

# FOR THE CANADIAN CROSS-BORDER FINANCE LAWYER OR LENDER, A UCC FINANCING STATEMENT HYPOTHETICAL WITH FAQs

*Smarter Way to Cross Blog Archives*  
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As a U.S. finance lawyer practicing in Canada, Canadian lawyers and lenders frequently ask me about the filing of UCC financing statements. This blog entry describes a typical scenario and memorializes my answers to the questions that I am asked.

## SCENARIO

A company (the “Canadian Company”) has its:

- Place of incorporation in British Columbia
- Chief executive office in Ontario; and
- Assets located in New York and Ontario.

**Q1. Under the Uniform Commercial Code (UCC), where should a financing statement be filed to perfect a security interest in the assets of the Canadian Company?**

**A1. Under the UCC, the law of Ontario is controlling, and a financing statement should be registered under the Personal Property Security Act (PPSA) in Ontario according to the law of Ontario.**

## Explanation:

First, some background:

- The “location” of the debtor under the UCC determines what law governs perfection by filing a UCC financing statement with a few exceptions for certain real estate related collateral such as minerals, timber to be cut, and fixtures when perfection is by filing a fixture filing. (This blog entry does not address such exceptions.)
- For a debtor that is not an individual or a registered organization (a registered organization is typically a U.S. corporation, limited partnership, or limited liability company), the “location” of the debtor will depend on whether or not the debtor’s chief executive office is in a jurisdiction that maintains a notice filing system for nonpossessory security interests meeting the requirements of UCC§9-307(c).
- A jurisdiction maintains a notice filing system meeting the requirements of UCC§9-307(c), if (a) secured parties are generally required to file information concerning their security interests in such system to obtain priority over a lien creditor (in other words, to obtain the priority afforded a “perfected” security interest), and (b) such system generally makes such information available to the public. In this blog entry, a jurisdiction with a notice filing system conforming to such requirements is called a “UCC equivalent jurisdiction.”

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- If the debtor's chief executive office is located in a UCC equivalent jurisdiction, the debtor's "location" is that jurisdiction.
- If the debtor's chief executive office is not located in a UCC equivalent jurisdiction, the debtor's "location" is Washington, D.C.
- Once the debtor's location is determined, a financing statement must be filed in the filing office determined under the internal law (not the choice of law rules) of the jurisdiction of the debtor's location.

Now, application to the scenario:

The Canadian Company is not a registered organization because it is incorporated under the law of British Columbia.

The Canadian Company is located where its chief executive office is located, Ontario, if Ontario is a UCC equivalent jurisdiction.

Though we are not Canadian lawyers, we understand that the PPSA, which is based on the 1972 version of Article 9 of the UCC, establishes a notice filing system for nonpossessory security interests that is very similar to the filing system under the UCC and requires registration of a financing statement for perfection of a nonpossessory security interest with fewer exceptions than the UCC. For example, under the PPSA, there is no automatic perfection (without registration of a financing statement) of a purchase money security interest in consumer goods, in contrast to the automatic perfection generally afforded such a security interest under the UCC. Under the PPSA as now in effect (there is a movement afoot to change this), there is also no concept of "control" with respect to a deposit account; perfection can only be accomplished by registration of a financing statement. In addition, based on my observations, up to date searches reflecting PPSA financing statements registered against a debtor are readily available in Ontario and elsewhere in Canada. If Ontario is not a UCC equivalent jurisdiction, we would question whether there is any foreign jurisdiction that is. See also, the article of Arnold S. Rosenberg, "Classification of Foreign Filing Systems" in *Practice Under Article 9 of the Uniform Commercial Code* at 107 (ABA) UCC Committee, Stephen L. Sepinuck, ed., 2d ed. 2008, in which Mr. Rosenberg classifies all of the Canadian provinces as "Category A" jurisdictions that "clearly" are UCC equivalent jurisdictions.

Therefore, based on our belief that Ontario is a UCC equivalent jurisdiction, the Canadian Company is "located" in Ontario and the internal law of Ontario controls. The registration of a financing statement against the Canadian Company in Ontario is required.

*Under the UCC*, no filings are required in New York even though the Canadian Company has assets in New York (but see Q3 below). No filings are required in Washington, D.C., because, we believe, Ontario is a UCC equivalent jurisdiction.

It is important to remember that the place of incorporation of the Canadian Company is only relevant for determining that the Canadian Company is not a U.S. "registered organization." Once that determination has been made, the determinative facts are: (a) the location of the debtor's chief executive office (here, Ontario) and (b) whether that jurisdiction is a UCC equivalent jurisdiction (we conclude that Ontario is a UCC equivalent jurisdiction, so therefore, the secured party must file in Ontario).

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**Q2. *But should I file a financing statement against the Canadian Company in Washington, D.C., to be safe?***

**A2. *It seems unnecessary to do so. But a secured party may elect to file a financing statement in Washington, D.C., to protect against the questionable argument that Ontario is not a UCC equivalent jurisdiction.***

**Explanation:**

If a secured party wants to eliminate any possibility that a competing creditor will argue that Ontario is not a UCC equivalent jurisdiction, the secured party should file a financing statement in Washington, D.C., making any such argument pointless. We do not recommend filing in Washington, D.C., as a matter of course, however. If a decision is made to file in Washington, D.C., then more questions inevitably follow, such as should searches be performed there (not just under the debtor's current name, but also under each predecessor name and any alternative French or English version of such name), and will any required opinion address the UCC filing in Washington, D.C.? The decision to file in Washington, D.C., may add costs beyond additional filing fees. It may also perpetuate common misunderstandings about the necessity of filing in Washington D.C.

**Q3. *Should a financing statement be filed against the Canadian Company in New York because the Canadian Company has assets there?***

**A3. *Yes, but such filing is not required by the UCC. Such filing is required as a result of the choice of law rules of the PPSA.***

**Explanation:**

As a general principle, if there is a possibility that the issue of perfection may be litigated in an insolvency or other proceeding outside of the United States (because some aspect of the transaction bears a relationship to that foreign jurisdiction), the choice of law rules of that foreign jurisdiction should be considered. Perfection of a security interest in the assets of the Canadian Company may become an issue in an insolvency proceeding in Ontario, where the Canadian Company has its chief executive office, or in British Columbia, where the Canadian Company is incorporated. Therefore, the application of the choice of law rules under the PPSA should be considered. Once again, we are not Canadian lawyers. However, we understand that under such rules, perfection of a security interest in goods (other than mobile goods) is governed by the internal law of the jurisdiction of the physical location of such goods (See Ontario and British Columbia PPSA §§5, 6 and 8.1). Therefore, under the PPSA choice of law rules, New York internal law would govern perfection of a security interest in the Canadian Company's assets located in New York, and the filing of a financing statement under the internal law of New York with the New York secretary of state is required (even though not required under the UCC).