

IT'S HERE, BUT IT WAS NEVER “BROUGHT INTO THE JURISDICTION”?: THE POLICY IMPLICATIONS OF *RE: HUGHES* ON ISSUES OF CONFLICT-OF- LAWS UNDER THE PPSA

D A R C Y L . M A C P H E R S O N *

INTRODUCTION

In *Re: Hughes*,¹ the conflict-of-law provisions of the *Personal Property Security Act* (Ontario)² were at issue. In particular, an Ontario Registrar in

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¹ 2016 ONSC 6832, 272 ACWS (3d) 650 [*Hughes* (Registrar)].

² RSO 1990, c P-10 [PPSA Ont]. For clarity, the other PPSAs are: *Personal Property Security Act*, RSA 2000, c P-7 [PPSA Alb]; *Personal Property Security Act*, RSBC 1996, c 359 [PPSA BC]; *Personal Property Security Act*, CCSM, c P35 [PPSA Man]; *Personal Property Security Act*, SNB 1993, c P-7.1 [PPSA NB]; *Personal Property Security Act*, SNL 1998, c P-7.1 [PPSA NL]; *Personal Property Security Act*, SNWT 1994, c 8 [PPSA NWT]; *Personal Property Security Act*, SNS 1995-1996, c 13 [PPSA NS]; *Personal Property Security Act*, SNWT 1994, c 8 [PPSA NU]; *Personal Property Security Act*, RSPEI 1988, c P-3.1 [PPSA PEI]; *Personal Property Security Act* 1993, S.S. 1993, c P-6.2 [PPSA Sask]; *Personal*

Bankruptcy found that, despite the presence of an asset in Ontario, that asset had never been "brought in" to Ontario, for the purposes of the conflict-of-law provisions, given the debtor's lifestyle. In this case comment, I will argue that this decision is incorrect and should not be followed in Ontario or in any other jurisdiction with similar conflict-of-law provisions, including Manitoba.

Interestingly, as I was writing this comment, The Superior Court overturned the Registrar.³ While I agree with the ultimate decision of the Superior Court, some of the wording in its ruling is potentially problematic. It is problematic for quite different reasons than the concerns that I raise herein about the decision of the Registrar. As a result, we will begin by addressing the reasons presented by the Registrar, and then, we will deal separately with the reasons presented by the Ontario Superior Court of Justice.

THE FACTS

In *Hughes*, a man who lived in Alberta purchased a vehicle⁴ in Alberta,

Property Security Act, RSY 2002, c 169 [PPSA Yn]. Again, for clarity, each of these has been amended since either the original passage of the PPSA, or since the last consolidation of statutes in the relevant province. In each case, the references herein will be to the PPSA of the province or territory, as amended.

³ On this point, see *Hughes, (Re)*, 2017 ONSC 2421, 227 ACWS 3d 689, Kershman J [*Hughes* (Ont. Sup. Ct.)].

⁴ Registrar Champagne does not specify what type of "vehicle" is at issue here. For the sake of completeness, I will assume that this will fall within the definition of a "motor vehicle" for the purposes of both the PPSA Ont, *supra* note 2, and the PPSA Alb, *supra* note 2.

The definition of "motor vehicle" for Ontario is found in O. Reg. 56/07, s. 1, and reads as follows: "For the purposes of the Act, "motor vehicle" means an automobile, motorcycle, motorized snow vehicle and any other vehicle that is self-propelled but does not include, (a) a street car or other vehicle running only upon rails, (b) a farm tractor, (c) an implement of husbandry, (d) a machine acquired for use or used as a road-building machine, or (e) a craft intended primarily for use in the air or in or upon the water."

In Alberta, the equivalent definition is found in *Personal Property Security Regulation*, Alta Reg 95/2001 [the "Alberta Regulation"], para 1(1)(p). The definition reads as follows: "motor vehicle" means, (i) except in respect of a garage keeper's lien, a mobile device that is propelled primarily by any power other than muscular power (A) in, on

as part of a secured transaction, in July, 2014.⁵ Snap Auto Finance Corp. (Snap) was the secured party.⁶ Snap registered a financing statement in respect of its security interest in Alberta, and its security interest was thus perfected in Alberta.⁷ It would appear that the registration of a financing statement in Alberta was done properly, in the sense that the Registrar (Master Champagne) does not make reference to any errors in that financing statement.⁸ The debtor, Mr. Hughes, then, in November, 2016, "moved to" Ontario.⁹ While Mr. Hughes claimed to be resident in Ontario, Master Champagne found as a fact that much of his life continued to be carried on in Alberta, including being employed full-time

or by which a person or thing may be transported or drawn, and that is designed for use on a road or natural terrain, or (B) that is used in the construction or maintenance of roads, and includes a pedal bicycle with a motor attached, a combine or tractor, but does not include a device that runs on rails or machinery designed only for use in farming, other than a combine or tractor, and (ii) in respect of a garage keeper's lien, "motor vehicle" as defined in the *Garage Keepers' Lien Act*."

⁵ *Hughes* (Registrar), *supra* note 1 at para 3.

⁶ *Ibid* at para 2.

⁷ PPSA Alb, *supra* note 2, ss 19, 25.

⁸ Under the Alberta Regulation, *supra* note 4, a "motor vehicle" as defined is included in the term "serial number goods". The latter term is found at para. 1(1)(y), and is defined as follows: "serial number goods" means, (i) except in respect of a garage keeper's lien, a motor vehicle, a trailer, a mobile home, a designated manufactured home, an aircraft, a boat or an outboard motor for a boat, and (ii) in respect of a garage keeper's lien, a motor vehicle or farm vehicle".

There are certain rules with respect to the information that must be provided with respect to serial number goods, including specific reference to serial number. If the serial number is not recorded at all, or contains a "seriously misleading" error, the registration may be invalid. See PPSA Alb, *supra* note 2, ss 35(4), 43(7). Most of the other PPSAs have similar provisions. With respect to the former subsection, see PPSA BC, s 35(4); PPSA Man, s 35(4); PPSA NB, s 35(4); PPSA NL, s 36(4); PPSA NWT, s 35(4); PPSA NS, s 36(4); PPSA NU, s 35(4); PPSA PEI, s 35(4); PPSA Sask, s 35(4) all *supra* note 2. With respect to the latter subsection, see PPSA BC, s 43(7); PPSA Man, s 43(8); PPSA NB, s 43(8.1); PPSA NL, s 44(8); PPSA NWT, s 43(7); PPSA NS, s 44(8); PPSA NU, s 43(7); PPSA PEI, s 43(8); PPSA Sask, s 43(7), all *supra* note 2; Yukon Territory, *Personal Property Security Regulations*, OIC 1983/092, para 5(1)(k).

Ontario works on a bit of different standard, but nonetheless, some similar concepts are at play. See PPSA Ont, *supra* note 2, ss 28(5), 46(4).

⁹ *Hughes* (Registrar), *supra* note 1 at para 4.

there,¹⁰ spending the majority of his time there,¹¹ and maintaining his Alberta driver's license.¹² However, the vehicle which was the subject-matter of the dispute here remained, throughout the relevant period, in Ontario.¹³ Mr. Hughes was subsequently adjudged bankrupt. However, the exact date of the bankruptcy was unclear.¹⁴ The question was whether the secured party, Snap, had properly registered its security interest against the vehicle.¹⁵

WHY IS THIS RELEVANT TO A MANITOBA AUDIENCE?

Given that I intend to publish this article in the Manitoba Law Journal, some may question how a case involving a conflict-of-law scenario between Ontario, on the one hand, and Alberta, on the other, is relevant to Manitoba. There are at least two reasons for this. First, the conflict-of-law provisions in the Manitoba PPSA are remarkably similar to their counterparts in other Canadian common jurisdictions.¹⁶ Therefore, the

¹⁰ *Ibid* at para 3.

¹¹ *Ibid* at para 4.

¹² *Ibid*.

¹³ *Ibid*.

¹⁴ From the judgment, it is quite difficult to tell the precise date of the bankruptcy. Registrar Champagne wrote as follows: "On May 24, 2016, the trustee served Snap with a Form 69 Notice of Bankruptcy and a Form 79 Statement of Affairs which showed Hughes' address to be 7 Ainsly Place, Kingston, Ontario. In the Statement of Affairs the vehicle is listed, but its location is not indicated. On May 27, 2016 Snap filed a proof of claim and on June 17, 2016, some 20 days after being served with Hughes' Notice of Bankruptcy, Snap registered under Ontario's *Personal Property Security Act*, RSO 1990, c P-10 registration system.", *Ibid*.

¹⁵ *Ibid* at paras 5-7.

¹⁶ The relevant Manitoba sections read as follows (*PPSA Man*, *supra* note 2):

"5(1) Subject to this Act, the validity, perfection and 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 and chattel paper;

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

5(3) A security interest in goods perfected under the law of the jurisdiction in which the goods are situated at the time the security interest attaches but before the goods are brought into the province continues perfected in the province if it is perfected in the province,

- (a) not later than 60 days after the goods are brought into the province;
- (b) not later than 15 days after the day the secured party has knowledge that the goods have been brought into the province; or
- (c) before perfection ceases under the law of the jurisdiction in which the goods were situated when the security interest attached;

whichever is earliest, but the security interest is subordinate to the interest of a buyer or lessee of the goods who acquires the interest without knowledge of the security interest and before it is perfected in the province under section 24 or 25. ...

7(1) For the purpose of this section, a debtor is located at

- (a) any place of business of the debtor;
- (b) the executive office of the debtor, if the debtor has more than one place of business; and
- (c) the principal residence of the debtor, if the debtor has no place of business.

7(2) The validity, perfection and 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 equipment or inventory leased or held for lease by a debtor to others; and
- (b) a non-possessory security interest in a security, an instrument, a negotiable document of title, money and chattel paper;

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

7(3) Where a debtor relocates to another jurisdiction or transfers an interest in the collateral to a person located in another jurisdiction, a security interest perfected in accordance with the law applicable as provided in subsection (2) continues perfected in the province if it is perfected in the other jurisdiction

- (a) not later than 60 days after the day the debtor relocates or transfers an interest in the collateral to a person located in the other jurisdiction;
- (b) not later than 15 days after the day the secured party has knowledge that the debtor has relocated or transferred an interest in the collateral to a person located in the other jurisdiction; or
- (c) before the day that perfection ceases under the law of the first jurisdiction; whichever is earliest.”

similarity of statutory language between the various common-law provinces makes the issue presented in *Hughes* legally meaningful, regardless of the common-law province with which one is dealing.¹⁷

The second reason why this case should be of interest to a Manitoba audience is that many people who spend much of their time in Winnipeg would also have cottages or other homes on lakes or in other areas of northwestern Ontario. Therefore, one can imagine that at least some Manitobans will have vehicles and other assets in Ontario, while they continue, for all intents and purposes, to reside in Manitoba. Thus, for lenders who deal with debtors who may have significant assets in northwestern Ontario, there may be important reasons to consider the impact of the *Hughes* decision on their practices.

THE LAW

Registration of a financing statement is one of two possible “perfection steps”¹⁸ under the PPSAs.¹⁹ The other perfection step is possession of the collateral by the secured party,²⁰ which does not appear relevant on the facts of *Hughes*.²¹ So, when Snap registered in Alberta, because the steps for attachment were completed,²² and a financing

¹⁷ For a more fulsome discussion of the similarities between the PPSAs, see, for example, Darcy L. MacPherson, “Financial Leasing in Common Law Canada” as part of a Report on Financial Leasing and its Unification by UNIDROIT, prepared for the 18th International Congress of Comparative Law (2011) XVI: 1-2, Unif. L. Rev. 83.

¹⁸ See Ronald C.C. Cuming, Catherine Walsh & Roderick J. Wood, *The Essentials of Canadian Law – Personal Property Security Law*, 2nd ed (Toronto: Irwin Law, 2012) at 299 and 301 [Cuming, Walsh & Wood].

¹⁹ PPSA Alb, ss 19, 25; PPSA BC, ss 19, 25; PPSA Man, ss 19, 25; PPSA NB, ss 19, 25; PPSA NL, ss 20, 26; PPSA NWT, ss 19, 25; PPSA NS, ss 20, 26; PPSA NU, ss 19, 25; PPSA Ont, ss 19, 23; PPSA PEI, ss 19, 25; PPSA Sask, ss 19, 25; PPSA Yn, ss 18, 23, *supra* note 2.

²⁰ See PPSA Alb, s 24; PPSA BC, s 24; PPSA Man, s 24; PPSA NB, s 24; PPSA NL, s 25; PPSA NWT, s 24; PPSA NS, s 25; PPSA NU, s 24; PPSA Ont, s 22; PPSA PEI, s 24; PPSA Sask, s 24; PPSA Yn, s 22, *supra* note 2.

²¹ *Hughes* (Registrar), *supra* note 1.

²² A signed security agreement with an indication of the type of collateral, where value is given, and the debtor is given rights in the collateral are necessary for attachment in these circumstances. For the requirements for attachment under the PPSA, see PPSA

statement was properly registered, Snap was considered to have a perfected security interest within the meaning of the PPSA.

If this were the end of the factual scenario, prior to the bankruptcy of the debtor, there is no question that the interest of a perfected security interest is superior to that of the trustee in bankruptcy.²³ It is equally clear registration in Ontario after the date of bankruptcy would be irrelevant.

However, the PPSAs also contain conflict-of-law provisions. The most relevant of these is subsection 5(2) in the Ontario PPSA, which reads as follows:²⁴

A security interest in goods perfected under the law of the jurisdiction in which the goods are situated at the time the security interest attaches but before the goods are brought into Ontario remains perfected in Ontario if a financing statement is registered in Ontario before the goods are brought in or if it is perfected in Ontario,

(a) within sixty days after the goods are brought in;

(b) within fifteen days after the day the secured party receives notice that the goods have been brought in; or

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

whichever is earliest, but the security interest is subordinate to the interest of a buyer or lessee of those goods who acquires the goods from the debtor as consumer goods in good faith and without knowledge of the security interest and before the security interest is perfected in Ontario.

Subsections 7(1) through 7(3) read as follows:

Alb, ss 10, 12; PPSA BC, ss 10, 12; PPSA Man, ss 10, 12; PPSA NB, ss 10, 12; PPSA NL, ss 11, 13; PPSA NWT, ss 10, 12; PPSA NS, ss 11-13; PPSA NU, ss 10, 12; PPSA Ont, s 11; PPSA PEI, ss 10, 12; PPSA Sask, ss 10, 12; PPSA Yn, ss 8, 11, *supra* note 2.

²³ See PPSA Alb, subpara 20(a)(i); PPSA BC, subpara 20(b)(i); PPSA Man, subpara 20(b)(i); PPSA NB, para 20(2)(a); PPSA NL, para 21(1)(a); PPSA NWT, para 20(1)(b); PPSA NS, para 21(2)(a); PPSA NU, para 20(1)(b); PPSA Ont, para 20(1)(b); PPSA PEI, para 20(2)(a); PPSA Sask, para 20(2)(a); PPSA Yn, para 19(1)(d), *supra* note 2.

²⁴ See PPSA Alb, s 5(2); PPSA BC, s 5(3); PPSA Man, s 5(3); PPSA NB, s 5(3); PPSA NL, s 6(3); PPSA NWT, s 5(3); PPSA NS, s 6(3); PPSA NU, s 5(3); PPSA PEI, s 5(3); PPSA Sask, s 5(3); PPSA Yn, s 6(3), *supra* note 2. Admittedly, there are some textual differences. Many of the provincial and territorial counterparts do not include any of the closing words of the section after the words “whichever is earliest”. Certain of the provincial and territorial counterparts also have other minor textual variations. However, in my view at least, none of these textual variations would have much, if any effect on the arguments made below. Therefore, very little time will be spent discussing these variations.

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

- (a) of 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 equipment or inventory leased or held for lease by a debtor to others; and
- (b) of a non-possessory security interest in an instrument, a negotiable document of title, money and chattel paper,

shall be governed by the law of the jurisdiction where the debtor is located at the time the security interest attaches.

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

- (a) 60 days after the day the debtor relocates to another jurisdiction;
- (b) 15 days after the day the secured party receives notice that the debtor has relocated to another jurisdiction; and
- (c) the day that perfection ceases under the previously applicable law.

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

- (a) if the debtor is an individual, in the jurisdiction where the debtor's principal residence is located;
- (b) if the debtor is a partnership, other than a limited partnership, and the partnership agreement governing the partnership states that the agreement is governed by the laws of a province or territory of Canada, in that province or territory;
- (c) if the debtor is a corporation, a limited partnership or an organization and is incorporated, continued, amalgamated or otherwise organized under a law of a province or territory of Canada that requires the incorporation, continuance, amalgamation or organization to be disclosed in a public record, in that province or territory;
- (d) if the debtor is a corporation incorporated, continued or amalgamated under a law of Canada that requires the incorporation, continuance or amalgamation to be disclosed in a public record, in the jurisdiction where the registered office or head office of the debtor is located,
 - (i) as set out in the special Act, letters patent, articles or other constating instrument under which the debtor was incorporated, continued or amalgamated,
 - (ii) as set out in the debtor's by-laws, if subclause (i) does not apply;

(e) if the debtor is a registered organization that is organized under the law of a U.S. State, in that U.S. State;

(f) if the debtor is a registered organization that is organized under the law of the United States of America,

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

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

(iii) in the District of Columbia in the United States of America, if subclauses (i) and (ii) do not apply;

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

(i) if the trust instrument governing the trust states that the instrument is governed by the laws of a province or territory of Canada, in that province or territory, or

(ii) in the jurisdiction in which the administration of the trust by the trustees is principally carried out, if subclause (i) does not apply;

(h) if none of clauses (a) to (g) apply, in the jurisdiction where the chief executive office of the debtor is located.²⁵

We will return to section 7 below.

SECONDARY SOURCES

The secondary material makes clear that subsection 5(2) applies the law of the site of attachment to determine attachment perfection and the effect of perfection (which the authors refer to as “*lex rei situs*” rule). Then, once goods are relocated to a different jurisdiction, there is a grace period. During this period, the secured party has the opportunity to take steps to perfect the security interest in the jurisdiction in which the goods are now located. As Cuming, Walsh and Wood explain:

A post-attachment change in the location of the goods poses a risk for third persons who deal with the goods at their new location and who therefore would expect any security interest granted in the goods to be registered or otherwise perfected locally. The Acts address this risk by requiring local reperfecting where goods subject to a security interest that attached abroad are brought into the

²⁵ PPSA Ont, *supra* note 2, ss 7 (1)(3).

enacting jurisdiction. To preserve continuity of perfection, the secured party is given a grace period of reperfecton. The security interest continues perfected in the enacting province if it is registered or otherwise perfected in accordance with the enacting province's PPSA before the expiry of the earliest of the following periods:

- Sixty days after the goods are brought into the province;
- Fifteen days after the secured party has knowledge that the goods have been brought into the Province;
- Before perfection lapses under the original *lex rei sitae*.²⁶

The authors continue:

The PPSA does not define what constitutes “bringing” goods into the enacting jurisdiction so as to trigger the reperfecton requirement. The case law, while sparse, supports a purposive interpretation. Has the primary location of the goods shifted to a new jurisdiction so as to cause third parties there to reasonably believe that they can rely on local perfection rules when dealing with the goods?

Applying this approach a change in the primary physical location of the goods will normally be sufficient for consumer goods, that is, goods intended for personal family or household purposes. Thus, where a debtor ships household furnishings and other personal use goods to a new province, a finding that the goods have been “brought into the province” as of the date of their arrival will usually be possible without having to worry about whether the principal residence of the debtor changed at the same time.

For mobile goods, such as cars, the interpretation problems may be more acute. Where mobile goods constitute equipment, or inventory held for leave by the debtor, the PPSA substitutes the law of the debtor's location for the *lex rei sitae* in order to avoid the difficulties of determining a stable location. However, determination of the primary location remains necessary for consumer goods and inventory. Bringing a car into a province for the purposes of a road trip does not qualify, even though the car has been “brought into” the province as a physical fact. On the other hand, if the debtor brings a car into the province in the course of establishing a residence there, the car will be considered to have been “brought into” the province, notwithstanding periodic trips back to the old province of residence, and notwithstanding that the car remains registered at the old location after its physical relocation.

A change in the debtor's principal residence is not always necessary. Something less may be enough, for example, bringing a vehicle into a province for long term use at a secondary residence located there. In other words, the emphasis should be on the change in the apparent primary location of the goods as opposed to the debtor.²⁷

²⁶ Cuming, Walsh & Wood, *supra* note 18 at 194.

²⁷ *Ibid* at 195-196.

Richard McLaren takes a similar approach when he writes as follows: The secured party can be certain that a security interest in goods will be perfected in Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Nunavut, the Northwest Territories, Ontario, Saskatchewan, or the Yukon upon the goods being brought into those jurisdictions if the registration of a financing statement for the particular province has taken place prior to the goods being brought into Ontario. This is certainly the safest way to ensure perfection. However, the secured party is not always aware of a change of location of the collateral and, thus, does not always have the opportunity to register a financing statement prior to the goods being moved. Likewise, the secured party may be unable to ascertain that the collateral has been moved to the jurisdiction even within the 60-day time period of temporary perfection. However, in the interests of efficiency and certainty a limit must be imposed, after which the secured party will not receive the benefits of temporary perfection. If the secured party, for one reason or another, does not register prior to the collateral being removed into the jurisdiction, the secured party may reperfect an interest by registering a financing statement.²⁸

ANALYSIS

VII. The Registrar

1. *Does The Registrar Not Believe the Evidence?*

There can be little doubt that the focus of Registrar Champagne was on the lifestyle of the debtor. The Registrar mentions the debtor's full-time employment in Alberta,²⁹ and the division of the debtor's time between Ontario and Alberta.³⁰ The Registrar acknowledges the current location of the vehicle, but seemingly, only grudgingly. Registrar Champagne writes as follows: "His affidavit states that the vehicle has remained in Ontario since that time."³¹ Interestingly, when discussing the knowledge of the secured party on the other hand, this is the applicable sentence: "It is not disputed that Snap was unaware of this purported move."³²

²⁸ Richard McLaren, *Secured Transactions in Personal Property in Canada*, 3rd ed (Toronto: Carswell, loose-leaf edition, current to 2018, release 3), at §8.02[1][b] [McLaren].

²⁹ *Hughes* (Registrar), *supra* note 1 at para. 4.

³⁰ *Ibid.*

³¹ *Ibid* [Emphasis added].

³² *Ibid* [Emphasis added].

In my view, the language choices of the Registrar might indicate that the Registrar does not believe the evidence, and would prefer to find that the vehicle was not held continuously in Ontario during the period at issue, for more than 60 days. If this were true, subsection 5(2) would not apply in any event, because the clock provided for in subsection 5(2) would not expire, meaning that the perfection in Alberta would remain effective in Ontario. But, there was evidence that the vehicle had left Alberta and entered Ontario, namely, the affidavit of the bankrupt.³³ The Registrar would have had the right to not accept the evidence in the affidavit, but this would have been difficult to justify without pointing to some sort of cross-examination that led the Registrar to take issue with the credibility of the bankrupt. The judgment makes no reference to any such cross-examination. Therefore, it becomes difficult for the Registrar to find the facts that would support the conclusion that the Registrar would have preferred to reach.

But this is really a factual distinction. Below, we confront the legal problems with the analysis offered by Registrar Champagne.

2. Is The Analysis Offered Contrary to the Rules of Statutory Interpretation?

The PPSA is a statute like any other, in the sense that it is subject to the basic rules of statutory interpretation. One of these basic rules is that different words imply a different meaning.³⁴ A related rule, is that a common pattern of expression should be given the same meaning.³⁵ A third rule of statutory interpretation is that the legislature is presumed not to needlessly repeat itself.³⁶ Each of these rules is important in this context, for at least two reasons. First, paradoxically, both of the first two rules can be said to apply to the PPSA on the facts presented here. Second, the Registrar's analysis seems to treat two sections as repetitive of each other. Let us deal with each of these issues in turn.

i. Different words, different meaning

³³ *Ibid.*

³⁴ On this point, see Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ont.: LexisNexis Canada Inc., 2014) at 217 [Sullivan].

³⁵ *Ibid.*

³⁶ *Ibid* at 211.

In order to explain how this rule applies, let us review the opening words to each subsection:

Subsection 5(2) ³⁷	Subsections 7(1) 7(2)
<p>(2) A security interest in goods perfected under the law of the jurisdiction in which the goods are situated at the time the security interest attaches but before the goods are brought into Ontario continues perfected in Ontario if a financing statement is registered in Ontario before the goods are brought in or if it is perfected in Ontario,</p>	<p>7. (1) The validity, the perfection, the effect of perfection or non-perfection, and the priority,</p> <p>(a) of a security interest in,</p> <p>(i) an intangible, or</p> <p>(ii) goods that are of a type that are normally used in more than one jurisdiction, if the goods are equipment or inventory leased or held for lease by a debtor to others; and</p> <p>(b) of a non-possessory security interest in an instrument, a negotiable document of title, money and chattel paper,</p> <p>shall be governed by the law of the jurisdiction where the debtor is located at the time the security interest attaches.</p> <p>(2) If a debtor relocates to another jurisdiction, a security interest perfected in accordance with the applicable law as provided in subsection (1) continues perfected until the earliest of,</p>

One can see the distinctions between subsection 5(2), on the one hand, and subsection 7(2), on the other. For example, subsection 5(2) is concerned with goods. “Goods” are defined in subsection 1(1) of the PPSA as follows:

³⁷ For the record, the equivalent wording in Alberta is: “(2) A security interest in goods perfected under the law of the jurisdiction in which the goods are situated at the time the security interest attaches but before the goods are brought into the Province continues perfected in the Province if it is perfected in the Province,” Despite minor textual variations, in essence, for our purposes, these two sections are equivalent, *PPSA Alb, supra* note 2.

“goods” means tangible personal property^[38] other than chattel paper ^[39], documents of title ^[40], instruments^[41], money^[42] and investment property^{[43],[44]}

³⁸ “Personal property” is defined under subsection 1(1) of the *PPSA Ont*, *supra* note 2 as follows: “personal property’ means chattel paper, documents of title, goods, instruments, intangibles, money and investment property, and includes fixtures but does not include building materials that have been affixed to real property”.

³⁹ “Chattel paper” is defined under subsection 1(1) of the *PPSA Ont*, *ibid*, as follows: “chattel paper’ means one or more than one writing that evidences both a monetary obligation and a security interest in or a lease of specific goods.

⁴⁰ “Document of title” is defined under subsection 1(1) of the *PPSA Ont*, *ibid*, as follows: “document of title’ means any writing that purports to be issued by or addressed to a bailee and purports to cover such goods in the bailee’s possession as are identified or fungible portions of an identified mass, and that in the ordinary course of business is treated as establishing that the person in possession of it is entitled to receive, hold and dispose of the document and the goods it covers”.

⁴¹ “Instrument” is defined under subsection 1(1) of the *PPSA Ont*, *ibid*, as follows: “instrument’ means, (a) a bill, note or cheque within the meaning of the *Bills of Exchange Act* (Canada) or any other writing that evidences a right to the payment of money and is of a type that in the ordinary course of business is transferred by delivery with any necessary endorsement or assignment, or (b) a letter of credit and an advice of credit if the letter or advice states that it must be surrendered upon claiming payment thereunder, but does not include a writing that constitutes part of chattel paper, a document of title or investment property”.

⁴² “Money” is defined under subsection 1(1) of the *PPSA Ont*, *ibid*, as follows: “money’ means a medium of exchange authorized or adopted by the Parliament of Canada as part of the currency of Canada or by a foreign government as part of its currency”.

⁴³ “Investment property” is defined under subsection 1(1) of the *PPSA Ont*, *ibid*, as follows: “investment property’ means a security, whether certificated or uncertificated, security entitlement, securities account, futures contract or futures account”.

⁴⁴ It would appear that what these exclusions have in common is that each of them is somehow related to an obligation of payment (which would more typically be thought of as a chose in action, rather than a chose in possession, thereby making it more akin to an intangible). However, most of these exceptions also often have a physical manifestation (such as the physical paper of a cheque, the contractual document manifesting chattel paper, or security certificate in the case of investment property. As such, they could be considered have a "tangible" form. These exclusions from the term "goods" make it clear that, despite any physical manifestation that might be available, such physical manifestation does not move these types of personal property into the realm of “goods”.

and includes fixtures, growing crops, the unborn young of animals, timber to be cut, and minerals and hydrocarbons to be extracted [⁴⁵] [footnotes added]⁴⁶

It is clear that a “vehicle” is a “good” pursuant to the above definition. In fact, under most of the provincial PPSAs, vehicles are included in the definition of “serial number goods” under the applicable regulations promulgated pursuant to the PPSA. Therefore, it seems relatively clear, absent some overriding policy concern (considered in more detail below) that subsection 5(2) is more likely to apply than is subsection 7(2), concerned, as the latter is, with “intangibles”.⁴⁷

If this is true, it then follows that we should be concerned with the differences between the two sections. Section 5 is concerned with the location of the collateral. Section 7, on the other hand, is concerned with the location of the debtor. Why is this distinction particularly relevant? In my view, it is because, with respect to physical collateral such as goods, a potential purchaser or subsequent lender will generally ask to see the physical collateral before making any arrangements with respect to it. Only the most foolhardy person would agree to purchase a vehicle sight unseen. In this scenario presented in *Hughes*, the vehicle was located in Ontario. Therefore, any potential purchaser for the vehicle, or lender who was planning to lend on the strength of the vehicle as collateral, would likely ask to see the vehicle in Ontario. With respect to the lender, the only jurisdiction with respect to which the collateral has a connection, in so far as the potential lender is concerned, is Ontario. A reasonable lender would not necessarily do searches of the personal property registry in each of the 13 provincial or territorial jurisdictions on the off chance that the collateral may be connected with one of those other jurisdictions.

Put another way, goods can be connected to a physical location completely independent of the location of the debtor. As long as the

⁴⁵ It would appear that what these inclusions have in common is that each of them is in some way related to an interest in land. Thus, in other circumstances, each of these things might be thought to “run with the land”. However, for the purposes of the PPSA, these exclusions are separate personal property, as opposed to becoming or remaining attached to the land.

⁴⁶ *Supra* note 2.

⁴⁷ “Intangible” is defined under subsection 1(1) of the PPSA Ont, *supra* note 2 as follows: “‘intangible’ means all personal property, including choses in action, that is not goods, chattel paper, documents of title, instruments, money or investment property”.

lender or purchaser can assess the value of the asset at issue, it really should not matter where the debtor is.

Conversely, with an intangible, there is no physical form of the collateral to which its “location” can be said to be connected. Therefore, any intangible can be said to be connected to the location of the debtor as much as it can be said to be connected to any other jurisdiction. For example, generally a bank account would be considered to be an “intangible” for these purposes. I am currently resident in Manitoba. I access all of my bank accounts from a bank branch in Winnipeg. However, some of my accounts were opened when I was a resident of Ontario, at a branch of the same bank in the city where I was living at the time the account was opened. Yet that bank account is accessible from almost anywhere. With current technology, my debit card from my bank will work in virtually any automated teller machine in the world. Therefore, my location is as much of a connector to the bank as is anything else.

It is in this sense that the approach of Registrar Champagne is inconsistent with the wording of the opening words of section 5(2). The Registrar’s approach focused on the lifestyle of the debtor, as opposed to the location of the collateral.

ii. Consistent pattern of expression, same meaning

Following the opening words of subsections 5(2) and 7(2), there is clearly a deliberate legislative choice to use a consistent pattern of expression with respect to the operative parts of each subsection. Excluding the opening words reproduced above, the two subsections read as follows:

Subsection 5(2) ⁴⁸	Subsection 7(2)
(a) within sixty days after the goods are brought in;	(a) 60 days after the day the debtor relocates to another jurisdiction;
(b) within fifteen days after the day the	(b) 15 days after the day the secured party

⁴⁸ For the record, the equivalent wording in Alberta is: “(a) not later than 60 days after the goods are brought into the Province, (b) not later than 15 days after the day the secured party has knowledge that the goods have been brought into the Province, or (c) prior to the date that perfection ceases under the law of the jurisdiction in which the goods were situated when the security interest attached, whichever is the earliest ...”. Despite minor textual variations, in essence, for our purposes, these two sections are equivalent, *PPSA Alb*, *supra* note 2.

<p>secured party receives notice that the goods have been brought in; or (c) before the date that perfection ceases under the law of the jurisdiction in which the goods were situated at the time the security interest attached, whichever is earliest, ...⁴⁹</p>	<p>receives notice that the debtor has relocated to another jurisdiction; and (c) the day that perfection ceases under the previously applicable law.</p>
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What is interesting about these provisions is that, in either one (subsection 5(2) and subsection 7(2)), two of three alternatives provided for in the subsection are triggered by either the knowledge or actions of the secured party. While the debtor has to either moved the collateral (under subsection 5(2)) or themselves (under subsection 7(2)), the reality is that the original perfection (in *Hughes*,⁵⁰ in Alberta) remains valid until one of the grace periods⁵¹ referred to in paragraphs (a) through (c) expires.

More importantly, the grace periods⁵² referred to in paragraphs (b) and (c) are within the control of the secured party. If the secured party allows

⁴⁹ For the sake of completeness, there is a further exception in the closing words of s 5(2), that reads as follows: "... but the security interest is subordinate to the interest of a buyer or lessee of those goods who acquires the goods from the debtor as consumer goods in good faith and without knowledge of the security interest and before the security interest is perfected in Ontario."

This exception has no application on the facts of *Hughes*, given that there was no purchaser for the vehicle involved in the priority competition that arose on the facts. The exception is focused on consumer goods. This exception is part of the special protection given to consumer goods in all of the PPSAs. Generally, consumer goods are defined as "consumer goods" means goods that are used or acquired for use primarily for personal, family or household purposes". See *PPSA Ont*, *supra* note 2, s 1(1), *sv* "consumer goods".

The further exception is also included in the *PPSA Alb*, but is broader than its Ontario counterpart. The relevant reads as follows: "... but the security interest is subordinate to the interest of a buyer or lessee of the goods who acquires the buyer's or lessee's interest without knowledge of the security interest and before it is perfected in the Province under section 24 or 25."

Again, there is no indication that this exception would have any application on the facts of *Hughes*, for the reasons mentioned above.

⁵⁰ *Hughes* (Registrar), *supra* note 1.

⁵¹ Cuming, Walsh & Wood, *supra* note 18 at 194.

⁵² *Ibid.*

the perfection to lapse (either by losing possession of the collateral,⁵³ or by allowing the registration⁵⁴ in the original to run out), the grace period ends. It is clear that the secured party has the ability to prevent the lapse of their registration, and maintain possession of collateral. If the secured party learns of the intended relocation of the asset, it is within the power of the secured party to remedy the issue.

This commonality points out that there is likely a shared policy base for the two subsections. Clearly, the intention of each of subsection is related to the policy of the other. Again, this is a matter for our discussion of policy, undertaken below.

iii. The Legislature did not repeat itself

The effect of the approach offered by Registrar Champagne is that subsection 5(2) and subsection 7(2) are essentially equivalent. However, subsection 7(3) modifies the meaning that can be extracted from subsection 7(2) and there is no equivalent modification for subsection 5(2). This modification in meaning for just the one subsection insists that these subsections should not be treated as equivalent. Subsection 7(3) postulates that the lifestyle of the debtor can affect the interpretation of the “residence” of the debtor. It reads as follows: “(3) For the purposes of this section, a debtor is located, (a) if the debtor is an individual, in the jurisdiction where the debtor’s principal residence is located; ...”. In effect, subsection 7(3) clarifies that the location of the debtor at a particular moment in time is where the debtor has his or her “primary residence” at that time. It is worth noting that the lifestyle of the debtor and the jurisdiction in which he spent the majority of his time are critical elements of the Registrar’s analysis. As discussed in the policy section below, these elements are part of a residency analysis, suggesting that the Registrar is in fact applying section 7 of the PPSA (and not section 5), in particular, sections 7(2) and 7(3).

⁵³ PPSA Alb, s 24; PPSA BC, s 24; PPSA Man, s 24; PPSA NB, s 24; PPSA NL, s 25; PPSA NWT, s 24; PPSA NS, s 25; PPSA NU, s 24; PPSA Ont, s 22; PPSA PEI, s 24; PPSA Sask, s 24; PPSA Yn, s 22, *supra* note 2.

⁵⁴ PPSA Alb, s 25; PPSA BC, s 25; PPSA Man, s 25; PPSA NB, s 25; PPSA NL, s 26; PPSA NWT, s 25; PPSA NS, s 26; PPSA NU, s 25; PPSA Ont, s 23; PPSA PEI, s 25; PPSA Sask, s 25; PPSA Yn, s 23, *ibid*.

VIII. The Superior Court

Some may suggest that the Superior Court fixed these problems. The issue with this approach is that the Superior Court did not clearly invalidate the analysis of the Registrar based on its interpretation of the PPSA. Instead, the Court focuses on the provisions of the *Bankruptcy and Insolvency Act*,⁵⁵ in particular, section 49 thereof, which, in the relevant part, read as follows:

49(1) An insolvent person or, if deceased, the executor or administrator of their estate or the liquidator of the succession, with the leave of the court, may make an assignment of all the insolvent person's property for the general benefit of the insolvent person's creditors.

(2) The assignment must be accompanied by a sworn statement in the prescribed form showing the debtor's property that is divisible among his or her creditors, the names and addresses of all his or her creditors and the amounts of their respective claims.

(3) The assignment made under subsection (1) shall be offered to the official receiver in the locality of the debtor, and it is inoperative until filed with that official receiver, who shall refuse to file the assignment unless it is in the prescribed form or to the like effect and accompanied by the sworn statement required by subsection (2)... [emphasis added].⁵⁶

The vast majority of the remainder of the Superior Court's analysis on this point focuses on determining the locality of the debtor.⁵⁷ In terms of the issue of the car being "brought into" the second jurisdiction, in this case, Ontario, the Court simply holds as follows:

Notwithstanding, the Court respectfully finds that the Registrar made a palpable and overriding error in its finding that the Vehicle had not been "brought in" to Ontario. Evidence before the Registrar indicated that Mr. Hughes worked full-time in Alberta at a camp, where he slept. The company he worked for provided him a Vehicle to use while in Alberta. Mr. Hughes brought all of his furniture to his Kingston residence.

Based on the foregoing, the Court finds that the Vehicle had in fact been "brought in" to Ontario by Mr. Hughes in November 2015.⁵⁸

The Superior Court then goes on to hold that Snap had actual knowledge of the transfer of the vehicle no later than the date of the notice of the trustee in bankruptcy that was delivered to Snap (on May

⁵⁵ RSC 1985, c B-3 [BIA].

⁵⁶ *Hughes* (Ont Sup Ct), *supra* note 3 at para 20.

⁵⁷ *Ibid* at paras 21-29.

⁵⁸ *Ibid* at paras 30-31.

25), and that Snap did not register within the statutory 15-day limit.⁵⁹ The Court also holds that Snap did not register within the outside limit of 60 days.⁶⁰

The problem with the analysis of the Superior Court, in my view, is essentially that because it begins with the determination of where the debtor is located for the purposes of bankruptcy law, a subsequent court could come to the conclusion the locality of the debtor should somehow affect the applicability of the conflict-of-laws provisions of the PPSA. In my view, the *BIA*⁶¹ should be virtually irrelevant to the application of these provisions. The reason for this is simple. Though the PPSA can be applied during bankruptcy proceedings, it is quite clear the provincial law (including the PPSA and its conflict-of-laws provisions) governs with respect to the determination of who constitutes a secured party, as opposed to an unsecured creditor.⁶² As was explained in the analysis of the Registrar's judgment, the location of the debtor should be irrelevant. There is a significant portion of the judgment of the Superior Court which is devoted to resolving the location of the debtor.

A careful reader might point out that in fact this case does revolve around bankruptcy. While this is true, section 20 of the PPSA (the section which subordinates an unperfected security interest of that of a trustee in bankruptcy),⁶³ also subordinates an unperfected security interest to other

⁵⁹ *Ibid* at para 33.

⁶⁰ *Ibid* at para 32.

⁶¹ *BIA*, *supra* note 55.

⁶² *Ibid*, s 72(1). This, of course, is an express rejection, by the wording of the federal statute, of the doctrine of federal paramountcy under the jurisprudence with respect to the division of powers provided for the *Constitution Act, 1867*, (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5. For an example of a case of a case of federal paramountcy in the area of secured transactions, see, for example, *Bank of Montreal v Hall*, [1990] 1 SCR 121, *per* Justice LaForest, for the Court. Note, however, that the case involved operational conflict between the Saskatchewan PPSA, on the one hand, and the *Bank Act*, RSC 1970, c B-1, subsequently s 178 of the *Banks and Banking Law Revision Act, 1980*, SC 1980-81-82-83, c 40, subsequently s 178 of the *Bank Act*, RSC, 1985, c B-1, on the other. Similar provisions (with respect to special security arrangement for banks) are now found at ss 425-436.1 of the *Bank Act*, SC 1991, c 46 [*"Bank Act, 1991"*].

⁶³ The relevant portion of the section reads as follows:

"20.(1) Except as provided in subsection (3) [which is not relevant on the facts of the

forms of interests as well. These other forms of interest that are protected by section 20 do not revolve around the same statutory framework provided for trustees in bankruptcy pursuant to the *BIA*.⁶⁴ Therefore, the decision of the Superior Court to rest its judgment at least in part on that statutory framework⁶⁵ creates significant ambiguity. Perhaps a simple example will assist to explain this more fully. Instead of the bankrupt debtor, this property has been transferred to a trustee in bankruptcy pursuant to the statutory mandate provided for under the *BIA*,⁶⁶ (as was the case in *Hughes*). Imagine that the other claimant to the vehicle was a judgment creditor in Ontario seeking to enforce his, her, or its judgment as against the property of the debtor in Ontario after seizure of the goods. The result in this hypothetical fact scenario might be different than the result offered by the Superior Court in *Hughes* to the extent that the statutory scheme provided for under the *BIA* is critical to the resolution of the case in *Hughes*.

case], until perfected, a security interest,
 in collateral is subordinate to the interest of,
 a person who has a perfected security interest in the same collateral or who has a lien given under any other Act or by a rule of law or who has a priority under any other Act, or
 a person who causes the collateral to be seized through execution, attachment, garnishment, charging order, equitable execution or other legal process, or
 all persons entitled by the *Creditors' Relief Act, 2010* or otherwise to participate in the distribution of the property over which a person described in subclause (ii) has caused seizure of the collateral, or the proceeds of such property;

(b) in collateral is not effective against a person who represents the creditors of the debtor, including an assignee for the benefit of creditors and a trustee in bankruptcy;

(c) in chattel paper, documents of title, instruments or goods is not effective against a transferee thereof who takes under a transaction that does not secure payment or performance of an obligation and who gives value and receives delivery thereof without knowledge of the security interest;

(d) in intangibles other than accounts is not effective against a transferee thereof who takes under a transaction that does not secure payment or performance of an obligation and who gives value without knowledge of the security interest.”

⁶⁴ *Supra* note 55.

⁶⁵ *Hughes* (Ont. Sup. Ct.), *supra* note 3 at paras. 20-29.

⁶⁶ *Supra* note 55.

However, in my view if one focuses solely on the provisions of the PPSA, the result is exactly the same as the one offered by the Superior Court in *Hughes*. The effect of section 20 of the PPSA is to say that if a secured party's interest is left unperfected at the relevant time,⁶⁷ the trustee in bankruptcy's interest prevails.

In this case, the Superior Court comes to the conclusion that both tests (the location of the debtor for the purposes of the *BIA*, on the one hand, and the location of the collateral for the purposes of the PPSA, on the other) favour Ontario, unlike the decision of the Registrar. In my view, only the PPSA matters on this point. The inclusion of the discussion about the *BIA* regrettably serves to, at least in part, "muddy the waters".

Even more problematic is the fact that the Superior Court does not explain specifically its interpretation of section 5 of the PPSA. The Superior Court simply offers a variety of factors to explain why the interpretation offered by the Registrar is inappropriate, but does not offer a test that sets out how section 5 should work. The Court concludes as follows:

Thus, while each factor not determinative, a proper analysis would have found that they both acted in favour of Mr. Hughes' contention that he moved to Ontario and brought his Vehicle with him. This is notwithstanding the fact that the Vehicle was still registered in Alberta.⁶⁸

In fact, the Superior Court also uses the term "palpable and overriding error" to describe the Registrar's holding.⁶⁹ Through its use of the term the Superior Court seems to suggest that the Registrar made an error of fact, as opposed to an error of law.⁷⁰ The Superior Court seems to

⁶⁷ The relevant time is the date of bankruptcy (subpara 20(b)(i)) or the date of winding-up order (subpara 20(b)(ii)). Of course, the date of the bankruptcy is unclear on the facts of *Re: Hughes*, *supra* note 1.

⁶⁸ *Hughes* (Ont Sup Ct), *supra* note 3 at para 29.

⁶⁹ *Ibid* at para 30.

⁷⁰ For just some of the cases where the Supreme Court of Canada uses the term "palpable and overriding error" as the standard of review with respect to errors of fact, see *Benhaim v St Germain*, 2016 SCC 48 at para 36, [2016] 2 SCR 352 *per* Justice Wagner, for the majority; *Housen v Nikolaisen*, 2002 SCC 33 at paras 8, 10, 19, [2002] 2 SCR 235 *per* Justices Iacobucci and Major, for the majority; *St-Jean v Mercier*, 2002 SCC 15 at para 36, [2002] 1 SCR 491 *per* Justice Gonthier, for the Court [*St-Jean*]; *Stein v The Ship "Kathy K"*, [1976] 2 SCR 802 at para 7, 6 NR 359 *per* Justice Ritchie, for the Court.

acknowledge this distinction in its decision.⁷¹ It is said that questions of fact are generally concerned with what happened between the parties.⁷² Questions of law, on the other hand, are generally concerned with the legal test to be applied to facts that have been clearly established.⁷³ In my view, the proper law to be applied (that is, whether section 5 of the PPSA should be applied and in what fashion) are questions of either law, on the one hand, or possibly, questions of mixed fact and law, on the other. In my view, these are not questions of fact.

POLICY

IX. SIMPLICITY AND CERTAINTY ARE VIRTUES OF THE PPSA

1. Introduction

While the PPSAs are hardly simple statutes, they are clearly designed to be clear enough that both experts (such as lawyers and paralegals) and regular users of the statute (like repetitive lenders, such as banks and credit unions) should be able to understand what the statute demands of the parties that they represent. The overall approach of the PPSA is laid out as follows, and this approach has been cited by a number of judicial decisions

The fundamental aim of the Act is to provide rules under which commercial transactions can be concluded with reasonable simplicity and certainty. It recognizes that all security devices regardless of form have one single purpose - to give creditors who bargain for them special, definite, specific and exclusive rights in particular property to secure payment or performance of a debt or satisfaction of an obligation. It is this common objective that dictates a single lien concept with precise specification of rights and obligations. The Act abolishes multiple documentation and registration. Thus a borrower now may charge his inventory and accounts receivable in one single document, whereas under the law in effect prior to the proclamation of this Act two documents, a chattel mortgage and an assignment of book debts, would usually be required. It permits complete integration of a borrower's needs in a single transaction by the simple expedient of abolishing distinctions in secured transactions based on form.^{74 75}

⁷¹ *Hughes* (Ont Sup Ct), *supra* note 3 at para 18.

⁷² See *St-Jean*, *supra* note 70 at para 35, citing *Canada (Director of Investigation and Research) v Southam Inc.*, [1997] 1 SCR 748 at para 35, 209 NR 20 [Southam].

⁷³ *St-Jean*, *supra* note 70 at para 33, again citing *Southam*, *supra* note 72 at para 35.

⁷⁴ Fred M. Catzman, *Personal Property Security Law in Ontario* (Toronto: Carswell, 1976),

Generally, the statute itself lays out what is required. The approach offered by Registrar Champagne violates both simplicity and certainty. I will expand on this theme in the subsections that follow.

2. “Location of the Collateral” Is Quite Clear, Whereas the Approach of the Registrar Is Not

In the case of section 5(2), judges are directed to consider the location of the property that was at issue. They are directed to consider when the property at issue arrived in the jurisdiction at issue. On the facts of *Hughes*,⁷⁶ the relevant jurisdiction is Ontario. If the collateral arrived in Ontario earlier than 60 days prior to the bankruptcy, all of the “grace periods” referred to by Cuming, Walsh and Wood,⁷⁷ provided for in each of subsections 5(2) and 7(2) would have expired.

The Registrar decided to apply the “location of the debtor” test (provided for in subsection 7(2)) when the Registrar should have applied the “location of the collateral” test (provided for in subsection 5(2)). To be clear, such a transposition of the test would be problematic in and of itself, for a number of reasons, but this is not the issue for discussion now.

The issue here is the Registrar claims to be applying the location of the collateral test, while, as mentioned earlier, the Registrar is nonetheless applying factors extraneous to the location of the collateral. The lifestyle and decisions of the debtor (other than, of the course, the decision to move the collateral) are irrelevant in the application of the location of the collateral test.

Even if we forget the potential transposition of the two tests, and the application of the extraneous factors, the fact is the Registrar does not explain when, or more accurately, under what circumstances, this new type of analysis should be applied. Assuming we should ever ignore what could be considered the clear wording of subsection 5(2), it would be necessary for the judiciary to offer some guidance as to when future courts

at 3.

⁷⁵ *Re West Bay Sales Ltd. and Hitachi Sales Corp. of Canada Ltd.* (1978), 20 OR (2d) 752; 88 DLR (3d) 743; 4 BLR 224; 28 CBR (NS) 244; 1 PPSAC 20 (Ont SC, in bankruptcy); *Trans Canada Credit Corporation v Royal Bank of Canada* (1985), 5 PPSAC 1 (Sask QB).

⁷⁶ *Hughes* (Registrar), *supra* note 1.

⁷⁷ *Supra* note 18.

confronted with similar issues should view the situation before that as sufficiently similar to *Hughes* that the Registrar's analysis should govern the situation.

There are no cases that suggest a highly technical application of the term "brought into" Ontario. A non-technical application of the term is easy to understand. Is the vehicle in Ontario? Applying the traditional, paradigmatic approach to this question requires asking: When did it arrive in Ontario? Was the interest perfected under the laws of any jurisdiction at that time?

Such a non-technical interpretation of the term would also be consistent with the pragmatic approach that, in my view, animates the PPSA overall. Even the most neophyte lender would understand that if the collateral changes jurisdictions, there may be additional responsibilities placed on the lender.⁷⁸ To apply the approach offered by Registrar Champagne, would suggest that a multitude of factors may enter into the analysis in attempting to resolve whether to apply the "location of the debtor" test, as opposed to the "location of the collateral" test. Most sophisticated lenders would require specialized assistance to draw this conclusion in some cases. This hardly seems simpler or more certain for market participants.

3. "Residency" Is Uncertain

The residence of the debtor seems to be a very important factor in the analysis offered by Registrar Champagne. While the term may seem very straightforward to some, "residence" has a nuanced meaning in tax law.⁷⁹ However, everyone is considered to have a residence.⁸⁰ In determining the

⁷⁸ This is not to suggest that any lender would necessarily want to take on these additional responsibilities. I suspect that most lenders would want to avoid such responsibilities if at all possible. My point here is actually much simpler. Applied in a non-technical way, most lenders would in fact know when these additional responsibilities were placed on them. In this sense, the non-technical approach to the PPSA suggested here is in fact simpler and more certain. Thus, it is consistent with the overall theme of creating more certain outcomes while simplifying the process for market participants.

⁷⁹ Tim Edgar, Arthur Cockfield, & Martha O'Brien, eds., *Materials on Canadian Income Tax*, 15th ed (Toronto: Carswell, 2015), c. 3. In the interests of full disclosure, I was one of the contributors to another chapter in this edition of this volume.

⁸⁰ *Thomson v Minister of National Revenue*, [1946] SCR 209, at 224-225, [1946] 1 DLR

residence of the individual, the amount of time spent in a particular jurisdiction is a factor.⁸¹ But, various connections to each jurisdiction where the taxpayer might reasonably be said to be resident are also considered.⁸² As explained by Tax Court Judge Teskey put it in *Denis M. Lee v Minister of National Revenue*:

The question of residency is one of fact and depends on the specific facts of each case. The following is a list of some of the indicia relevant in determining whether an individual is resident in Canada for Canadian income tax purposes. It should be noted that no one or any group of two or three items will in themselves establish that the individual is resident in Canada. However, a number of factors considered together could establish that the individual is a resident of Canada for Canadian income tax purposes:

- past and present habits of life;
- regularity and length of visits in the jurisdiction asserting residence;
- ties within the jurisdiction;
- ties elsewhere;
- permanence or otherwise of purposes of stay;
- ownership of a dwelling in Canada or rental of a dwelling on a long-term basis (for example, a lease for one or more years);
- residence of spouse, children and other dependent family members in a dwelling maintained by the individual in Canada;
- memberships with Canadian churches or synagogues, recreational and social clubs, unions and professional organizations;
- registration and maintenance of automobiles, boats and airplanes in Canada;
- holding credit cards issued by Canadian financial institutions and
- other commercial entities including stores, car rental agencies, etc;
- local newspaper subscriptions sent to a Canadian address;
- rental of Canadian safe deposit box or post office box;
- subscriptions for life or general insurance including health insurance through a Canadian insurance company;
- mailing address in Canada;
- telephone listing in Canada;
- stationery including business cards showing a Canadian address;
- magazine and other periodical subscriptions sent to a Canadian address;
- Canadian bank accounts other than a non-resident bank account;
- active securities accounts with Canadian brokers;
- Canadian driver's licence;

689, *per* Justice Rand.

⁸¹ *Lee v Minister of National Revenue*, [1990] 1 CTC 2082 at para. 18, 90 DTC 1014.

⁸² *Ibid.*

- membership in a Canadian pension plan;
- holding directorship of Canadian corporations;
- membership in Canadian partnerships;
- frequent visits to Canada for social or business purposes;
- burial plot in Canada;
- will prepared in Canada;
- legal documentation indicating Canadian residence;
- filing a Canadian income tax return as a Canadian resident;
- ownership of a Canadian vacation property;
- active involvement in business activities in Canada;
- employment in Canada;
- maintenance or storage in Canada of personal belongings including clothing, furniture, family pets, etc;
- obtaining landed immigrant status or appropriate work permits in Canada;
- severing substantially all ties with former country of residence.⁸³

The greater the degree of discretion appropriated by the judge, the more one tends to undermine the certainty intended to be provided by specific statutory language. The more one undermines the certainty of the application of the statute, the greater the risk for the lender at issue. The way that sophisticated lenders will most likely deal with this risk is either by: (i) imposing more stringent conditions on borrowers with goods, such as vehicles, that are easily transferrable between Canadian jurisdictions; (ii) increasing the interest payable; or (iii) in my view, most likely, both of the above measures would be employed. Of course, as I discuss in more detail below, there is the possibility that lenders will register in multiple jurisdictions out of an abundance of caution. However, the cost of such registrations will be passed on to the borrower in any event. It is virtually beyond debate at this point that the PPSA was to simplify the secured transaction system, as compared to the system that existed prior to its adoption, so as to reduce systemic risk. The Registrar's interpretation, in my view, has the opposite effect.

4. Ignorance of the Facts Creates Uncertainty

What is in issue in this section is that there is no language anywhere in the PPSA suggesting that there is any discretion in the judge to ignore the only facts provided to the judge. The only evidence was that the vehicle had been brought into Ontario. The Registrar seems to have

⁸³ *Ibid.*

decided that the Court did not agree with the statutorily-mandated result that the vehicle had been “brought into” Ontario, and therefore, had simply decided that it had not been “brought in” at all. This of course could itself create uncertainty. If the Registrar’s ignorance is appropriate, under what other circumstances should registrars or other decision makers simply decided to ignore the clear language of the PPSA? If such circumstances could potentially exist, but cannot be defined in advance for the purposes of allowing the parties to order their affairs in a way that they consider efficient, does this not erode the confidence that users can have in the system that the law demands they use? In other words, sometimes certainty of result is actually just as important ~ one could make the argument that it is even more important ~ than the result in any particular case.

X. Where is the Risk Better Placed?

1. *Introduction*

The previous section was focused on issues of certainty and simplicity. The section that follows asks a more basic question, that is, if we were to alter the onus of following the property, with this in fact lead to a better result?

2. *The Need For An Incentive To Ensure an Accurate Registry*

On the facts of *Hughes*,⁸⁴ the priority competition was between the trustee in bankruptcy (technically representing all creditors of the debtor, but realistically representing the unsecured creditors)⁸⁵, on the one hand,

⁸⁴ *Supra* note 1.

⁸⁵ Of course, the job of the trustee in bankruptcy is to accumulate all of the debtor’s property and distribute it in accordance with the bankruptcy regime. In general, the rights of a secured creditor to the collateral (the property subject to the security interest) are determined by secured transactions law. However, the trustee must determine whether the security interest is enforceable. If the trustee determines that the security interest is enforceable, then secured transactions law deals with the property. But, there are two scenarios where a “secured creditor” may be represented by the trustee in bankruptcy. First, if the trustee determines that the security interest is not enforceable, though the party thought that they were a secured creditor, in fact, they are not. This was the case in *Hughes*, *supra* note 1. The secured party was disputing a determination by the trustee in bankruptcy that secured party’s security interest was not enforceable. The second reason that a secured creditor might be

and a secured party on the other. It has often been said that the law is in place to protect the party when the party cannot protect itself. The law is less likely to protect a party when the party could have protected him-, her- or itself (whether through contractual provisions or otherwise), but chose not to do so.⁸⁶ If this is generally an accurate statement, which I believe that it is, the question is: As between the party with a security interest, on the one hand, and either the parties who did not take a security interest (such as trade creditors, for example⁸⁷) clearly, in the vast majority of cases, the holder of the security interest is in the best position to protect his or her interests through perfection pursuant to the PPSA. Moreover, the statute, by making the unperfected security interest ineffective as against the trustee in bankruptcy, in essence provides a prudential incentive for

represented by the trustee in bankruptcy is if the security taken by the secured party is insufficient to ensure repayment of the underlying obligation. For example, if a secured party is owed \$150,000, and the security is sold, but the proceeds of sale are only \$100,000, the secured party is to the extent of the remaining \$50,000, an unsecured creditor of the debtor. Therefore, from time to time, the same person may begin their relationship with the debtor as a secured creditor, and after the disposition of the collateral to reduce the debt, become unsecured.

The reverse is also technically possible, where after the commencement of the relationship in an unsecured loan, the debtor may offer security to the creditor to allow the debtor to receive, for example, more time to repay the principal and interest owing on the previously unsecured loan.

⁸⁶ See *BCE Inc. v 1976 Debentureholders*, [2008] 3 SCR 560, per The Court, in particular at paras 78, 108. Though this case arose under the oppression remedy provision of the *Canada Business Corporations Act*, RSC 1985, c C44, s 241,

⁸⁷ A reader might suggest that certain people who do not take a security interest in the assets of the debtor are choosing not to do so, and therefore must live with that choice. Put another way, such unsecured creditors are legally permitted to take a security interest. Therefore, they should be in no better position in terms of the PPSA than is the secured creditor who does not perfect their interest properly.

There are two interrelated responses to this argument. First, for many creditors who are unsecured, the taking of security is simply not practicable in the circumstances. Imagine if a vendor with thousands of clients for small amounts needed to take a security interest and perfect it in an effort to protect its interests. The costs (both financial and opportunity-related costs) would be prohibitive.

Second, there are other types of “involuntary” creditors (such as tort victims) who have no such ability to protect their own interests through other types of consensual arrangements. Whether it is impossible for the person to protect their own interests, or merely unreasonable, the law does not expect perfection.

the holder of a security interest to register his or her interest as soon as possible. Furthermore, there is value in the registration, beyond simply the perfecting step that it entails. For example, it may save other lenders the time and trouble of trying to figure out whether or not to lend to the debtor, because, upon examining the public Registry,⁸⁸ it may become very clear to even an unsecured creditor that the debtor is severely overextended. Put another way, the registration in a public forum has public value. The only way that society gets that public value is if the private actor has an incentive to ensure that the registry is accurate. The PPSA provides that incentive by giving the secured party who registers properly advantages over the secured party who fails to do so, vis-à-vis both unsecured creditors and purchasers for value.⁸⁹

3. *The Registrar's Interpretation Undermines the Purpose of the Section*

It seems to me that the purpose of the relevant sections is to resolve a debate. The debate is this: "On whose shoulders does following the asset

⁸⁸ The Personal Property Registry (the "PPR" or "Registry") is continued by s 42 of the PPSA Man, *supra* note 2. All of the PPSAs work off a similar base in terms of the creation or continuation of a public registry to document security interests. On this point, see Cuming, Walsh & Wood, *supra* note 18, c 6.

⁸⁹ Now, a knowledgeable reader might point out that there is a different perfection step beyond registration, that is, the secured party taking possession of the collateral. See Cuming, Walsh & Wood, *supra* note 18 at 307-309. See also PPSA Alb, s 24; PPSA BC, s 24; PPSA Man, s 24; PPSA NB, s 24; PPSA NL, s 25; PPSA NWT, s 24; PPSA NS, s 25; PPSA NU, s 24; PPSA Ont, s 22; PPSA PEI, s 24; PPSA Sask, s 24; PPSA Yn, s 22, *supra* note 2. Such a reader might then be heard to argue that if the point of perfection is to ensure an accurate public registry, allowing possession by the secured party to function as a perfection step does not serve that goal. However, the possession by the secured party as a perfection step is reasonable for different reasons. A purchaser generally would not purchase a vehicle without seeing it. A purchaser who did so is taking very large risk. Ultimately, reasonable lenders would want to assess the condition of the underlying asset to determine its reasonable value as collateral. Therefore, as a general rule, the non-availability of the asset should put lenders and purchasers on notice of an increased risk of lending against, or purchasing, the asset, as the case may be. It follows that the law of secured transactions does not seek to protect a purchase or lender who takes such an undue risk. This is unlike the purchaser or lender who sees the asset, but even with reasonable diligence, would be unable to discover the security interest of the prior lender, because the prior lender did not register the security interest in the public registry.

fall?” If the obligation is on the third party (in this case, the trustee in bankruptcy or the creditors that the trustee represents) to track the provenance of the vehicle, then it would follow that the analysis offered by Registrar Champagne would promote the policy of the section.

However, if the purpose of the section is to put the emphasis on the need for the secured party to follow the asset, then the approach of the Registrar is misplaced. In my view, the latter approach is preferable. The reason for this is three-fold. First, the third party may not even be aware that they need to track an asset. For example, it is clear that an involuntary creditor (such as a tort victim) would not even know that they needed to be concerned with the creditworthiness of any party until they had no control over what was happening. Secondly, even for those creditors who are aware that the creditworthiness of the party with whom they are transacting is an issue, this may be simply outside the norm for this type of transaction. For example, trade creditors fall in this category.

Third, even if one does not fall into one of these first two categories, certain creditors may be more comfortable lending money on the strength of assets that cannot move. Put another way, one of the purposes of the PPSAs was to make more credit available on the basis of the actual creditworthiness of the borrower, rather than being overly concerned with the asset type. The PPSA was designed to simplify borrowing against personal property. Let us imagine, therefore, that the priority contest at issue in *Hughes* was not between the secured lender from Alberta, on the one hand, and the trustee in bankruptcy, on the other. Instead, let us assume that once the car was in Ontario, Mr. Hughes sought additional financing through a lender in Ontario, and Hughes put the vehicle up as collateral for that loan. The new lender registers a financing statement under the Ontario registry. Otherwise, the facts remain unchanged.

In such a scenario, if the Registrar is correct, Snap remains perfected in Alberta. The fictional Ontario lender remains perfected in Ontario. In the case of conflicting perfected security interests, the general rule is that the party that perfected its interest first defeats the interest of the party that is perfected later,⁹⁰ until either the party that perfected first is paid out in full, or the value in the collateral is exhausted. Therefore, in such a

⁹⁰ This default rule is contained in para 30(1)1 of the PPSA Ont, *supra* note 2; and para 35(1)(a) of the PPSA Alb, *supra* note 2.

conflict the Ontario lender who sees the vehicle directly before him or her, and searches the Ontario registry to ensure that there are no prior registered security interests which would defeat his interest can no longer rely on his search of the registry in Ontario.

Thus, the effect of the Registrar's decision is to require that potential lenders search all 13 Canadian jurisdictions when attempting to sort out whether there are any prior security interest granted against potential collateral which stands before the new lender.⁹¹ In other words, the approach taken by Registrar Champagne requires that the new lender in Ontario do a search, as it turns out on the facts of this case, of the Alberta personal property registry to discover the relevant security interest that defeats his interest.

Some may say that this is not a large expense for sophisticated lenders to take on. However, in my view, such an approach misses the point. First of all, not all lenders under the PPSA are as sophisticated as some of its users (such as banks, credit unions and other institutions that use the PPSA in the ordinary course of their business). Second, Snap, as its name suggests, may in fact be a sophisticated user of the Act, given that its business is the provision of finance. If so, there is certainly an argument that the more sophisticated party should bear the costs that are reasonable part of his, her or its business, rather than forcing potential purchasers or other transferees (who may or may not be as sophisticated as Snap) to take on that risk. So, even if we were to base the Registrar's interpretation solely on the facts before the Registrar, the sophistication of a party whose main business is lending would seem to suggest that the facts of *Hughes*⁹² did not provide an appropriate basis for an *ad hoc* deviation from the statutory rule.

Third, there is nothing to suggest in *Hughes*⁹³ that the deviation from the statutory rule should be limited to Canada. In other words, the states of the U.S. function on the basis of a statutory regime which is largely similar to its Canadian cousins in terms of its approach to regulating secured transactions in personal property.⁹⁴ The debtor in *Hughes*

⁹¹ This, of course, ignores the possibility of registration under the *Bank Act, 1991*.

⁹² *Supra* note 1.

⁹³ *Ibid.*

⁹⁴ Title IX to the *Uniform Commercial Code* is generally considered the precursor to the

happened to come from Alberta to Ontario. Would the results have been different if the debtor had come from Michigan, Minnesota, Utah or California? There is nothing in the judgment of Registrar Champagne to indicate such a distinction, nor can I independently conceive of a principled basis to justify such a difference in approach.⁹⁵

Why is this important? It is important because if there is no such distinction, then we are not simply discussing doing 13 searches as opposed to a single search. Rather, Registrar Champagne is suggesting (inadvertently, I hope) that many more searches may be necessary just to protect against the transfer of collateral within North America alone. Surely, this is not a result to be countenanced.

CONCLUSION

In the end, in my view, the dispute in *Hughes* should have been resolved by a straightforward application of section 5 of the PPSA. If either court (the Registrar or the Superior Court of Justice) had restricted itself to this analysis, the confusion in both law and policy might have been avoided. It would have been preferable to decide directly that any other approach would have been to disregard the dictates of section 5, and would therefore, be unacceptable, rather than taking what be described as an approach that favours the perceived equities of the situation.⁹⁶ Policy arguments would also seem to support this conclusion.

modern PPSAs. See *McLaren*, *supra* note 28 at §1.01. For a list of all the PPSAs, see *supra* note 2.

⁹⁴ To be fair, I have not studied Title IX of the UCC for these purposes (nor any other, for that matter). There may be legal distinctions between the regimes in Canada and the U.S., respectively, of which I am not aware. My point is not to suggest equivalence between the two regimes. Rather, I am doing nothing more than suggesting that the two countries take approaches that are sufficiently similar that the Ontario courts might have similar expectations of American jurisdictions as those courts do of their Canadian counterparts.

⁹⁵ In fact, subsection 72(1) of the PPSA Ont would seem to support this conclusion. The section reads as follows: “Except in so far as they are inconsistent with the express provisions of this Act, the principles of law and equity, including the law merchant, the law relating to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake and other validating or invalidating rules of law, shall supplement this Act and shall continue to apply.”

The value in the decision, however, may actually reside in its mistaken analysis. Decisions like those in *Hughes* provide a valuable opportunity for people interested in the law (judges, legislators, academics, law reform bodies, and practitioners and the like) to consider how the law ought to develop. In short, we are most likely to know that we need to clarify the law when someone uses the law in a way that is unanticipated. In that sense, *Re: Hughes* is an important development, and one that needs to be discussed.

Registrar Champagne makes no reference to this this section in seemingly deciding that the equitable resolution of this case demanded some reconceptualization of the contours of s. 5. Without an explicit reference to this section, it is unclear whether in fact Registrar Champagne was trying to apply equitable principles on the facts, or, at the very least, what equitable principle was being applied.