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Justifications for UCC Article 9's Treatment of Deposit Accounts: A Comparative Note

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**JUSTIFICATIONS FOR UCC ARTICLE 9'S
TREATMENT OF DEPOSIT ACCOUNTS: A
COMPARATIVE NOTE**

*Catherine Walsb**

INTRODUCTION

Debtor-creditor and insolvency laws in western legal traditions generally treat a defaulting debtor's assets as subject to liquidation by its creditors or their insolvency representative, with the proceeds then distributed among them in proportion to their claims. Secured creditors seek to escape this baseline principle by bargaining in advance for the right to have assets of their debtors in which they have contracted for security preferentially appropriated to the payment of their debts. Thus, a contract for security has been described as a private bargain "between A and B that C take nothing"¹ with C representing the collectivity of the collateral-giver's other creditors.

In view of the distributional consequences, legal systems traditionally have found it necessary to impose certain limitations on party autonomy in security agreements. In recent decades, these constraints have been increasingly dismantled for creditors who take security in what is popularly referred to as "cash collateral" — meaning not just cash in the strict sense of hard currency but also intangible rights that are highly liquid in the sense that the secured creditor can almost immediately acquire their cash value.

This article focuses on cash collateral in the form of a right to payment of money credited to an account with a bank or other

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¹ Lynn M. LoPucki, *The Politics of Article 9: The Unsecured Creditor's Bargain*, 80 VA. L. REV. 1887, 1899 (1994).

financial institution (deposit account). Secured transactions regimes in effect in the Canadian provinces and territories traditionally have subjected deposit accounts to the same public notice and temporal priority rules that apply to security agreements covering other intangible assets in the form of a monetary obligation owed to the debtor. In contrast, deposit accounts under Article 9 of the Uniform Commercial Code in the United States are governed by a special set of rules organized around the concept of “control.”

The Article 9 deposit account regime is increasingly promoted internationally. The UNCITRAL Legislative Guide on Secured Transactions is particularly notable.² It represents the first attempt at the international law level to articulate a comprehensive regime of security for movable assets. The close affinity between U.C.C. Article 9 and the Guide’s recommendations is such that, in the words of Tomáš Richter, it “could be called the ‘New York/ Vienna consensus.’”³ Certainly, with respect to the treatment of deposit accounts,⁴ the recommendations of the Guide replicate almost completely the Article 9 rules.⁵

Reforms aimed at aligning the treatment of deposit accounts in Canadian secured transactions law with the Article 9 (and UNCITRAL) control approach have recently been proposed. As will

² See UNCITRAL LEGISLATIVE GUIDE ON SECURED TRANSACTIONS, U.N. Sales No. E.09.V.12 (2010), available at http://www.uncitral.org/pdf/english/texts/security-lg/e/09-82670_Ebook-Guide_09-04-10English.pdf (hereinafter UNCITRAL LEGISLATIVE GUIDE). For ease of reference, the terminology and recommendations of the Guide are published in a separate publication: UNCITRAL LEGISLATIVE GUIDE ON SECURED TRANSACTIONS: TERMINOLOGY AND RECOMMENDATIONS, U.N. Sales No. E.09.V.13 (2010), available at <http://www.uncitral.org/pdf/english/texts/security-lg/e/Terminology-and-Recs.18-1-10.pdf> (hereinafter UNCITRAL TERMINOLOGY AND RECOMMENDATIONS).

³ Tomáš Richter, *The Uneasy Case for the Priority of Secured Credit: A Minskian Sequel* 4 (Oct. 1, 2013) (unpublished article), available at <http://ssrn.com/abstract=2390013>.

⁴ Instead of “deposit account,” the UNCITRAL LEGISLATIVE GUIDE uses the conceptually more accurate, but also more cumbersome, term “right to payment of funds credited to a deposit account.” For an explanation of this term, see UNCITRAL TERMINOLOGY AND RECOMMENDATIONS, *supra* note 2.

⁵ *Id.* at 49, 103-04, 125-26, 173-75.

be seen, adoption of the control approach will in effect exempt secured creditors who obtain control of a deposit account from the public notice and temporal priority rules that until now have applied to security rights in all types of monetary obligations. It will also result in a departure from the basic premise of secured creditor equality implicit in the traditional temporal priority rule by privileging the depository bank over other secured credit providers.

The principal aim of this article is to explore the justification for the exceptional treatment of deposit accounts under the Article 9 control approach. Parts I and II summarize the current Canadian rules and compares them with the Article 9 regime. Part III reviews the official justifications for the Article 9 approach and finds them less than persuasive. Part IV explores the relatively recent push to import the Article 9 treatment of deposit accounts into Canadian secured transactions law and locates the reform pressure in the desire to facilitate the use of cash collateral in the form of deposit accounts by financial actors, notably in the derivatives and securities lending markets. In light of that finding, Part V concludes by asking whether privileging the extension of credit to the financial sector represents wise policy if it comes at the potential expense of reducing the availability of and increasing the cost of credit to the real economy.

I. THE TRADITIONAL CANADIAN APPROACH TO THE TREATMENT OF DEPOSIT ACCOUNTS IN SECURED TRANSACTIONS LAW

Funds deposited to a bank account are not set aside as belonging to the customer. Rather, they become the property of the bank and are replaced by the obligation of the bank to pay the equivalent amount to the customer. Thus, in general property law, a deposit account has come to be characterized simply as a debt owed by the bank to its customer. It constitutes a sub-species of pure intangible property since its value is not reified in any tangible document capable of being negotiated, such as a cheque or a certificated investment security.⁶

⁶ See, e.g., Benjamin Geva, *Rights in Bank Deposits and Account Balances in Common Law Canada*, 28 *BANKING FIN. L. REV.* 1, 2-3 (2012); Clayton Bangsund, *The*

Consistent with this general conceptualization, the secured transactions regimes in effect in the Canadian provinces and territories⁷ traditionally have subjected deposit accounts to the same general rules that apply to other intangible assets that take the form of a monetary obligation owed to the grantor. Thus, a security right in a deposit account must be “perfected” by public registration of a notice of the security right to take effect against third parties⁸ and priority among secured creditors is ordered temporally according to the order of registration.⁹ On the debtor’s default, the secured creditor is entitled to collect payment of the value of the deposit account directly from the bank with whom the deposit account is held and may then apply the proceeds of collection in satisfaction of the obligation secured by its security interest.¹⁰

If the bank with whom the deposit account is held wishes to take a security interest in its customer’s account to secure an obligation owing to it by the customer, it does not enjoy any special exemption from these rules. Thus, the bank must register notice of its security right and its priority against outside secured creditors who have previously acquired a perfected security interest in the deposit account generally will be subject to the first-to-register priority rule. The application of that rule is subject, however, to the bank’s right, in its capacity as the debtor on the deposit account, to set-off any obligations owing to it by its customer that arise before it receives notice of a

Deposit Account & Chose in Action at Common Law & Under the PPSA: A Historical Review, 30 BANKING FIN. L. REV. 1, 22-23 (2014); Bruce A. Markell, *From Property to Contract and Back: An Examination of Deposit Accounts and Revised Article 9*, 74 CHI.-KENT L. REV. 963, 966-67 (1999).

⁷ In the province of Quebec where the civil law tradition prevails, secured transactions law is primarily found in the Civil Code rules governing hypothecary security. *See* Civil Code of Québec, S.Q. 1991, c. 64, bk. 6 (Can.). While the common law tradition prevails in the other nine provinces and the three territories, secured transactions law is primarily found in the Personal Property Security Acts (PPSAs) proclaimed in force between 1976 and 2001. *See, e.g.*, Ontario Personal Property Security Act, R.S.O. 1990, c. P.10 (Can.) [hereinafter Ontario PPSA]. *See generally* R.C.C. CUMING, CATHERINE WALSH & RODERICK WOOD, PERSONAL PROPERTY SECURITY LAW (2d ed. 2012).

⁸ *See, e.g.*, Ontario PPSA, *supra* note 7, at §§ 19, 20, 23.

⁹ *Id.* at § 30(1)(1).

¹⁰ *Id.* at § 61(1).

security right that otherwise would have priority.¹¹ The bank's set-off right, whether arising by operation of law or contractually, may be exercised regardless of whether or not it concurrently holds a security interest in the deposit account.¹²

II. THE ARTICLE 9 "CONTROL" REGIME

Under Article 9, the concept of control by a secured creditor plays a key role in the rules governing the perfection and priority of a security right in a deposit account. Control is not a unitary concept—its meaning varies according to whether the secured creditor is the bank with whom the grantor maintains the deposit account or an outside creditor.¹³ If the bank is the secured creditor, it automatically has control upon its customer's grant of security to it.¹⁴ If the secured creditor is an outside creditor, it can obtain control either by becoming the bank's customer with respect to its debtor's deposit account or by entering into a control agreement with the bank and the debtor under which the bank agrees that it will comply with instructions originated by the secured creditor directing disposition of the funds in the deposit account without further consent by the debtor.¹⁵

Obtaining control is an alternative to registration as a mode of perfecting a security interest in deposit accounts. This is so even though control does not give public notice of the potential existence of the security right to creditors and other potential competing claimants. The secured creditor's control need not be exclusive: a secured creditor has control even if the debtor retains the right to direct the disposition of funds from the deposit account as if it were unencumbered.¹⁶ Outside parties cannot require the bank to disclose whether a security right exists in the deposit account: a bank that has entered into a control agreement is not required to confirm the existence of the agreement to another person unless requested to do

¹¹ CUMING, WALSH & WOOD, *supra* note 7, at 664.

¹² *Id.* at 666-67. And *see infra*, Section IV, for the distinction between a mere set-off right and a set-off right that, when combined with other terms, amounts to a security interest in substance.

¹³ U.C.C. § 9-104(a) (2014).

¹⁴ *Id.* at § 9-104(a)(1).

¹⁵ *Id.* at § 9-104(a)(2)-(3).

¹⁶ *Id.* at § 9-104(b).

so by its customer.¹⁷ The result is a “secret lien,” the very mischief that the general requirement for perfection was intended to alleviate.¹⁸

A secured creditor who obtains control of a deposit account has priority over a secured creditor who perfects its security right by registration even if registration preceded the obtaining of control.¹⁹ The privileged status accorded to security rights perfected by control at the level of priority carries over to enforcement on default. If the secured creditor has control by virtue of its status as the depository bank, it may simply apply the funds credited to the deposit account to the obligation secured by the deposit account.²⁰ If the secured creditor is an outside creditor who has obtained control by virtue of a control agreement or because it has become the bank’s customer on the account, it may instruct the bank to pay the balance on deposit.²¹ If, however, the secured creditor is relying on perfection by registration as opposed to control, it may enforce its security right only by obtaining a court order under other law compelling the bank to pay the funds to it.²² The secured creditor has no right to demand payment simply on notification to the bank. In contrast, the depository bank, in its capacity as secured creditor with automatic control, is entitled to simply pay itself out of the funds in the account, and outside secured

¹⁷ *Id.* at § 9-342.

¹⁸ Lynn M. LoPucki, Arvin I. Abraham & Bernd P. Delahaye, *Optimizing English and American Security Interests*, 88 NOTRE DAME L. REV. 1785, 1800 (2013); Jonathan C. Lipson, *Secrets and Liens: The End of Notice in Commercial Finance Law*, 21 EMORY BANKR. DEV. J. 421, 426 (2005).

¹⁹ Under Article 9, control is the only method available for perfecting a security right in a deposit account as original collateral: U.C.C. § 9-312(b)(1) (2014). However, a security right in a deposit account perfected by control may come into conflict with one perfected by registration where the deposit account is claimed as proceeds of collateral perfected by public registration pursuant to U.C.C. § 9-315(c) and (d). In that event, the security interest perfected by control has priority under U.C.C. § 9-327(1). Under the UNCITRAL Legislative Guide, while a security right in a deposit account may be made effective against third parties by registration even when the deposit account is original collateral (recommendation 49), the secured creditor who has obtained control has priority even against a prior registered secured creditor (recommendation 103). *See* UNCITRAL LEGISLATIVE GUIDE, *supra* note 2.

²⁰ U.C.C. § 9-607(a)(4) (2014).

²¹ *Id.* at § 9-607(a)(5).

²² *Id.* at § 9-607, cmt. 7.

creditors who have obtained control are likewise entitled to self-help collection rights without the need for judicial intervention.

As between the depository bank and outside secured creditors who seek to perfect a security right in a deposit account by control, the control regime privileges the depository bank. The depository bank is not obligated to enter into a control agreement with an outside secured creditor, even if its customer so requests, and even if it does not itself hold a security right in the account.²³ If the bank does agree to enter into a control agreement, any security right the bank obtains in the deposit account has priority even if the control agreement was concluded before the bank acquired its security right.²⁴ So in practice the outside secured creditor will also need to obtain the agreement of the depository bank to waive its priority.

In theory, an outside secured creditor can be assured of priority over the depository bank by relying on the alternative method of control: becoming the bank's customer with respect to the deposit account.²⁵ This method of control gives it priority over any security interest acquired by the bank²⁶ and terminates the bank's set-off right for any claims it has against the debtor.²⁷ However, this method of control requires the cooperation of the bank, so in practice the bank's consent to waive its priority is needed.²⁸ Nor is this method of control a feasible one for operating accounts to which the debtor needs regular access.²⁹

III. OFFICIAL JUSTIFICATIONS FOR SPECIAL CONTROL RULES

The official justifications for the Article 9 control rules are not particularly convincing. With respect to the priority enjoyed by control secured creditors over those who have perfected by registration, the

²³ *Id.* at § 9-342.

²⁴ *Id.* at § 9-327(3).

²⁵ *Id.* at § 9-104(a)(3).

²⁶ *Id.* at § 9-327(4).

²⁷ *Id.* at § 9-340(c).

²⁸ See, e.g., Willa E. Gibson, *Banks Reign Supreme Under Revised Article 9 Deposit Account Rules*, 30 DEL. J. CORP. L. 819, 844 (2005).

²⁹ Markell, *supra* note 6, at 987; see also G.R. Warner, *Deposit Accounts as Collateral under Revised Article 9*, AM. BANKR. INST. J. 18 (Aug. 2000).

Official Comment states that secured creditors “for whom the deposit account is an integral part of the credit decision will, at a minimum, insist upon the right to immediate access to the deposit account upon the debtor’s default (i.e., control)” whereas those “for whom the deposit account is less essential will not take control.”³⁰ The implication here seems to be that a secured creditor who demonstrates special reliance by taking the extra steps needed to obtain control should be rewarded for its efforts by a special priority.³¹ But this justification is predicated on circular reasoning, since a secured creditor would not have to take these extra steps if priority were instead predicated on the basis of the order of registration of the security rights.

With respect to the priority generally enjoyed by the bank over outside secured creditors, the Official Comment explains that a “rule of this kind enables banks to extend credit to their depositors without the need to examine either the public record or their own records to determine whether another party might have a security interest in the deposit account.”³² But this is a conclusory statement, not a justification. After all, all secured creditors would wish to be assured of receiving an automatic super-priority over prior-perfected secured creditors. Why privilege depository banks over other suppliers of secured credit?

With respect to the automatic control enjoyed by the depository bank by virtue of its status, the official comment states that public notice is unnecessary since all actual and potential creditors are always on notice that the bank may assert a claim by virtue of its set-off rights against the deposit account.³³ The implication here is that awarding automatic control and a special priority to a depository bank’s security right does not put third parties in a more

³⁰ U.C.C. § 9-327, cmt. 3 (2014).

³¹ For an argument suggesting that this is the justification for control super-priority, see Randal C. Picker, *Perfection Hierarchies and Nontemporal Priority Rules* 74 CHI.-KENT L. REV. 1157 (1999).

³² U.C.C. § 9-327, cmt. 4 (2014).

³³ *Id.* at § 9- 104, cmt. 3 (“No other form of public notice is necessary; all actual and potential creditors of the debtor are always on notice that the bank with which the debtor’s deposit account is maintained may assert a claim against the deposit account.”).

disadvantageous position than they already occupy. It is true that set-off is not a security interest and as such is not subject to any public registration or other public notice requirement. However, a bank can only set-off obligations already owing to it by its customer at the time it receives notice of a competing claim.³⁴ The concept of automatic control, combined with the special priority accorded to the depository bank's security right, dispenses with the need for the bank to first ascertain whether notice has been received before extending credit and eliminates the potential for litigation concerning the relative timing of the receipt of notice and the extension of credit.³⁵ It follows that the concept of automatic control without the need for public notice cannot be explained simply as a neutral and logical application of the consequences of set off. Rather, it enhances the bank's position relative to the set-off rights of other obligors.

With respect to the right of the bank to refuse to disclose whether control has been obtained by an outside secured creditor, the Official Comment explains that this protects banks "from the need to respond to inquiries from persons other than their customers."³⁶ But requiring outside secured creditors to register notice of their security rights would equally relieve the bank from that burden while also serving to ensure public notice to competing creditors and other claimants.

IV. JUSTIFICATIONS FOR IMPORTING THE ARTICLE 9 CONTROL REGIME INTO CANADIAN LAW

Writing in 2000, some Canadian commentators concluded that there was no justification for importing the Article 9 regime for deposit accounts into Canadian law.³⁷ Why, they asked, should depository institutions be exempt from the general registration requirements and first-to-register priority rules applicable to the holders of security rights in other intangible obligations? And why should they enjoy what

³⁴ See, e.g., CUMING, WALSH & WOOD, *supra* note 7, at 664.

³⁵ See UNCITRAL LEGISLATIVE GUIDE, *supra* note 2, at 139, ¶ 144.

³⁶ U.C.C. § 9- 342, cmt 2 (2014).

³⁷ Ronald C.C. Cuming & Catherine Walsh, *Revised Article 9 of the Uniform Commercial Code: Implications for the Canadian Personal Property Security Acts*, 16 BANKING FIN. L. REV. 339, 364-68 (2001).

amounts in effect to a veto over the ability of a debtor to give an effective security interest in its deposit account to an outside creditor when the existing law, including the depository bank's rights of set-off, would seem to offer it adequate protection against interference with ordinary banking practices?

In recent years, the tide of opinion in Canada has swung heavily in favor of adoption of the Article 9 control approach.³⁸ Indeed, the province of Quebec already has introduced legislation to that end, and reforms are pending in the other provinces and territories.³⁹

A significant catalyst for the pending reforms was the 2009 decision of the Supreme Court of Canada in *Caisse populaire Desjardins de l'Est de Drummond v. Canada*.⁴⁰ In that case, a customer had deposited \$200,000 with a credit union subject to contractual terms that prevented the customer from withdrawing the deposit before the expiry of a five-year term and entitled the credit union to set-off any obligations owing under the line of credit it had extended to the customer and to refuse repayment of the deposit for the duration of the line of credit agreement.⁴¹

The Supreme Court of Canada concluded that, while a mere contractual set-off right without more is not a security interest, the arrangement must be characterized as a security agreement in substance when a contractual set-off right is combined with other contractual terms designed to prevent the customer from withdrawing or otherwise dealing with the funds in its account until its own

³⁸ See Ontario Bar Association, *Perfecting Security Interests in Cash Collateral* (Feb. 6, 2012), available at <https://www.oba.org/CMSPages/GetFile.aspx?guid=c020380c-6c0a-496f-b4b1-b44d6ac07eb5>.

³⁹ See Michel Deschamps, Mathieu Dubord & Mary Jeanne Phelan, *New Regime in Quebec for Security on Bank Deposits and Other Monetary Claims*, MCCARTHY TETRAULT (May 15, 2015), http://http://www.mccarthy.ca/article_detail.aspx?id=7105. See also ONTARIO MINISTRY OF GOVERNMENT AND CONSUMER SERVICES, BUSINESS LAW AGENDA: PRIORITY FINDINGS AND RECOMMENDATIONS REPORT 9 (2015).

⁴⁰ *Caisse populaire Desjardins de l'Est de Drummond v. Canada*, [2009] 2 S.C.R. 94 (Can.).

⁴¹ *Id.*

obligations to the bank are satisfied.⁴² Although the decision related to the concept of security for the purposes of income tax legislation, it was widely seen as jeopardizing the use of “cash collateral” in the form of a customer’s right to the payment of money credited to a deposit account in the context of derivatives and securities lending transactions.⁴³ Participants in these markets had thought they might protect their priority in “cash collateral” transactions by relying on “flawed asset” contractual arrangements under which the customer agrees that money deposited by the customer is not repayable until the occurrence of specified events. If these arrangements, as the *Drummond* case correctly implied,⁴⁴ are characterized as giving rise to a security right in substance, it follows that they are required to be perfected by registration, and will be subordinated to any prior-registered competing security right unless the secured creditor obtains a subordination agreement.⁴⁵ In contrast, adoption of an Article 9 control approach would enable secured creditors and particularly banks to obtain a first ranking security right to deposit accounts in cash collateral transactions without the need to register and without any risk of subordination to prior-registered secured creditors. Consequently, in the wake of the *Drummond* decision, the financial industry stepped up its lobbying efforts to import the Article 9 treatment of deposit accounts into Canadian law⁴⁶ with success now imminent.

⁴² *Id.*

⁴³ See, e.g., Anthony Duggan, *The Australian PPSA From a Canadian Perspective: Some Comparative Reflections* 11-13 (U. Toronto Law, Working Paper No. 2014-03, 2014), available at http://www.law.utoronto.ca/utfl_file/count/documents/Duggan/WPS%202014-3.pdf.

⁴⁴ CUMING, WALSH & WOOD, *supra* note 7, at 667, 143-46.

⁴⁵ Duggan, *supra* note 43, at 12.

⁴⁶ See, e.g., INTERNATIONAL SWAPS AND DERIVATIVES ASSOCIATION (ISDA), ISDA LETTER TO ALBERTA AND ONTARIO GOVERNMENTS RE PROPOSAL FOR AMENDMENTS TO THE TREATMENT OF DEPOSIT ACCOUNTS UNDER THE PPSA (Apr. 13, 2010), available at <http://www2.isda.org/regions/canada/page/3>.

CONCLUSION

Whatever the official explanation for the Article 9 control approach, the recent Canadian experience suggests that its primary purpose is to facilitate the use of deposit accounts in cash collateral transactions in derivatives and other financial markets. Dispensing with the public registration requirements and registration based temporal priority rules that traditionally have informed Canadian secured transactions law will come at a cost to creditors in the real economy. For example, secured creditors who finance a commercial debtor's operating costs, including its acquisition of inventory, will no longer be able to rely on registration to give them an enforceable security right in the debtor's deposit account. They will need to undergo the additional expense and effort of obtaining control, including negotiating the agreement of the bank with which the account is maintained to waive its own priority. Unsecured creditors are also disadvantaged. At present, they can determine whether it is worth their time and expense to obtain a judgment and garnish their debtors' deposit accounts by searching the registry to verify whether any security rights have been granted in those accounts. While these creditors still would be subject to any set off rights enjoyed by the bank, they would at least know that those set off rights would be limited to the credit extended to the bank at the time of enforcement against the bank.

Recent scholarship argues that, while facilitating the extension of secured credit has a positive impact on economic growth when it is directed to the real economy, its effect when channeled to the financial economy may be destructive, generating price bubbles and subsequent debt deflation.⁴⁷ If that argument is correct, we may yet come to regret dismantling the general requirements of secured transactions law in order to facilitate the extension of credit based on deposit account collateral in financial markets⁴⁸ while increasing the cost of and thereby

⁴⁷ For an analysis of the scholarship, see Richter, *supra* note 3.

⁴⁸ *Id.* at 10-11 (discussing the Financial Collateral Directive in the European Union, which, in a similar vein to the Article 9 control regime, seeks to exempt financial collateral from most of the formal requirements traditionally imposed on security arrangements).

diminishing the extension of credit to financiers of real economy services and products.⁴⁹

⁴⁹ This is not to reject altogether the proposition that some protection of the finality of ‘cash collateral’ transactions in financial markets may be justified to contain systemic risk. Rather, it is a plea for a more nuanced and targeted modality. In this respect, consider, for example, the amendments effected to the Canadian *Payment Clearing and Settlement Act* (S.C. 1996, c. 6, Sch.) in 2012 to add a provision (s. 8(1)(c)) to protect the finality of payments made or property delivered or transferred “in accordance with the settlement rules of designated clearing and settlement systems” notwithstanding anything in any Canadian or provincial statute (including provincial secured transactions statutes).