APPENDIX B

THE COMMERCIAL LAW STRATEGY

THE STUDY COMMITTEE ON REFORM OF SECURED TRANSACTIONS LAW

CONSULTATION QUESTIONNAIRES

The aim of the Commercial Law Strategy is to modernize and harmonize commercial law in Canada, with a view to creating a comprehensive framework of commercial statute law that will make it easier to do business in Canada, to the benefit of Canadians and the economy as a whole. The Strategy has identified two areas that appear to be particularly in need of reform. The first concerns the problems of interaction between the federal Bank Act security device and the provincial secured transactions regimes. The second involves the disparity in the rules among provincial and territorial systems dealing with security interests and hypothecs.

To address the issue of interaction between federal law and that of the provinces and territories, the Law Commission of Canada and the Uniform Law Conference of Canada have undertaken a joint project on the harmonization of the federal Bank Act security and the provincial and territorial secured transaction regimes. In addition, the Uniform Law Conference of Canada has undertaken a project on the harmonization of provincial and territorial secured transactions law. To address these issues the Uniform Law Conference of Canada has established a Study Committee on the Reform of Secured Transactions Law. The Study Committee will report back to the Law Commission of Canada and the Uniform Law Conference of Canada with recommendations with respect to the Bank Act. The Study Committee will also report back to the Uniform Law Conference of Canada on the reform of the provincial and territorial legislation.

The Committee has examined several aspects of these issues with a view to determining whether a greater degree of harmonization is possible and, if so, what approach should be taken to achieve it. Before reaching any conclusions that will be the basis for recommendations to the Uniform Law Conference and the Law Commission of Canada, the Committee wishes to get as much guidance as possible from members of the legal profession and from those affected by the operation of the law in these areas. To that

end, a large number of people and organizations involved in secured financing in Canada will be contacted, primarily by way of electronic communication, to solicit their response to the following questionnaires. The Study Committee welcomes all responses.

If you are unable to provide your response directly through completion of the on-line questionnaires, you may:

- Print the questionnaire(s) to which you wish to respond and forward your completed documents to:

  [mailing and/or FAX address]

- Download the questionnaire(s) to which you wish to respond and forward your response electronically as an e-mail attachment to: **[e-mail address]**

The logistics of administering these questionnaires limit the extent to which background information or analysis of the issues addressed can be provided in them. Consequently, the Study Committee has provided background papers that more fully explain the problems raised, and offer a discussion and analysis.

INDIVIDUALS RESPONDING TO THESE QUESTIONNAIRES ARE *STRONGLY* ENCOURAGED TO CONSULT THE BACKGROUND PAPERS PROVIDED THROUGH THE INDICATED LINKS TO ASSIST THEM IN OFFERING AN INFORMED RESPONSE TO THE ISSUES ADDRESSED.

The Committee will be greatly assisted in the formulation of its recommendations by input from respondents regarding the reasons for their views on the issues raised, and on their experience of the manner in which those issues are presently dealt with. You are urged to use the textual response boxes provided for that purpose.

THE QUESTIONNAIRES AND ACCOMPANYING BACKGROUND PAPERS MAY BE ACCESSED THROUGH THE FOLLOWING LINKS:

QUESTIONNAIRE 1: **Priority Competitions Between Bank Act Security and Provincial or Territorial Security Interests [link to questionnaire 1]**

QUESTIONNAIRE 2: **Priority Competitions Involving Proceeds of Inventory: PMSI Inventory Financers *vs.* Accounts Financers [link to questionnaire 2]**

QUESTIONNAIRE 3: **Facilitation of Cross-border Secured Financing: Harmonizing Choice of Law Rules on Security in Movable Property [link to questionnaire 3]**

QUESTIONNAIRE 4: **Anti-assignment Clauses Affecting Receivables and Chattel Paper [link to questionnaire 4]**

QUESTIONNAIRE 5: **Security Interests in Licenses [link to questionnaire 5]**

QUESTIONNAIRE 1

PRIORITY COMPETITIONS BETWEEN BANK ACT SECURITY AND PROVINCIAL SECURITY INTERESTS

INDIVIDUALS RESPONDING TO THIS QUESTIONNAIRE ARE *STRONGLY* ENCOURAGED TO CONSULT THE BACKGROUND PAPER PROVIDED THROUGH THE INDICATED LINK TO ASSIST THEM IN OFFERING AN INFORMED RESPONSE TO THE ISSUES ADDRESSED.

[LINK to Background Paper 1]

Every Canadian province and territory has enacted a law that governs the secured financing of personal property or moveables. In the Province of Quebec, this law is found in the Civil Code. In the common law jurisdictions, it is found in a statute called the Personal Property Security Act. The federal Bank Act also contains legislative provisions that create a secured financing regime which is available only to banks. The problem arises when the holder of a provincial security interest, hypothec or title-based security right comes into competition with a federal Bank Act security in the same collateral. Neither the Bank Act nor the provincial legislation provides a complete set of rules that can be used to determine which of the competing parties should have the highest ranking claim. This has produced great uncertainty in the law, in an area where certainty and predictability are highly valued. We have identified three possible options for reform.

Option A: The first option would be to do away with the federal security system through the repeal of sections 427 to 429 of the Bank Act. Banks that wished to take security rights in the personal property and moveables of their debtors would do so by taking a provincial security right.

Option B: The second option would be to retain the Bank Act security system and devise a set of priority rules that would eliminate the priority problems identified in this consultation document. Banks would continue to be able to take Bank Act security to secure their loans. The harmonization of the priority rules would mean that a more

predictable set of priority rules and more commercially sensible outcomes would be attainable when a priority competition arose between a Bank Act security and a provincial security right.

Option C: The third option would be to replace the present Bank Act system with a modernized federal secured transactions system. This new federal system would be based upon provincial secured transactions legislation. Option C would therefore involve the repeal of sections 427 to 429 of the Bank Act and the enactment of a modern federal secured transactions statute based upon the same language, concepts and structure as provincial legislation. The priority rules of this new federal statute would be harmonized with provincial law so as to provide similar priority rules (i.e., a first to register rule of priority).

After careful consideration by the Study Committee, its members have reached the unanimous view that Option A is preferred, for these reasons:

- *Fairness:* The creation of a separate secured transactions system available only to banks gives an unfair advantage to banks over other non-bank lenders.
- *Efficiency:* The co-existence of federal and a provincial secured transaction regimes leads to great inefficiencies, since interested parties must conduct multiple searches of registries before entering into transactions.
- *Effectiveness:* Historic deficiencies in provincial law that made it difficult for banks to obtain effective security in the assets of their customers have been remedied in every province and territory by highly effective secured transactions
- *Certainty:* Revision of the Bank Act security provisions might reduce, but would not eliminate, uncertainties regarding priorities as between Bank Act and non-Bank Act interests.

PLEASE INDICATE YOUR VIEW BY SELECTING <u>ONE</u> OF THE FOLLING:

- O **Option A: Abolition of the federal security system through the repeal of sections 427 to 429 of the Bank Act.**

- O **Option B: Retention of the Bank Act security system and inclusion of priority rules to clarify priorities issues.**

- **Option C: Replacement of the Bank Act security system with a modernized federal secured transactions system.**

YOU ARE URGED TO USE THE RESPONSE BOX BELOW TO:

- **Qualify your response or offer further general comment**
- **Indicate the reason(s) for your response**
- **Describe your experience of the manner in which the issues raised are likely to be addressed under the current law**

[BOX FOR TEXT ENTRY RESPONSE]

QUESTIONNAIRE 2

PRIORITY COMPETITIONS INVOLVING PROCEEDS OF INVENTORY: PMSI INVENTORY FINANCERS *VS*. ACCOUNTS FINANCERS

INDIVIDUALS RESPONDING TO THIS QUESTIONNAIRE ARE *STRONGLY* ENCOURAGED TO CONSULT THE BACKGROUND PAPER PROVIDED THROUGH THE INDICATED LINK TO ASSIST THEM IN OFFERING AN INFORMED RESPONSE TO THE ISSUES ADDRESSED.

[LINK to background paper 2]

The various provincial and territorial PPSAs have differing priority rules to deal with proceeds collateral in the form of accounts. These rules apply where a priority competition arises between a secured inventory financer claiming accounts as proceeds, generated by sale of the original inventory collateral, and a prior financer who has taken a general security interest in accounts or an outright assignment of accounts from the business debtor involved.

The policy issue raised in this context is whether or not the inventory financer should take priority over the prior-in-time accounts financer or assignee through assertion of its purchase money security interest (*pmsi*) in the accounts (assuming that the PPSA requirements for establishing *pmsi* priority have otherwise been met).

There are, among the PPSAs of the Canadian provinces and territories, three different approaches to resolution of these priority disputes:

- **Option A:** In Ontario, the inventory financer would have priority on the basis of its *pmsi*.
- **Option B:** In the Atlantic provinces, the inventory financer would have priority, also by reason if its *pmsi*, provided that it has given the accounts financer the stipulated notice.

- **Option C:** In the Western provinces and the territories, the accounts financer would have priority provided that it has given new value for its security interest in the accounts in question.

The **Civil Code** represents a distinct approach to the problem as it might arise in Quebec. Since a security interest in inventory does not extend to or continue in the accounts receivable generated by sale, a priority dispute over accounts is determined on the basis of who is first to register an interest in those accounts. In the scenario contemplated by the consultation paper, the accounts financer would win. The result is therefore substantially the same as that produced by Option C.

The Study Committee seeks your advice on two separate issues:

1. Which of the three approaches represented by the current PPSAs is preferable?
2. Is a uniform approach to these issues necessary or desirable?

PLEASE INDICATE YOUR VIEWS BY SELECTING <u>ONE</u> RESPONSE TO EACH OF THE FOLLOWING:

1. The best of the priority rules presented by the current PPSAs is:

- O **Option A**
- O **Option B**
- O **Option C**

2. The enactment of a uniform PPSA priority rule in all (or most) provinces and territories is:

- O **very important**
- O **desirable but not essential**
- O **not required**

YOU ARE URGED TO USE THE RESPONSE BOX BELOW TO:

- **Qualify your response or offer further general comment**
- **Indicate the reason(s) for your response**
- **Describe your experience in dealing with this priority issue**

[BOX FOR TEXT ENTRY RESPONSE]

Questionnaire 3

FACILITATION OF CROSS-BORDER SECURED FINANCING: HARMONIZING CHOICE-OF-LAW RULES ON SECURITY IN MOVABLE PROPERTY

INDIVIDUALS RESPONDING TO THIS QUESTIONNAIRE ARE *STRONGLY* ENCOURAGED TO CONSULT THE BACKGROUND PAPER PROVIDED THROUGH THE INDICATED LINK TO ASSIST THEM IN OFFERING AN INFORMED RESPONSE TO THE ISSUES ADDRESSED.

[LINK to background paper 3]

The secured financing market is increasingly national and international. At present, however, the cost of cross-border trade is increased by the legal risk posed by differences in the applicable substantive rules among the provinces or countries to which a financing transaction is connected. One effective means of reducing this legal risk lies in the achievement of inter-jurisdictional consensus on the "conflict of law" rules that determine which jurisdiction's substantive law applies to the issues of validity, perfection (publicity) and priority of security rights.

In the common law provinces and three territories, the applicable conflicts rules are found in the Personal Property Security Acts (PPSAs) enacted by each. In Quebec, the rules are set out in the Civil Code, in the Book on Private International Law.

The Study Committee has reached tentative conclusions on a range of issues relating to harmonization of this area of the law. It was not able to reach a consensus with respect to others. It invites your response.

PLEASE INDICATE YOUR VIEWS BY SELECTING THE APPROPRIATE RESPONSE TO THE QUESTIONS POSED BELOW. IN ADDITION, YOU ARE URGED TO USE THE RESPONSE BOXES PROVIDED TO:

- **Qualify your response or offer further general comment**
- **Indicate the reason(s) for your response**
- **Describe your experience in dealing with these issues under the current law**

<u>Issue 1</u>: Adoption of a harmonized test for locating national and multinational debtors for the purpose of determining the law applicable to the validity, publicity and priority of security rights in intangibles and 'mobile goods'.

Under both the PPSAs and the CCQ, the law of the location of the debtor governs the validity, perfection (publicity) and priority of security granted in intangible property and documentary intangibles (e.g. trade receivables, negotiable instruments) and 'mobile goods'. However, if the debtor has places of business in more than one jurisdiction, the CCQ refers to the law of the jurisdiction in which the debtor maintains its 'statutory seat' (i.e. its registered head office). In contrast, the PPSAs refer to the law of the jurisdiction in which the debtor's chief executive office is located.

For debtor enterprises created under the law of a foreign country, the Study Committee has tentatively concluded to recommends uniform adoption of a test along the lines of the current PPSA "chief executive office" test. For debtor enterprises constituted under federal or provincial/territorial law, the Committee tentatively recommends uniform adoption of a test along the lines of the registered office test in the current CCQ (and in revised Article 9 of the UCC for U.S. constituted debtor entities).

I support ____ do not support ____ the above recommendation.

[BOX FOR TEXT ENTRY RESPONSE]

<u>Issue 2</u>: Law governing the Characterization of Security Interests

To clear up any residual confusion, the Study Committee tentatively recommends that each PPSA jurisdiction confirm explicitly that the term "security interest," for the

purposes of choice of law, means a "security interest" as defined by the PPSA of that particular jurisdiction.

I support ____ do not support ____ the above recommendation.

[BOX FOR TEXT ENTRY RESPONSE]

Issue 3: Scope of Transactions Subject to Choice of Law Rules for Security

The Study Committee has tentatively decided to recommend that the CCQ be amended to explicitly confirm, in harmony with the PPSA (and Article 9), that quasi security rights, as well as rights arising under other non-possessory commercial transactions for which the Code requires publicity, be assimilated to hypothecs for the purposes of determining the law applicable to their validity, publicity and priority.

I support ____ do not support ____ the above recommendation.

[BOX FOR TEXT ENTRY RESPONSE]

Issue 4: Effect of an Unauthorized Transfer of Collateral to a Third Party Located in Another Jurisdiction

Under the current Ontario and Québec conflicts rules, a secured creditor who duly publicizes or perfects security in intangible collateral or mobile goods under the law of the jurisdiction where the debtor is located does not have to do anything more to preserve its publicity or perfected status even if the debtor later transfers the collateral to a transferee located in a different jurisdiction. In contrast, under the non-Ontario PPSAs, the secured creditor must re-perfect or re-publicize under the law of the transferee's jurisdiction to maintain the effectiveness of its security against a secured creditor or transferee dealing with the transferee.

The Study Committee has tentatively decided to recommend that the existing disharmony on this issue be resolved by the uniform adoption of a compromise rule, under which a secured creditor would be required to re-register in the jurisdiction where the transferee

has located within a stipulated "grace period" after acquiring actual knowledge of a cross-border transfer.

I support ____ do not support ____ this recommendation.

[BOX FOR TEXT ENTRY RESPONSE]

Issue 5: Choice of Law for Procedural Aspects of Enforcement

The PPSAs currently provide that procedural issues relating to the enforcement of a security interest are governed by the law of the jurisdiction in which the collateral is located in the case of tangibles, and by the law of the forum in the case of intangibles. The CCQ does not deal explicitly with the issue but the solution seems to be the same for tangible property; the position is unclear with respect to intangible property.

The Study Committee has tentatively decided to recommend that all regimes be amended to provide that the law of the forum where enforcement is pursued governs enforcement procedure.

I support ____ do not support ____ the above recommendation.

[BOX FOR TEXT ENTRY RESPONSE]

Issue 6: Choice of Law for Substantive Aspects of Enforcement

Under the PPSAs, the parties are free to agree on the substantive remedies that the secured party may exercise (although it is assumed that their freedom of contract would be subject to the mandatory enforcement provisions of the most closely connected law). The CCQ does not have a similar rule. Two approaches are possible: the law governing the validity of the security (because remedies against the collateral are closely linked with the nature of the interest of the secured party), or the *lex situs* (for policy reasons and because this is the residual rule for proprietary interests in general).

The Study Committee was unable to reach consensus on what the most appropriate harmonized choice of law approach should be.

The most appropriate resolution of the above issue is:

[BOX FOR TEXT ENTRY RESPONSE]

Issue 7: Security in Intangible and Mobile Goods: Effect of Absence of a Public Registry System under Otherwise Applicable Law

The non-Ontario PPSAs create an explicit exception to the normal application of the law of the grantor's location to issues of perfection and priority for security in intangible and mobile goods. The security must be perfected in accordance with local PPSA law if the law of the jurisdiction where the grantor is located does not provide a public registration system for giving notice of the security. The Ontario PPSA and the CCQ do not provide any equivalent exception.

The Study Committee was unable to reach a consensus on whether a harmonized policy was achievable.

The most appropriate resolution of the above issue is:

[BOX FOR TEXT ENTRY RESPONSE]

Issue 8: Effect of a Change in the Location of Tangible Assets on the Rights of a Subsequent Buyer or Lessee

All regimes currently provide that if tangible collateral subject to an extraprovincial security (or equivalent) right is relocated to the enacting jurisdiction, the publicized status of the security is preserved so long as perfection (publicity) is effected locally within a specified "grace period." Under the CCQ, there are no exceptions to this rule. In contrast, the non-Ontario PPSAs create an exception to protect buyers and lessees without actual knowledge who buy or lease before the security is perfected (publicized) locally. The

Ontario Act falls somewhere in the middle: the exception is limited to intervening sale and lease transactions involving consumer goods.

The Study Committee was unable to reach consensus on whether this issue should continue to be left to local policy or was susceptible to a nationally uniform rule, and, if so, what that rule should be.

The most appropriate resolution of the above issue is:

[BOX FOR TEXT ENTRY RESPONSE]

Issue 9: A Unitary Choice of Law Rule for Perfection (the Revised Article 9 model)?

Under the current Canadian regimes, the validity, publicity and priority of security rights in tangibles are governed by the law of the location of the collateral, and in intangibles and mobile goods by the law of the location of the debtor. Although old UCC article 9 reflected roughly the same policy, revised article 9 now bifurcates the law governing perfection and the law governing the effect of perfection or non-perfection and priority. *The law of the location of the grantor governs perfection for all forms of collateral, whether tangible or intangible*, subject to only very limited exceptions.

The Study Committee has tentatively concluded that a similar policy is undesirable in principle and unworkable in practice in a Canadian context. The Committee further noted that the inconvenience created by having different choice of law rules for perfection for different categories of collateral would be less acute if the provincial registries were linked in a way that would permit registration and searching across Canada through a single gateway. The Committee decided to recommend that the Canadian Conference on Personal Property Security Law consider structural reforms that might be undertaken to achieve national access to all provincial regimes for registration and searching.

I support ____ do not support ____ adoption of the choice of law rule implemented by Revised Article 9 of the UCC.

[BOX FOR TEXT ENTRY RESPONSE]

Issue 10: Minor Harmonization and Clarification Reforms

The Study Committee tentatively concluded that the following reforms to the current provincial and territorial conflicts rules are desirable but relatively minor and non-controversial:

- Explicit confirmation (in line with Revised Article 9 of the UCC) that the current choice of law rules governing the validity and perfection (publicity) of security rights apply to all issues of priority, not just those that arise as a consequence of perfection (publicity) or failure to perfect (publicize);

I support ____ do not support ____ the above recommendation.

- Repeal of section 5(5) of the Ontario PPSA requiring registration or repossession within twenty days to preserve an extra-provincial seller' rights of revendication of goods later brought into Ontario;

I support ____ do not support ____ the above recommendation.

- Repeal of the reference to the choice of law rules of the applicable legal system (renvoi) in the choice of law rules for intangible collateral and movable goods in the non-Ontario PPSAs

I support ____ do not support ____ the above recommendation.

- Clarification that the law of the jurisdiction where the collateral is situated when a possessory interest in money or other negotiable collateral is acquired applies in a dispute with the holder of a non-possessory security right in that collateral;

I support ____ do not support ____ the above recommendation.

- Explicit confirmation in the PPSAs that the term "attaches" in the PPSA choice of law rules does not refer to the domestic attachment rules of the PPSA, but to the rules governing the creation of a security interest under the applicable law;

I support ____ do not support ____ the above recommendation.

- Explicit confirmation in the PPSAs that the law governing the validity, perfection, and priority of a security right in proceeds of original collateral is the law that would govern a security interest in proceeds of that kind if they were original collateral.

I support ____ do not support ____ the above recommendation.

[BOX FOR TEXT ENTRY RESPONSE]

Questionnaire 4

ANTI-ASSIGNMENT CLAUSES AFFECTING RECEIVABLES AND CHATTEL PAPER

INDIVIDUALS RESPONDING TO THIS QUESTIONNAIRE ARE *STRONGLY* ENCOURAGED TO CONSULT THE BACKGROUND PAPER PROVIDED THROUGH THE INDICATED LINK TO ASSIST THEM IN OFFERING AN INFORMED RESPONSE TO THE ISSUES ADDRESSED.

[LINK to background paper 4]

Apart from Ontario, each provincial and territorial PPSA in Canada ensures the validity of a security interest in, and the transfer of, accounts receivable and chattel paper despite any contractual term prohibiting or restricting that security interest or transfer

The effect of a contractual anti-assignment clause is unclear at common law and under the Civil Code. At common law, the jurisprudence is clear that an anti-assignment clause can preclude the assignee from acquiring a right of action against the account debtor. As to the common law validity of an assignment as between the assignor and the assignee, the authorities do not clearly establish that every assignment would be valid. There is strong support for the view that, as a matter of public policy, an anti-assignment clause cannot operate to invalidate an assignment of the "fruits of a contract" in the hands of the assignor, as between the assignor and the assignee. However, in the views of some, there remains a basis to conclude that a sufficiently broadly worded anti-assignment clause may render that type of assignment invalid even as between the assignor and the assignee. Moreover, where the assignee has knowledge of the anti-assignment clause, the tort of inducing breach of contract could provide the basis for additional uncertainty as to the validity of the assignment as between the assignor and the assignee.

The validity and effects of anti-assignment clauses are not addressed explicitly in the Civil Code. However, some analysts believe that an assignment in breach of an anti-assignment clause would be valid, not only as between the assignor and assignee and as against third parties but also against the debtor, by virtue of the general codal articles

which limit the effectiveness of stipulations which attempt to restrict the free alienation of property rights by contract.

The arguments in favour of enforcing an anti-assignment clause centre largely around the theory that contracting parties (*i.e.* the creditor assigning its account receivable and the account debtor which owes that receivable to the creditor) should be free to strike whatever bargain they please and their agreement should be respected. Anti-assignment clauses preserve the account debtor's right of set-off in an on-going relationship with the creditor.

However, the right of an account debtor to restrict a transfer in order to protect its right of set-off must be weighed against the consequences of enforcing such clauses. A clause prohibiting the assignment of payment rights could severely restrict sources of financing that would otherwise be available to assignors if the law did not give effect to such a clause.

On balance, the Study Committee prefers a policy favouring the assignability of accounts and chattel paper and the granting of security interests therein. This policy choice has been made in each PPSA jurisdiction[1] (apart from Ontario), in Article 9 and in the recently adopted United Nations Convention on the Assignment of Accounts Receivable in International Trade.

PLEASE INDICATE YOUR VIEWS BY SELECTING THE APPROPRIATE RESPONSE TO THE QUESTIONS POSED BELOW.

1. Should the Ontario PPSA be amended to bring it into conformity with all other PPSAs by ensuring the validity of a security interest in, or transfer of, accounts receivable and chattel paper despite any contractual term prohibiting or restricting that security interest or transfer?

- O **Yes**
- O **No**

[1] For example, see section 41(9) of the Saskatchewan PPSA. As noted in the text, the Ontario PPSA has no corresponding provision.

2. Should all of the PPSAs be amended to extend such a provision so that it applies to partial assignments – not just to whole assignments?

- O **Yes**
- O **No**

3. Should the Quebec Civil Code be amended to produce the same result as currently in the non-Ontario PPSAs – to ensure the validity of an assignment of accounts receivable and chattel paper despite any contractual term prohibiting or restricting that assignment?

- O **Yes**
- O **No**

4. If the Quebec Civil Code is so amended, should the amendment also apply to partial assignments – not just to whole assignments?

- O **Yes**
- O **No**

5. In practice, do businesses experience difficulty obtaining secured financing because of anti-assignment clauses?

- O **Yes**
- O **No**

6. In practice, do businesses experience difficulty carrying out securitization transactions because of anti-assignment clauses?

- O **Yes**

O **No**

YOU ARE URGED TO USE THE RESPONSE BOX PROVIDED TO:

- **Qualify your response or offer further general comment**
- **Indicate the reason(s) for your response**
- **Describe your experience in dealing with these issues under the current law**

[BOX FOR TEXT ENTRY RESPONSE]

QUESTIONNAIRE 5

SECURITY INTERESTS IN LICENCES

INDIVIDUALS RESPONDING TO THIS QUESTIONNAIRE ARE *STRONGLY* ENCOURAGED TO CONSULT THE BACKGROUND PAPER PROVIDED THROUGH THE INDICATED LINK TO ASSIST THEM IN OFFERING AN INFORMED RESPONSE TO THE ISSUES ADDRESSED.

[LINK to background paper 5]

In some provinces (such as Ontario), the PPSA does not provide a clear test as to whether licences are included within the meaning of "personal property" used in the Act; and in those provinces it is often difficult to apply the judicially created test to determine whether a licence is or is not personal property. In other provinces (such as Saskatchewan), the PPSA clearly addresses that question and indicates that transferable licences are "personal property" for the purpose of the Act, but non-transferable licences are excluded.

There may be a significant public policy reason for not recognizing the creation of a security interest in a licence the transfer of which is prohibited by statute. This is particularly so where the licence has been issued by government. This public policy reason may be more significant for some types of governmental licences (*e.g.* a licence to practice medicine) than is the case for other types of governmental licences (*e.g.* some types of quotas or licences that are "bought and sold" with the approval of governmental regulators despite a statutory prohibition against transfer; in these cases, the regulator cancels the seller's licence and issues a new licence to the buyer).

Where a licence constitutes "personal property" and the law recognizes the validity of a security interest in that licence, the issue arises as to the extent to which the secured party enforce its security interest in the licence. This question is answered in at least three different ways in different jurisdictions. The Study Committee has tentatively concluded that the law should recognize the validity of the security interest in all licences despite terms in the licence or in applicable law that prohibit the transfer of, or the creation of a security interest in, the licence.

The Study Committee seeks your views about the appropriate resolution of a number of issues in this area. Those issues are set forth below. The types of licences addressed by the Study Committee include both governmental and contractual licences, and both transferable and non-transferable licences.

PLEASE INDICATE YOUR VIEWS BY SELECTING THE APPROPRIATE RESPONSE TO THE QUESTIONS POSED BELOW.

1. **Should transferable licences be included within the definition of personal property?**

   - O **Yes**
   - O **No**

2. **Should non-transferable licences be included within the definition of personal property?**

   - O **Yes**
   - O **No**

3. **Should the PPSA uphold the validity of a security interest in a licence despite any terms in the licence or other applicable law that prohibit the transfer of, or the creation of a security interest in, the licence?**

   - O **Yes**
   - O **No**

4. **Should the PPSA prevent a licensor from terminating a licence in the event a security interest is created in violation of the licence terms or applicable law?**

   - O **Yes**
   - O **No**

5. If a security interest in a licence is recognized, should the secured party be precluded from using the debtor's rights under the licence or from enforcing its security interest in the licence, but be entitled to receive any proceeds of disposition of the licence?

- **Yes**
- **No**

6. Should the same approach be taken with other general intangibles such as contracts, permits or franchises?

- **Yes**
- **No**

7. In practice, do businesses experience difficulty obtaining secured financing because of the current uncertainties in this area of law?

- **Yes**
- **No**

YOU ARE URGED TO USE THE RESPONSE BOX PROVIDED TO:

- **Qualify your response or offer further general comment**
- **Indicate the reason(s) for your response**
- **Describe your experience in dealing with these issues under the current law**

[BOX FOR TEXT ENTRY RESPONSE]