

## Banking and Finance Law

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### Cash Collateral – Promised changes to the Ontario PPSA will facilitate taking cash as security

Currently, a security interest in a deposit account is perfected by filing a financing statement under the Ontario *Personal Property Security Act* (“PPSA”). This can create a challenge for lenders and swap counterparties as there is no way to take priority over creditors with pre-existing registrations without asking those creditors for releases or estoppels. This in turn may create significant delay for those lenders and swap counterparties who need to take security over cash collateral quickly.

On March 27, 2012, in connection with the 2012 Ontario budget, the Government of Ontario announced plans to put forward changes to the PPSA consistent with the intent of a proposal from the Ontario Bar Association. The Ontario Bar Association’s Personal Property Security Law Subcommittee’s proposal recommends amending the PPSA to introduce a “control” regime for deposit accounts and other forms of cash collateral (comparable to the regime in the U.S.). If the promised amendments are implemented, it would be a significant improvement for secured parties taking security over cash collateral.

#### Proposed Amendments to PPSA

The proposed amendments would create a new class of collateral, “financial accounts”, defined broadly to include any form of deposit account maintained by a financial institution and other similar items. “Financial institution” would also be defined broadly to include any type of financial entity that maintains deposit accounts for customers, or receives cash collateral as

security. However, “consumer accounts” (i.e., accounts maintained by natural persons primarily for personal, family or household purposes) would be excluded from the new regime.

Under the proposal, perfecting a security interest in a financial account could be accomplished by either:

- filing a financing statement (as the current PPSA provides); or
- taking “control” (the crux of the amendment to the PPSA, since control will give the secured party priority over all other creditors who do not have control).

#### Taking Control

There are three ways proposed to take “control” over a financial account, similar to the means for taking control over a securities account under the Securities Transfer Act (Ontario) (“STA”):

- (1) **Automatic** The secured party will automatically have control if it is the financial institution that is obligated to a customer to pay a financial account (i.e., the debtor transfers funds to a financial institution to secure an obligation to such financial institution, giving rise to an account receivable with no deposit account established).
- (2) **Control Agreement** If the financial account is with a third party financial institution (or the financial institution is acting in more than one capacity), the secured party, the debtor and the financial institution may enter into a control agreement over the account.
- (3) **Transfer to the Financial Institution’s Account** The secured party will have control if it is the customer with respect to the financial account (i.e., the account is in its name at a third party financial institution).

Similar to the STA, this new regime will look to the financial institution’s jurisdiction to determine what law governs the perfection of the security interest, with a number of rules to determine the financial institution’s jurisdiction (including the option of specifying a jurisdiction in the relevant agreement).

# Goodmans<sup>LLP</sup> Update

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