

• RELIANCE ON COLLATERAL DESCRIPTIONS REINSTATED AND NEW
HOPE THAT s. 7 OF THE *PPSA* (ONTARIO) (WHERE TO REGISTER)
WILL BE PROCLAIMED INTO FORCE •

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REPEALED PROVISIONS TO BE FIXED

Certain provisions of the *Personal Property Security Act* (Ontario) [the *OPPSA*], R.S.O. 1990, c. P.10, were repealed: see on the Cassels Brock & Blackwell LLP website “An Overview of Bill 152: An Act to Modernize Various Acts Administered By or Affecting the Ministry of Government Services, 2006” and “Unexpected Change to the Personal Property Security Act (Ontario): Estoppel Letters Now Always Required”. It has often been suggested that these deletions were inadvertent. In addition, there were a number of other suggested changes that were not adopted in the most recent revision of the *OPPSA*. Bill 68, *An Act to promote Ontario as open for business by amending or repealing certain Acts* [the *Act*], was passed into law on October 25, 2010 and has reinstated the repealed provisions and made further amendments. The amendments to the *OPPSA* include:

- reinstating s. 46 with the effect that when a general collateral description is provided in a financing statement, the collateral will be limited to only that which is identified in the word description. This amendment is retroactive to August 1, 2007 (see comments regarding this section below).
- amending s. 56 to allow a debtor to demand a secured party amend its registration (i) where the secured party has registered a financing statement taking a broader security interest in collateral than that provided in the security agreement and (ii) where the secured party has not adequately limited the security interest in the collateral by providing a word description of the collateral. It is expected that the enactment of this amendment will encourage more secured parties to enter collateral descriptions in the first instance. Whether we should enter a collateral description is an open question. Typically we advise secured parties not to enter a description because if the descrip-

tion is incorrect in any manner, the secured parties may limit their rights in the collateral. This is balanced against the administrative headache of having to sign waivers for other secured parties. While our advice remains the same, it is more likely that we will see more parties opt to utilize the collateral description.

- extending the time to perfect a PMSI by registration from ten days after the debtor or its agent obtains possession of the goods to 15 days. This places Ontario in the same position as all other personal property security act provinces and is a welcome change.
- amending the definition of "purchase-money security interest" ("PMSI") to exclude transactions of sale and lease back, which was inadvertently removed with the enactment of the *Securities Transfer Act, 2006*, S.O. 2006, c. 8. This amendment is not retroactive and took effect on October 25, 2010.

Ontario is the only province with a personal property security act where a collateral description is not required. When registering a financing statement, a secured party checks the box pertaining to the particular collateral (*i.e.* inventory, accounts, equipment, motor vehicle, consumer goods or other) and may, but is not required to, include a word description describing the collateral. Section 46(3) provided that where a word description was included in the financing statement, the collateral was limited by that description.

Consequently, secured parties would rely on this section prior to advancing funds to borrowers as there was no need to obtain waivers from prior secured parties acknowledging that the prior secured party's collateral was limited. Transaction costs were reduced as less documentation was required.

The amendments to the *OPPSA* provide welcome clarity as to the reliance on words of limitation in *OPPSA* financing statements. The optional descrip-

tion in a financing statement once again limits the secured party's interest in the debtor's collateral (other than rights in proceeds).

WHERE TO FILE

Determining where to file a financing statement when the collateral is a mobile good or an intangible is problematic under the current "location of debtor" rules in the *OPPSA*. Currently, under the *OPPSA*, the debtor is deemed to be located at the debtor's place of business if there is one, at the debtor's chief executive office if there is more than one place of business, or otherwise at the debtor's principal place of residence. Each location more mysterious than the last! At least the *OPPSA* can take some solace in the fact that it is not alone. All of the common law provinces' *Personal Property Security Acts* [*PPSA*] follow the same confusing directions.

However, help is on the way! In 2007, Ontario introduced the *Ministry of Government Services Consumer Protect and Service Modernization Act, 2006* [the *Modernization Act*], which, among other things, seeks to amend the *OPPSA*'s location rules. Once the *Modernization Act* is proclaimed into force, for the purposes of the *OPPSA*, you will register at either the debtor's registered office or, if it is a Canadian company, at the address set out in its articles. However, before Ontario proclaims into force these easy to follow amendments, Ontario wants the other provinces to join in. Recently, British Columbia and Saskatchewan followed suit and introduced Bill 6 — *Finance Statutes Amendment Act, 2010* and Bill 102 — *An Act*

to amend the *Personal Property Security Act, 1993*, respectively. These bills would have the same effect as the *Modernization Act* with respect to each province's *PPSA*. It is anticipated that these acts may nudge Ontario to bring its own amendments into force.

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