Financial Services Flash

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Control and Certainty – Ontario's Proposed Amendments to the PPSA

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On May 2, 2013, the Ontario government tabled its annual budget, announcing its intention to amend the *Personal Property Security Act* (Ontario) (the "**PPSA**"). While the specific details of the amendment remain unclear, it appears that the changes will generally follow the recommendations of the Ontario Bar Association's Personal Property Security Law Subcommittee ("the **Committee**"). If the amendment follows the Committee's recommendations closely, it would permit creditors to obtain an automatic first priority security interest over cash collateral accounts under the creditor's control.

The Committee's recommendations would create a new class of collateral: "financial accounts." Financial accounts are defined broadly to include: (i) deposit accounts maintained by the financial institution; and (ii) any other monetary obligation of a financial institution in respect of funds or received by that financial institution as security for an obligation. Notably excluded from financial accounts are "consumer accounts," which are defined as accounts used by natural persons for personal, family or household purposes. The proposed amendments also include a broad definition of a "financial institution" in order to encompass any financial entity that regularly receives cash collateral as security. This definition is drafted with the intent to include all significant creditors in Canadian financial markets transactions including, but not limited to, the Crown, pension funds and mutual funds.

Under the current PPSA regime, security over cash collateral can be perfected by registration. Security over money may also be perfected by possession, however the case law is unclear as to whether funds held in a cash collateral account are considered "money" or "intangibles" (which may not be perfected by possession). In addition, security over cash collateral can also be obtained through other legislation and court orders. By implementing the Committee's recommendations, clarity will be achieved as secured creditors could perfect an automatic first priority security over cash collateral by control. In other words, creditors with control over such accounts will obtain priority to all existing security interests, whether perfected by registration or other means. The result is a clear, certain, automatic and instant first-priority security interest over cash collateral.

The Committee proposed three ways to establish control:

1. **Automatic Control**. A financial institution will automatically have control if it holds the financial account of the borrower.

2. **Control Agreements.** If the financial account is held by a third party, the secured creditor has entered into a control agreement that provides that the third party will follow its instructions concerning the disposition of the account.

3. **Transfer to the Financial Institution's Account**. A secured creditor will automatically have control if it acts as the customer with respect to the debtor's account at a financial institution.

The current regime for cash collateral under the PPSA is plagued with uncertainty that may be detrimental to creditors handling multiple secured transactions daily. The proposed amendments follow Article 9 of the United States *Uniform Commercial Code* which already permits the perfection of cash collateral by control. This change aligns with the control regime applied to securities accounts under the *Securities Transfer Act, 2006* (Ontario) and would enhance certainty and facilitate cross-border transactions between debtors and creditors. The implementation of this regime is highly desirable for secured creditors, as transaction costs are high given the current need to devise strategies to obtain a first priority security interest over a debtor's cash collateral. The inclusion of "financial accounts" and perfection through control will provide clarity and reduce costs in respect of obtaining an unassailable first priority security interest over cash collateral.

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