Montana property interest in all respects, including priority, whether in Montana or in Saskatchewan. The rule in section 5(2) changes that outcome only if Secured Party 1’s security interest is not reperfected in Saskatchewan within 60 days. This is a domestic rule that specifically precludes the application of the foreign law if its requirements are not satisfied. The wording of section 5(2) is deceptive, since it suggests that Montana law would not be recognized in the absence of a rule that actively recognizes the perfection of the Montana interest in Saskatchewan. In fact, that is not the case. The choice of law rule in section 5(1) is the rule that actively recognizes the effectiveness of Montana law, including the perfected status of the Montana security interest. Section 5(2) operates to deny the recognition of perfection under that law in the circumstances defined.

In the result, priority in this instance should be determined through the application of the Article 9 priority rules of Montana, unless the operation of that law is precluded by Secured Party 1’s failure to reperfet in Saskatchewan.

The location of the debtor rule does not apply to possessory security interests in collateral. As do the PPSAs, Article 9 provides that the perfection and priority of a

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67 UCC 9-301(2) provides:
possessory security interest in any type of collateral is governed by the law of the jurisdiction in which the collateral is located. However, the Article 9 rule differs from the PPSA rule in that the relevant law follows the collateral for so long as the secured party retains possession. For example, if the secured party initially perfected by possession in Montana but thereafter moved the collateral to Saskatchewan while retaining possession, the law governing perfection and priority would change from that of Montana to that of Saskatchewan.

In contrast, the PPSA provides that perfection and priority is determined by the relevant law at the date of attachment of the security interest. While this is inconsequential in terms of perfection, its implications may be significant in connection with priority. In the scenario posited, the result of application of the PPSA choice of law rule would be that Article 9 as enacted in Montana would continue to govern the priority of the security interest following removal of the collateral into Saskatchewan.

Location of Incorporated Debtor

The primacy of the location of the debtor as the determinant of choice of law under Revised Article 9 requires the definition of clear criteria establishing location. Here too, Article 9 departs both from its predecessors and from the PPSAs with respect to the very significant question of the location of an incorporated debtor. The “chief executive office” test formerly applicable to a debtor having more than one place of business has been retained in connection with non-U.S. debtors and debtor organizations that are not a “registered organization”. However, like other registered organizations, corporations incorporated under the law of a U.S. state or under U.S. federal law, are deemed to be located in the jurisdiction in which they were incorporated.68

As was noted earlier, the PPSAs employ a chief executive office test to determine the location of the debtor for purposes of the choice of law rule that depends on that criterion. The advantages and disadvantages of a chief executive office test as compared with a place of incorporation test were reviewed by the ULCC PPSA Working Group for purposes of a survey of legal opinion regarding the preferred approach.69 They are outlined as follows:

The CCQ [Civil Code of Quebec registered office/place of incorporation] and PPSA approaches each have their advantages and disadvantages. A

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68 In the case of a corporation incorporated under federal law, further provisions provide for the designation of a state for this purpose, in the absence of which location is deemed to be the District of Columbia. UCC 9-307(f). A debtor located in a jurisdiction whose law does not generally require notice in a filing or registration system is also located in the District of Columbia. Since this is not true of a Canadian debtor, whether or not incorporated, this qualification is irrelevant in the present context. See 9-307(c) and (h).

69 The issue is raised domestically by the fact that under the Quebec Civil Code, the choice of law reference is to the law of the jurisdiction in which the grantor of a security interest maintains its statutory seat (i.e. its registered head office), while the common law jurisdictions refer to the chief executive office.
legal enterprise's registered office is far easier to verify through a simple check of the corporate or other business organization records than the location of its chief executive office, an inherently fact-specific and occasionally ambiguous exercise. Moreover, a company's registered head office is less easily relocated and less prone to relocation than its administrative centre.

However, a registered head office test for location raises concerns in the context of a business entity whose real centre of business is in one place but which is constituted under the law of some other place for tax or similar extraneous reasons. The law of the jurisdiction where the security granter conducts its real day-to-day business is more likely to be in the reasonable contemplation of other secured and unsecured creditors, and prospective buyers, who enter into business dealings with it. It is also the place where the principal insolvency proceedings involving that grantor are most likely to be commenced. Accordingly, a chief executive office test would better ensure that the law governing the publicized status and third party effects of the security would coincide with the law governing the grantor’s insolvency. This in turn would eliminate the costs of having to plead and prove a foreign law in insolvency proceedings, and remove any potential for conflict between the priority rules of the applicable law and those of the insolvency forum.

These third party concerns are more acute in the international context. Nationally, there is less potential for third party prejudice owing to the federal character of Canadian bankruptcy and insolvency law and the broadly harmonious character of Canadian corporations and secured transactions legal policy.70

Though the Working Group received limited response to the questionnaire accompanying its background paper, the response that was received uniformly endorsed the recommendation that the location of debtor enterprises constituted under federal or provincial/territorial law be determined according to a test akin to the registered office test in the Quebec Civil Code and in revised Article 9. Similarly endorsed was the companion recommendation that the chief executive office test be retained for purposes of determining the location of debtor enterprises constituted under the law of a foreign country, including the United States. In effect, the recommendation would implement the criteria currently employed by Article 9 with respect to domestic and foreign debtors, respectively.

Under current law, both Canadian and American secured financiers dealing with incorporated debtors who have business operations in both Canada and the United States would be well-advised to register in both the jurisdiction in which the debtor was incorporated and that in which it maintains its chief executive office, if they differ. If a

priority issue involving a U.S. debtor incorporated in one jurisdiction but having its chief executive office in another is litigated in a U.S. court, the court will look to the registry in the place of incorporation to determine the perfected status of a security interest when location of the debtor is the basis for the choice of law, as is generally the case. If litigated in a PPSA jurisdiction and the collateral is mobile goods or intangibles falling subject to the location of the debtor choice of law rule in section 7, the court will look to the registry in the jurisdiction in which the debtor maintains its chief executive office.

If the priority competition involves a Canadian debtor, a U.S. court would look to the jurisdiction in which the debtor maintains its chief executive office, as would a Canadian court. Somewhat incongruously, while the ULCC recommendations regarding location of the debtor would replicate the Article 9 rules determining that issue, their adoption in this context would exacerbate the differences in practical approach, since the Canadian court would look to the registry in the jurisdiction in which the debtor was incorporated to determine perfection.

The following scenario demonstrates the application of the different Article 9 and PPSA rules determining location of a debtor:

Secured Party advances a loan to a debtor incorporated in Delaware. Debtor’s chief executive office is in Chicago, Illinois. Debtor operates retail stores in several Canadian provinces, including Saskatchewan. To secure its loan, Secured Party takes a security interest in account receivables generated by the sale of Debtor’s inventory from its Saskatchewan store.

If a priority competition involving this security interest were litigated in the United States, the law applicable to perfection and priority would be the law of the debtor’s location as determined by Article 9; namely, the law of Delaware.

If the priority competition were litigated in Saskatchewan, the choice of law for perfection and priority would similarly be the law of the debtor’s location. However, the debtor’s location as determined by the PPSA would be its chief executive office, which is in Illinois. To fully protect itself, the secured party must, therefore, perfect its security interest in the registries of both Delaware and Illinois.

If the same scenario arose in connection with a debtor incorporated in Saskatchewan with its chief executive office in Illinois, both a Canadian court and a U.S. court would apply the law of Illinois to the issues of perfection and priority. If the chief executive office were in Manitoba, the law of Manitoba would be applied.

Relocation of the Debtor or the Collateral

The application of both the location of the debtor and location of collateral rules of Article 9 is temporally contemporaneous with geographic locale. Note that, under the default rule, perfection and priority are determined by the law of the debtor’s location
while the debtor is located in a jurisdiction. Recall that, in the context of certain documentary collateral, money and goods, this is subject to the qualification that the choice of law for determination of priorities is the law of the jurisdiction in which the collateral is located while it is located in that jurisdiction. Similarly, perfection and priority of a possessory security interest is determined by the law of the jurisdiction in which the collateral is located while it remains in that jurisdiction. The corollary is that the applicable law changes to that of the new jurisdiction in the event of relocation of the debtor or the collateral, as may be relevant. Where the relevant rule is location of the debtor, a sale or transfer of collateral to a person located in another jurisdiction potentially has the same result.

This is to be contrasted with the PPSA rules, which refer perfection and priority to the location of the debtor or the collateral at the time of attachment of the security interest. As we saw earlier, a change in location may require reperfection in the new jurisdiction for purposes of a potential priority conflict arising in that jurisdiction, but will not change the law applicable to priority. The grace periods for reperfection are either sixty days after the day the debtor or the collateral enters the new jurisdiction, or fifteen days after the secured party acquires knowledge of the relocation.71

The change in the law governing perfection triggered under Article 9 by a change in location of the debtor or a transfer of collateral to a person located in another jurisdiction would, in the absence of a countervailing provision, mean that a security interest perfected by filing in the initial jurisdiction would become unperfected the moment the debtor relocates to another state or the collateral is transferred to a transferee located elsewhere, as the case may be. Although that result could be forestalled by an anticipatory filing in the new jurisdiction, the secured party will rarely know of the intended relocation or transfer in advance, and may have difficulty discovering it after the fact. The required countervailing provision is found in 9-316.72

Section 9-316(a) establishes that, in the case of a change in the debtor’s location, a security interest perfected pursuant to the law of the debtor’s former jurisdiction remains perfected in the new jurisdiction for a period of four months or until such time as perfection would have ceased under the law of the original jurisdiction, whichever comes first. In the case of a transfer of collateral to a “person that becomes a debtor” located in a different jurisdiction, such a security interest remains perfected for a full year after the transfer.73 Continued perfection in the new jurisdiction under both rules is conditioned

71 PPSA ss. 5(3), 7(3).
72 The detailed rules governing change in governing law with respect to certificate-of-title goods, deposit accounts, letter-of-credit rights and investment property are not addressed here. See in that regard UCC 9-316(d) through (g).
73 The rule refers to “a transfer of collateral to a person that thereby becomes a debtor and is located in another jurisdiction.” UCC 9-316(a)(3). To a reader acquainted with the PPSA, the notion of a person “becoming” a debtor is somewhat obscure. In this context, it encompasses Article 9’s distinctive concept of “new debtor”, which refers to a person who assumes obligations under a security agreement entered into by another person as, for example, in the case of a corporate reorganization resulting in the creation of a new legal entity. See UCC 9-102(a)(56) and 9-203(d). However, the Official Comment to UCC 9-316 points out that the application of the provision is not limited to transferees who are new debtors.
by the requirement that perfection under the law of the original jurisdiction has not ceased; for example, due to the expiry of the filing in that jurisdiction. In notable contrast to the approach taken in the PPSA, the length of the grace period is not truncated if the secured party gains knowledge of the relocation or transfer.

The continued perfection rules of Article 9 also differ from those of the PPSA in their approach to the priority position of a person who buys or acquires an interest in collateral after relocation. Under PPSA section 5(3), a person who buys or leases goods before the security interest has been reperfected in the new jurisdiction is given absolute protection against a security interest perfected where they were previously located. Article 9-316 would protect such a person only if the security interest is not reperfected within the relevant grace period. The PPSA takes what amounts to the same approach in the context of relocation of the debtor, where choice of law is determined by the debtor’s location rather than location of the goods. Section 7(3) gives absolute protection to the security interest during the period of continued perfection, provided the security interest is reperfected in the new jurisdiction within the requisite period of time. However, that time period is a great deal shorter than is Article 9’s.

The continued perfection rules of the PPSA and Article 9 are designed to balance two competing interests. On the one hand, a creditor who holds a perfected security interest in collateral requires protection against a loss of perfection or priority triggered by conduct on the part of the debtor that is beyond the creditor’s control and of which the creditor may have no knowledge. On the other, third parties who subsequently acquire an interest in property subject to a perfected security interest in circumstances in which the prior interest may not be disclosed or discovered require protection against the potential loss occasioned by subordination to such an interest. The PPSA rules tend to favour the interests of latter, while Article 9 attaches greater weight to those of the former.

For purposes of risk assessment and the design of policies for monitoring their debtors’ affairs, American secured financers should be cognizant of the fact that the potential application of the PPSA to a priority competition involving either non-mobile goods located in Canada or a Canadian debtor leaves their security considerably more vulnerable than it is in an equivalent situation governed by Article 9. On the other hand, Canadians who take security interests in the property of U.S. debtors or purchase property in the United States must take into account the possibility that their interest, whether as secured party or buyer, may be subordinated to a security interest that does not appear in the registry of the state whose law is the governing law at the time the interest is acquired.74

The differences between the PPSA and Article 9 are of less consequence in connection with possessory security interests. Both regimes refer the issues of perfection and priority of a possessory security interest in collateral to the law of the jurisdiction in

74 One of the fundamental policies underlying the PPSA is the protection of consumer and small business purchasers of high value goods such as motor vehicles. The PPSA’s continued perfection provisions are consistent with that policy.
which the collateral is located.\textsuperscript{75} Given the nature of this method of perfection, a change in location of the collateral does not result in a loss of perfection.\textsuperscript{76} However, while the perfected status of a possessory security interest will be governed by the law of the jurisdiction in which the collateral is located under both systems, the PPSA departs from Article 9 in its choice of law for determination of the priority of such an interest. Under Article 9, the law governing priority also follows the collateral. Under the PPSA, priority is determined by the law of the jurisdiction in which the collateral was located at the time of attachment of the security interest. Although this distinction is likely to be immaterial in most cases, it means that a Canadian court would apply the priority rules of Article 9 to collateral that has moved from the U.S. into a Canadian jurisdiction, and those of the PPSA to collateral that has moved from Canada into an American state.

\textit{Certificate-of-Title Collateral}

As was noted earlier, Article 9’s choice of law rule with respect to certificate-of-title collateral represents an important exception to the default choice of law rule. Where collateral is covered by a certificate of title issued under a state’s certificate-of-title statute, the law governing perfection and priority is the law of the jurisdiction issuing the certificate.\textsuperscript{77} A comparison of this approach to the approach that would be taken with respect to the same sort of goods by the PPSA requires further consideration of the relevant perfection provisions of Article 9. Although goods other than motor vehicles may be certificate-of-title goods under the laws of some states, for purposes of a comparison between the Article 9 system and that of the PPSA, it is helpful to address the discussion to motor vehicles alone.

By virtue of section 9-311, perfection of a security interest in a motor vehicle is accomplished exclusively by compliance with the applicable certificate-of-title statute, except when the certificate-of-title collateral is held by the debtor as inventory for sale. In that instance, the secured party can perfect by filing a single financing statement under the debtor’s name. The question of where that filing should be made is not readily answered by a Canadian certificate-of-title neophyte. However, it appears that with respect to inventory, the certificate-of-title goods choice of law rule contained in section 9-303 does not apply.\textsuperscript{78} That being the case, the applicable rules are those found in the

\textsuperscript{75} See PPSA s. 5(1), UCC 9-301(2).
\textsuperscript{76} This is explicitly addressed in UCC 9-316(c). There is explicit reference in the PPSA to continued perfection in the case of relocation of collateral subject to a possessory security interest. Note, however, that under UCC-9-316(c), the reference to a “possessor security interest” includes not only security interests perfected by the secured party’s having taken possession of the collateral, but also security interest perfected by a method in which an element of perfection involves the secured party having taken possession. Examples given in the Official Comment to UCC 9-316 are those of perfection by taking delivery of a certificated security in registered form, and perfection by obtaining control over a certificated security.
\textsuperscript{77} UCC 9-303.
\textsuperscript{78} The interpretational uncertainty is created by the fact that UCC 9-303(c) stipulates that the law of the jurisdiction under whose certificate of title the goods are covered governs perfection and priority. Though UCC 9-311(d) exempts security interests in such goods held as inventory for sale from the application of its perfection provisions, there is nothing explicitly exempting those security interests from the choice of law rule, assuming that at least some certificate of title goods held as inventory may be covered by a certificate
general choice of law provisions of section 9-301, pursuant to which perfection is
governed by the law of the jurisdiction in which the debtor is located, while priorities are
determined by the law of the jurisdiction in which the inventory is located.

Under this analysis, Article 9 differentiates the choice of law rules applicable to
security interests in motor vehicles depending upon whether the vehicles are held by a
debtor as inventory or non-inventory. The PPSA takes a different approach. In almost
all cases, a motor vehicle will fall within the descriptor; “goods that are of a type that are
normally used in more than one jurisdiction.” Accordingly, with respect to a security
interest in a motor vehicle held by the debtor either as equipment or as inventory leased
or held for lease to others, the PPSA will refer perfection and priority to the location of
the debtor. With respect to a security interest in a motor vehicle held by the debtor as
consumer goods or as inventory for sale, perfection and priority is governed by the
location of the vehicle.

The following chart identifies the choice of law rule that would be applied to
motor vehicles under Article 9 and the PPSA, respectively:

<table>
<thead>
<tr>
<th>Category</th>
<th>Perfection/Priority</th>
<th>PPSA</th>
<th>Article 9</th>
</tr>
</thead>
<tbody>
<tr>
<td>consumer goods</td>
<td>perfection priority</td>
<td>location of vehicle</td>
<td>certificate of title</td>
</tr>
<tr>
<td>equipment used in U.S. state</td>
<td>perfection priority</td>
<td>location of debtor</td>
<td>certificate of title</td>
</tr>
<tr>
<td>equipment used in Canadian province*</td>
<td>perfection priority</td>
<td>location of debtor</td>
<td>location of debtor, location of vehicle</td>
</tr>
<tr>
<td>inventory for sale</td>
<td>perfection priority</td>
<td>location of vehicle</td>
<td>location of debtor, location of vehicle</td>
</tr>
<tr>
<td>inventory for lease</td>
<td>perfection priority</td>
<td>location of debtor</td>
<td>certificate of title</td>
</tr>
</tbody>
</table>

* This assumes that motor vehicles used in a Canadian province or territory are licensed under the law of
that province or territory and are therefore not covered by a certificate of title.

Needless to say, a secured creditor financing automobiles must take care to ensure
that its security interest is perfected by registration or filing in the appropriate
jurisdiction, or by compliance with the applicable certificate-of-title statute. Notably, a

of title, a fact that seems to be contemplated by the Official Comment to UCC 9-311. It would seem, then,
that the law relevant to perfection and priority of a security interest taken by a single lender in various items
of inventory might differ according to the jurisdiction that has issued an extant certificate of title with
respect to those any such items. However, this conclusion is inconsistent with the Official Comment’s
assertion that “a secured party who finances an automobile dealer that is in the business of selling and
leasing its inventory of automobiles can perfect a security interest in all the automobiles by filing a
financing statement…” [emphasis added] To the same effect see also Lawrence, Henning and Freyermuth,
supra note 62 at 210.

79 PPSA s. 7(2).
80 PPSA s. 5(1).
secured creditor financing a cross-border transaction involving inventory who wishes to ensure that its security interest will be protected in the event of litigation in either Canada or the United States should register or file both in the jurisdiction in which the vehicles are located and in the jurisdiction identified by Article 9 as the location of the debtor.

A range of scenarios raising numerous permutations of the applicable rules can be conceived. However, the following serves for purposes of illustration:

A lender advances a loan to a debtor incorporated in Delaware. Debtor’s chief executive office is in Chicago, Illinois. Debtor operates retail stores in several Canadian provinces, including Saskatchewan. To secure its loan, Secured Party takes a security interest in the delivery vehicles used by Debtor for purposes of its Saskatchewan operation.

If a priority competition involving this security interest were litigated in the United States, the law applicable to perfection and priority would be the law of the debtor’s location as determined by Article 9; namely, the law of Delaware. However, the priority of the security interest would be determined by the law of the location of the collateral, which would be the Saskatchewan PPSA. Note that, although the vehicles would be certificate-of-title goods in the United States, the certificate-of-title rules do not apply in this instance because the vehicles are licensed and operated in Saskatchewan, which does not have a certificate-of-title statute. Accordingly, Article 9’s default choice of law rules would apply.

If the priority competition were litigated in Saskatchewan, the relevant choice of law rule would be that applicable to mobile goods, since the collateral is “goods of a type that are normally used in more than one jurisdiction”, and they are held by the debtor as equipment. Accordingly, the law applicable to perfection and priority of the security interest would be the law of the debtor’s location as determined by the PPSA; namely, the law of Illinois.

To fully protect itself, the secured party must, therefore, perfect its security interest in the registries of both Delaware and Illinois. Although in a domestic context the PPSA would demand inclusion of the serial number of the vehicles in the financing statement, serial number registration is not required and presumably not accommodated by state registries. Accordingly, filing by debtor name would suffice, even for purposes of litigation in Saskatchewan.

If the vehicles were held by the Debtor as inventory, a U.S. court would apply the law of Delaware to the issue of perfection, and the Saskatchewan PPSA to that of priorities. However, a Saskatchewan court would apply the law of the location of the vehicles to both issues; that is, the Saskatchewan PPSA. In this instance, the secured party should perfect in the registries of Delaware and Saskatchewan.
**Deposit Accounts**

One of the most significant differences between Article 9 and the PPSA is their respective treatment of deposit accounts used as collateral. Deposit accounts were entirely excluded from former versions of Article 9, except to the limited extent that a secured party could trace proceeds of collateral into such an account.\(^{81}\) Under the PPSA, deposit accounts fall within the general category of “account”,\(^{82}\) and are thus subject to the rules generally applicable to that form of collateral, with one or two minor exceptions.\(^{83}\) The category of collateral constituting an “account” in Article 9 is much more limited, and does not include deposit accounts.\(^{84}\) A deposit account falls within the separate category of “payment intangible”, which is itself a subset of the broader category of collateral described as a “general intangible”.\(^{85}\)

A full review of the relatively complex rules relevant to deposit accounts is beyond the scope of this paper. However, an appreciation of the significance of the choice of law rule applied to such accounts by Article 9 requires a basic understanding its provisions governing perfection of a security interest in that form of property. Revised Article 9 applies to deposit accounts the concept of “control”, which was first introduced into the Uniform Commercial Code in connection with investment property.\(^{86}\) Article 9 provides that a security interest in a deposit account may be perfected only by control, except in relation to deposit accounts as proceeds.\(^{87}\) If the secured party is the depositary institution, its security interest is automatically perfected by control. Other secured parties may establish control by either becoming the customer with respect to the account, or by entering into a tripartite agreement with the debtor and the bank stipulating that the bank will follow the secured party’s instructions without the further consent of the debtor.\(^{88}\) Under the PPSA, a security interest in an account of any kind can only be perfected by registration.

Deposit accounts fall within the general PPSA choice of law rule applicable to intangibles. Under that rule, the validity, perfection and priority of a security interest in a deposit account are governed by the law, including the conflict of law rules, of the jurisdiction where the debtor is located when the security interest attaches.\(^{89}\) In contrast, the Article 9 choice of law rule focuses on the location of the depositary bank. It provides that the local law of a bank’s jurisdiction governs the perfection and priority of a

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\(^{81}\) The exclusion continues to apply to consumer transactions. UCC 9-109(d)(13).

\(^{82}\) PPSA s. 2(1)(b) “account” means a monetary obligation that is not evidence by chattel paper, an instrument or a security, whether or not it has been earned by performance.”

\(^{83}\) See e.g. PPSA s. 34(7), under which a different priority rule applies to proceeds of inventory in the form of a deposit account than is otherwise the case.

\(^{84}\) UCC 9-102(a)(2).

\(^{85}\) UCC 9-102(a)(61) and 9-102(a)(42). A payment intangible is a general intangible under which the account debtor’s principal obligation is a monetary obligation.

\(^{86}\) As was noted earlier in this paper, the PPSAs do not currently recognize control as a form of perfection for investment property. However, that concept is adopted in the PPSA amendments that would accompany adoption of the Uniform Securities Transfer Act in Canadian jurisdictions.

\(^{87}\) UCC 9-312(b).

\(^{88}\) UCC 9-104.

\(^{89}\) PPSA s. 7(2)(a)(i).
security interest in a deposit account maintained with that bank. In turn, the jurisdiction of the bank can be established by agreement between the bank and the debtor. In the absence of agreement, the bank’s jurisdiction is that of the branch at which the account is maintained as indicated by the account statement or, if jurisdiction cannot be established on that basis, the jurisdiction in which the chief executive office of the bank is located.  

This makes for a rather complicated state of affairs. Consider this scenario:

Secured Party dealing with a Saskatchewan retail store owned by a U.S. company takes a security interest in property of the debtor, including a deposit account maintained at a local branch of a Canadian bank. The secured party perfects by filing in the jurisdiction in which the debtor is located, in attempted compliance with the PPSA choice of law rule referring perfection and priority to the law of the debtor’s location. For purposes of the PPSA, the debtor is located at its chief executive office in Chicago, though its state of incorporation is Delaware. However, the PPSA’s reference to the law of Illinois includes the conflicts rules of that state, which are those of Article 9. Under Article 9, perfection and priority of a security interest in a deposit account is determined by the law of the jurisdiction of the depositary bank.

If the debtor in our scenario (which, being a U.S. company, is acquainted with Article 9) has included in its account agreement with the Canadian bank a provision identifying a U.S. state as the bank’s jurisdiction for this purpose, the governing law will be Article 9 as enacted by that state. Since under that law, a security interest in a bank account can only be perfected by control, the security interest will be unperfected, assuming that the secured party has not established control. Notably, this result would follow whether the priority dispute were litigated in Saskatchewan or in the United States.

If the deposit agreement between the debtor and the depositary bank does not include a choice of law clause, the bank’s jurisdiction will likely be that of the branch at which the deposit account is maintained, since that branch will be identified in the account statement. If not, it will be the jurisdiction in which the chief executive office of the bank is maintained, which is likely to be a PPSA jurisdiction. Since that law will recognize a filing in Illinois as amounting to perfection, the security interest will be perfected.

The same analysis must be applied to the question of priority, since the PPSA refers both perfection and priority to the law of the debtor’s jurisdiction. In the first variant of our scenario, the relevant priority rules would be those of Article 9. In the second, they would be those of the PPSA.

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90 UCC 9-304.
Investment Property

As with deposit accounts, Article 9, in combination with Article 8 of the Uniform Commercial Code, applies to securities and other forms of investment property a regime that differs significantly from that of the PPSA. Its scope encompasses not only traditional types of securities, but also the unique form of property comprised by a “securities entitlement”. Though a security interest in these forms of property can be perfected by filing, the most potent form of perfection is control, which is established in a manner analogous to that applicable to bank accounts.

The PPSAs neither recognize a security entitlement as a type of collateral, nor accept control as a form of perfection. However, this is very likely to change in the near future. A Uniform Securities Transfer Act has been proposed for adoption by the Canadian Securities’ Administrators Uniform Securities Transfer Act Task Force, and approved by the Uniform Law Conference of Canada at its 2004 annual meeting. The Act is patterned on Article 8 of the Uniform Commercial Code, and would be accompanied by amendments to the PPSAs that would reflect the substance of Article 9’s provisions relating to investment property. In light of these developments, a full discussion of the current differences between the PPSAs and Article 9 is unwarranted. However, they will be summarized briefly.

Under the PPSA, the law governing validity, perfection and priority of a non-possessory security interest in a security is the law, including the conflict of law rules, of the jurisdiction where the debtor is located when the security interest attaches. In the case of a possessory security interest, those matters are governed by the law of the jurisdiction where the collateral is situated when the security interest attaches. Although an uncertificated security could not otherwise be capable of “possession”, the Act stipulates that where collateral is a security the transfer of which may be effected by an entry in the records of a clearly agency, a secured party is deemed to have taken possession of the security when the appropriate entries have been made in the records of the clearly agency. The location of an uncertificated security is the location at which the records of the clearing agency are kept. Unlike the choice of law rule governing a non-possessory security interest, the PPSA choice of law rule applicable to a possessory security interest in securities does not adopt the conflict of laws rules of the relevant jurisdiction.

The draft Act with commentary is available online through the Ontario Securities Commission website at http://www.osc.gov.on.ca/MarkeRegulation/SpecialProjects/usta/usta_20041112_task-force.pdf.

The requisite amendments have been prepared by the PPSA Working Group of the Uniform Law Conference of Canada, in consultation with the Canadian Securities’ Administrators Task Force. An initial draft of the amendments appears in the 2003 report of the Working Group, supra note 5. Minor revisions to the provisions so proposed will be recommended by the Working Group to the Uniform Law Conference at its annual meeting this summer.

PPSA s. 7(2)(b).
PPSA s. 5(1).
PPSA s. 2(5). The Ontario PPSA does not provide for a possessory security interest in uncertificated or deposited securities. Accordingly, the choice of rule applicable to a non-possessory security interest will always be the governing rule for that form of collateral.
PPSA s. 5(2).
It is apparent that under the current formulation of the PPSA provisions dealing with securities, including its choice of law rules, the substantial differences between Article 9 and the PPSA may create difficult problems of application in transactions spanning the Canada – U.S. border. Fortunately, these will be resolved by the anticipated enactment of the *Uniform Securities Transfer Act* and accompanying PPSA amendments.

**CONCLUSION**

The conclusions to be drawn from the analysis presented in this paper are self-evident. Though Article 9 and the Canadian PPSAs share much in point of concept and detail, they diverge in important respects. Of particular significance are differences in their approach to perfection of security interests in certain types of collateral, only a few of which have been mentioned in this paper. Differences in the relevant priority rules, which are also significant in some respects, have not been considered. Those differences in themselves would complicate the resolution of disputes involving competing legal interests in a situation involving a secured financing transaction spanning the Canada – U.S. border. That complexity is much exacerbated by the fact that the choice of law rules of Article 9 will very often identify a different governing law than will those of the PPSA.

From the point of view of secured parties and others dealing with property subject to a security interest, the consequences are twofold in nature. Firstly, risk assessment may require consideration of the application of more than one system of law, including an assessment of the uncertain outcome likely to follow when choice of law rules lead to the application of both systems in contradictory fashion within the parameters of a single dispute. Secondly, and of great practical significance, is the consequence of the choice of forum in which to litigate priority issues that may arise in this context. As the discussion and the scenarios presented above demonstrate, litigation in an American state may lead to very different results than would litigation in a Canadian province or territory.

Regrettably, the changes in choice of law adopted by Revised Article 9 have heightened rather than diminished the difficulties arising from the differences between Canadian and United States law. Moreover, since the innovation represented by selection of the location of the debtor as the over-arching choice of law rule is unworkable in Canada, there is no prospect for amelioration of those difficulties through parallel amendment of the PPSAs. This is an unfortunate state of affairs, since the reality of the increasingly integrated economies accompanying international trade demand more, rather than less, harmonization of the legal environment within which transactions crossing national borders occur. Nevertheless, the increased transaction costs and the costs flowing from the heightened legal risk created by the Article 9 – PPSA divergence are, apparently here to stay.