UNIFORM LAW CONFERENCE OF CANADA

CIVIL LAW SECTION

REFORM OF THE LAW OF SECURED TRANSACTIONS

REPORT OF THE WORKING GROUP 2002-2003

Prepared by Co-Chairpersons
Professor Ronald C.C. Cuming & Professor Tamara M. Buckwold

Fredericton, New Brunswick
August 2003

TABLE OF CONTENTS

REPORT OF THE WORKING GROUP ON REFORM OF CANADIAN SECURED TRANSACTIONS LAW
2002-03

Background

[1] As part of the Commercial Law Strategy of the Uniform Law Conference, a working group on the reform of Canadian secured transactions law was created. The chairpersons of the Group during the reporting period were Professor Ronald Cuming of the College of Law, University of Saskatchewan, Professor Catherine Walsh of the Faculty of Law, McGill University (until January, 2003) and Professor Tamara Buckwold of the College of Law, University of Saskatchewan (January 2003 – present).

[2] This is the third year of the Committee's operation. It held seven in person or conference call meetings: October 1/02, November 2/02, January 17-18/03, March 14-15/03, March 28-29/03, April 25-26/03, May 28/03 and June 5/03

Membership of the Committee

[3] Ian Binnie (Blake Cassels & Graydon LLP, Ontario) (new member in 2002); Professor Tamara Buckwold (University of Saskatchewan), Michael Burke (Blake, Cassels & Graydon LLP, Ontario) (new member in 2002); John Cameron (Torys LLP, Ontario), Arthur Close (ULCC Director, British Columbia Law Institute), Professor Ronald Cuming (University of Saskatchewan), Michel Deschamps (McCarthy Tétrault LLP, Quebec), Professor Catherine Walsh (McGill University) Professor Roderick Wood (University of Alberta), Professor Jacob Ziegel (Professor Emeritus, University of Toronto) and Hélène Yaremko-Jarvais (ULCC Commercial Law Strategy). Kenneth Morlock (Fasken Martineau DuMoulin LLP, Ontario) is a member of the Group but was unable to participate in its deliberations.

Mandate of the Committee

[4] The mandate of the Committee is to develop recommendations that might be used by the Uniform Law Conference of Canada to encourage greater harmonization and ongoing modernization of the provincial and territorial laws dealing with secured transactions in personal (movable) property.

Approaches to the Mandate

[5] The approach employed by the Committee since its formation has been to attempt to develop a set of recommendations relating to selected issues on which broad support for reform could likely be obtained. The issues identified were to have significance for all PPSA jurisdictions and Quebec.

[6] At its 2002 meeting, the Civil Law Section of the ULC requested that the Group continue its research and consultations on the issues the Group had identified, and pursue its mandate to develop recommendations to encourage greater harmonization and ongoing modernization of laws dealing with secured transactions in personal property. It expressed its interest in seeing the more general work of Professors Cuming and Walsh completed and requested that a draft Act and commentaries be prepared for consideration of the Conference at its 2003 meeting.

[7] At its first meeting following the 2002 ULC meeting, the Group examined the approach it should take to implement the instructions of the Civil Law Section. It was evident that if the Group shifted its focus to the development of a new uniform act, its Ontario members would be required to devote a very substantial amount of time and effort to a project that would be extremely unlikely to have any effect within their jurisdiction, and they might consequently find it necessary to withdraw from the work of the Group. Given that there is demonstrably no interest in the adoption of a uniform act in Ontario, the need to achieve greater convergence between Ontario and the other jurisdictions was therefore seen to be incompatible with development of a uniform act as the primary enterprise of the Group. It was concluded that the continuation of Ontario representation on the Group was essential, and would be critical in moving towards greater convergence among jurisdictions. Consequently, while the development of a uniform act remained on the working agenda of the Group, it was not addressed as its immediate objective.

[8] It was further noted that much of the Cuming-Walsh report consists of recommendations that are new to both the existing CCPPSL Act and to the Ontario Act. As such they should be of interest to all common law jurisdictions, including Ontario.

[9] The Group also had to address the request that it assume the important role of assessing the changes to the PPSAs proposed by the Uniform Securities Transfer Act (USTA) Task Force of the Canadian Securities Administrators, in order to achieve a workable interface between the proposed USTA and the PPSAs. It was apparent that this would be a complex, time-consuming and urgent task, given the requirement that it be completed by early summer of 2003 in order to meet the timeline of the USTA Task Force. The immediate need to finish the Group's work on section 427 of the Bank Act was also addressed.

[10] Finally, the Group took note of its potential role in assessing the Law Commission's paper on security interests in intellectual property. It was agreed that, should time permit, this matter would be addressed.

NATIONAL HARMONIZATION

[11] The Group decided to proceed with the process that had been started in 2001-02 with the preparation of background papers on areas of secured financing law that had been identified as being of significant interest in all provinces. These areas were:

- The bank security regime provided by section 427 of the Bank Act and the problems resulting from the conceptual conflict between this specialized system and the general provincial secured financing regimes (to be carried out in cooperation with the Law Commission of Canada).
- Harmonization of conflict of laws rules, including consideration of the conflicts features of Revised Article 9 (2001) of the U.S. Uniform Commercial Code that might be adapted to Canada.
- Purchase money security interests (including the priority of a security interest in accounts as proceeds, refinancing and cross-collateralization).
- Anti-assignment clauses affecting accounts and chattel paper.
- Security interests in licenses,

[12] The Group decided that, before making final recommendations on these matters, it would undertake a consultation process. Various approaches were explored. The principal

approach adopted was to create an interactive web page linked to the ULC web page for purposes of obtaining input from interested persons and organizations. The background papers prepared by Group members (Appendix A) along with related questionnaires (Appendix B) were posted on the web page. Approximately 1400 potential respondents (whose email addresses were obtained from various sources) were informed of the web page. The Law Commission also published the background papers and questionnaires on its web page. In addition, hardcopy versions of the background papers and questionnaires were mailed out to a wide range of organizations thought to be interested in PPSA law reform. Descriptions of the issues addressed and the consultation process were published in the February 2003 edition of CCH's Commercial Law Times, the February 2003 issue of CCH's Legal eMonthly, the March 2003 issue of BAR and the January 2003 issue (Volume 22, No. 2) of Imperfections published by the Ontario Bar Association.

[13] A disappointingly low number of responses were received. It is not clear why this was the case, though one factor may have been the serious difficulties that were encountered in the design and operation of the interactive web page.

[14] The Group reviewed the responses to the questionnaires that were received and took them into account (where appropriate) in determining whether it was in a position to finalize recommendations on the points addressed in the consultation process. What follows is a summary of the Group's conclusions including final recommendations. Since the reasons underlying our recommendations already appear in the consultation papers, they will not be repeated here.

Questionnaire 1: Bank Act Security

[15] The vast majority of responses favoured elimination of *Bank Act* security. It was noted that there were no responses from the affected financial community as such. Of particular note was the fact that the Canadian Bankers Association and other pertinent bodies chose not to respond with a view in opposition to that represented by the consultation paper.

[16] Conclusion**:** The response to the survey, including the response from Quebec, supports the conclusion of the Group that the ULC should recommend repeal of the provisions of the *Bank Act* creating a regime for security interests in personal property distinct from the PPSA and CCQ regimes.

Questionnaire 2: Priority Competitions Involving Proceeds of Inventory: PMSI Inventory Financers vs. Accounts Financers

[17] The response to the questionnaire reflected a mixed view as to the best rule, though the indication was that a uniform rule is desirable. The Group concluded that it was not able to make a recommendation in the absence of extensive additional research regarding prevailing financing practices.

Questionnaire 3: Harmonizing Choice of Law Rules on Security in Movable Property

[18] *Issue 1: 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'*

The responses to the questionnaire were uniformly in support of the Group's tentative recommendations on this issue. The Group therefore confirms its recommendation that the relevant choice of law provisions of the PPSAs and the CCQ be amended to provide:

- That debtor (grantor) enterprises constituted under the law of a foreign country be considered to be located in the jurisdiction where the "chief executive office" (centre of administration) is located.

- That the location of debtor enterprises constituted under federal or provincial/territorial law be determined according to a test akin to the registered office test in the current CCQ (and in revised Article 9 of the UCC for US constituted debtor entities).

[19] *Issue 2: Law governing the Characterization of Security Interests.*

There was wide support for the Group's tentative recommendation that all PPSAs be amended to confirm explicitly that the term "security interest," for the purposes of

applying the choice of law in the PPSAs, means a "security interest" as defined by the PPSA of each enacting jurisdiction. That recommendation was accordingly confirmed.

[20] *Issue 3: Scope of Transactions Subject to Choice of Law Rules for Security*.

General support was expressed for the Group's tentative recommendation that the CCQ be amended to explicitly confirm, in harmony with the PPSAs (and UCC Article 9), that quasi-security rights (e.g. instalment sales, financing leases), as well as rights arising under other non-possessory commercial transactions for which the Code requires publicity (e.g. assignments, leases), be assimilated to hypothecs for the purposes of determining the law applicable to their validity, publicity and priority. The recommendation was therefore confirmed.

[21] *Issue 4: Effect of an Unauthorized Transfer of Collateral to a Third Party Located in another Jurisdiction.*

General support was expressed for the Group's tentative recommendation that the existing disharmony on this issue be resolved by the uniform adoption in both the PPSAs and the CCQ of a compromise rule, under which a secured creditor, in the event of a cross-border transfer of collateral, would be required to re-register or otherwise perfect in the jurisdiction where the transferee is located within a stipulated "grace period" after acquiring actual knowledge of the transfer. The recommendation was confirmed.

[22] *Issue 5: Choice of Law for Procedural Aspects of Enforcement*

There was general support for the Group's tentative recommendation that all PPSAs be amended, and the CCQ be clarified if necessary, to provide that procedural issues relating

to the enforcement of a security right against the encumbered assets be governed by the law of the jurisdiction in which enforcement action is pursued. The recommendation was accordingly confirmed.

[23] *Issue 6: Choice of Law for Substantive Aspects of Enforcement*

The Group received mixed responses on the issue of most appropriate law to govern the substantive aspects of enforcement. In the end, the Group concluded that this issue is more appropriately governed by general principles of private international law, including the principles that determine when the mandatory substantive enforcement policies of a particular jurisdiction should override the enforcement policies of the law of the jurisdiction chosen by the parties to govern their security relationship. No legislative reform recommendation is therefore made.

[24] *Issue 7: Security in Intangible and Mobile Goods: Effect of the Absence of a Public Registry System under Otherwise Applicable Law.*

Although the Group was unable to reach a consensus on a harmonized policy on this point, it was agreed that the need for uniformity was not pressing.

[25] *Issue 8: Effect of a Change in the Location of Tangible Assets on the Rights of a Subsequent Buyer or Lessee.*

The PPSAs and the CCQ currently provide that if tangible assets subject to an extraprovincial security (or equivalent) right are 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; the non-Ontario PPSAs protect buyers and lessees who buy or lease without actual knowledge of the security before it is perfected (publicized) locally; the Ontario PPSA protects buyers and lessees only in the case of tangible assets acquired as consumer goods. There was general support for the Group's tentative recommendation in favour of a uniform policy in line with the current policy of the non-Ontario PPSAs. This recommendation was therefore confirmed.

[26] *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. Under revised Article 9, the choice of law for publicity in the form of registration is bifurcated from the choice of law for priority; publicity by way of registration is uniformly governed by the law of the location of the debtor, whereas the effects of publicity and priority continue to be governed, in the case of tangible assets, by the law of their location. The Group's

tentative recommendation that the current Canadian unitary approach be retained was supported by respondents, and this recommendation was accordingly confirmed.

[27] *Issue 10: Minor Harmonization and Clarification Reforms*

The Group's tentative recommendations on the following relatively minor conflicts issues received general support and were confirmed:

- The addition of explicit language in both the PPSAs and the CCQ (in line with Revised Article 9 of the UCC) to confirm that the choice of law rules governing the 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).
- 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 over goods later brought into Ontario;
- 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;
- Explicit confirmation in the PPSAs 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 priority dispute with the holder of a non-possessory security right in the same collateral;
- 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;

- 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.

Questionnaire 4: Anti-assignment Clauses Affecting Receivables and Chattel Paper

[28] The following tentative recommendations of the Group were supported by a significant majority of the respondents and were confirmed:

- The Ontario PPSA be amended to bring it into conformity with all other PPSAs by confirming the validity of a security interest granted in, or a transfer of, accounts receivable and chattel paper despite any contractual term prohibiting or restricting that security interest or transfer.
- All of the PPSAs be amended to confirm the validity of partial assignments as well as assignments of an entire obligation.
- The Quebec Civil Code be amended to bring it into conformity with the PPSAs by confirming the validity of a security interest granted in, or a transfer of, accounts receivable and chattel paper despite any contractual term prohibiting or restricting that security interest or transfer. This amendment should apply to partial assignments as well as to assignments of an entire obligation.

Questionnaire 5: Security Interests in Licenses

[29] The Group concluded that this questionnaire raises significant and controversial issues that require further consultation and discussion before recommendations can be advanced.

INTERFACE OF PPSAs AND UNIFORM SECURITIES TRANSFER ACT (USTA)

Background

[30] In June of 2002 the Uniform Securities Transfer Act Task Force created by the Canadian Securities Administrators (CSA) released the draft USTA and proposed amendments to the Ontario Personal Property Security Act and the Alberta Personal Property Security Act (as representative of the CCPPSL Act in force in all common law jurisdictions other than Yukon and Ontario). The proposed changes to the PPSAs were designed to accommodate new approaches to interests in securities contained in the USTA. These new approaches would affect the way in which security interests can be taken and perfected in securities, and entail a new set of priority rules addressing competing security interests in securities. They also affect the conflict of laws rules applicable to security interest in securities.

The Role of the Working Group

[31] The CSA Task Force provided an extensive package of material to the Working Group with a letter dated June 26, 2002 requesting that the Working Group examine the proposed changes to the PPSAs relating to security interests in securities. Given the importance of this developing area of the law and its effect on aspects of personal property security law, the Group decided to accede to the request. Several meetings of the Group (most attended by Mr. Spink and some attended by Mr. Max Pare of the Ontario Securities Commission) were devoted to this matter, and a great deal of background work was done by Group members. The outcome is a series of recommendations (i) accepting many of the changes proposed by the CSA Task Force, (ii) proposing additional or alternative changes, (iii) rejecting the changes proposed, or (iv) modifying some of the changes proposed. The Group also recommended changes to a few provisions of the Uniform Securities Transfer Act. Some of these recommendations were accepted while others are under consideration by the Task Force.

Background to the USTA and Proposed PPSA Changes

[32] The objective of the USTA is not to change securities holding practices, but to provide a clear and certain legal foundation for the practices that already dominate the market, especially in the indirect holding system. The key concept in the USTA is the "security entitlement", which is the term used to describe the special property interest of a person who holds a financial asset in a securities account with a securities intermediary. The USTA defines a security entitlement as "the rights and property interest of an entitlement holder with respect to a financial asset specified in Part 6 [of the USTA]".

[33] The rights and property interest of an entitlement holder specified in Part 6 may be summarized as follows:

- The entitlement holder does not take the credit risk of the intermediary's other business activities; that is, property held by the intermediary is not subject to the claims of the intermediary's unsecured creditors;
- The intermediary will maintain a one-to-one match between the assets that it itself holds and all of the claims of its entitlement holders;
- The intermediary will pass through to the entitlement holder payments or distributions made with respect to the financial asset;
- The intermediary will exercise voting rights and other rights and privileges of ownership of the financial asset in the fashion directed by the entitlement holder;
- The intermediary will transfer or otherwise dispose of the financial asset at the direction of the entitlement holder; and
- The intermediary will act at the direction of the entitlement holder to convert the security entitlement into any other available form of holding, e.g. obtain and deliver a share certificate.

[34] *A new distinction: direct vs. indirect instead of certificated vs. uncertificated*

A security entitlement is a unique form of property interest, not merely a personal claim against an intermediary. The security entitlement concept provides a number of advantages over existing law, all of which derive from the basic fact that it constitutes a coherent description of the unique property interest that is central to the indirect holding system. This facilitates the definition and application of clearer and more certain legal

rules than those currently extant. What follows are specific examples of these advantages. The format of the old rules was confusing, largely because there was no clear distinction between the rules governing the direct as distinguished from the indirect holding systems. There was, however, a definite demarcation between the rules governing certificated as distinguished from uncertificated securities. Since the USTA recognizes that the much more important distinction is between the direct and indirect holding systems, the rules applicable to those systems respectively are clearly differentiated.

[35] The distinction between certificated and uncertificated securities is retained, but is of diminished significance. It is relevant only to the relationship between the issuer and the registered owner. Uncertificated securities may be held in either the direct or indirect holding systems, so both systems include rules dealing with them. This distinction is reflected in a number of organizational changes to the governing legislation which should make it easier to understand.

[36] *The entitlement holder's rights are only against its intermediary*

This is not a change in the law. It merely clarifies a reality of current practice that was obscured by the old rules. Conceptually, the old rules define the property interest of an entitlement holder in terms of physical objects (certificates) that were normally held by an upper-tier intermediary (depository). This provides a legal foundation for the notion that the entitlement holder, or someone claiming through or against the entitlement holder, might be able to trace a property interest in a given security all the way to the depository. That notion is, however, impractical and inconsistent with the need for certainty in the settlement system.

[37] The revised rules make it clear that the entitlement holder's rights may only be asserted against its immediate intermediary. This locates the entitlement holder's property interest with the entitlement holder's intermediary, greatly simplifying the situation. So, for example, it becomes clear that a creditor wishing to seize the entitlement holder's property must deal with that intermediary.

[38] *Coherent choice of law rules*

Coherent choice of law rules are extremely important to ensure legal certainty in view of the massive and still growing number of cross-border securities transactions. The traditional use of a *lex situs* rule remains workable for certificated securities but is inappropriate for uncertificated securities, for securities held through a clearing agency, and, most importantly for investment property that is indirectly held through a broker or other intermediary.

[39] Like UCC Article 8 (and Article 9), the USTA (and associated revised PPSA rules) provides much clearer choice of law rules designed to respond to the realities of the diverse securities transfer and holding systems. For example, issues relating to the property and third party effects of a property right or a security right in a security entitlement are governed by the law of the jurisdiction in which the intermediary is located as determined by the agreement of the securities intermediary and its customer (with default connecting factors specified in the absence of such an agreement). This approach enables the parties to a transaction to order their affairs in accordance with a single predictable governing law.

[40] *Finality of settlement*

Finality of settlement means that the transfer of a security, if performed according to certain rules, cannot be unwound. Finality has been a key objective of settlement rules since long before the advent of the indirect holding system. The early transfer rules applied negotiable instruments principles to stock certificates, so that a bona fide purchaser for value without notice acquired shares free from all adverse claims.

[41] Over the years, revisions to the transfer rules were designed, with general success, to extend the finality principle to other types of certificated securities. However, difficulties in both concept and practice arose from the old rules' application of negotiable instruments concepts to transactions involving securities held in the indirect holding system.

[42] The USTA abandons the terms "bona fide purchaser" and "good faith purchaser" in favour of rules that more clearly state when a purchaser does (or does not) obtain

protection against adverse claims. The new term used is "protected purchaser". The USTA narrows, and thereby clarifies, the method of effectively asserting adverse claims and the rights and duties of intermediaries and issuers in respect of such claims.

[43] *Security interests in securities and security entitlements*

The old rules apply pledge concepts that relied upon deemed delivery and possession to perfect a security interest in indirectly-held securities. Pledge concepts are inherently incompatible with the intangible nature of the rights of entitlement holders in the indirect holding system. This produces uncertainty. Use of the concept of security entitlement to accurately describe the property interest involved permits the revised rules to operate more clearly and predictably.

[44] Under the revised PPSA rules, a security interest in "investment property" may be perfected by "control". "Investment property" includes securities, security entitlements

and securities accounts. This is intended to facilitate the common practice of granting a creditor a charge against the entire contents of a securities account.

[45] "Control" basically means that the creditor has taken whatever steps are necessary to be in a position to sell the collateral without any further action by the debtor. This does not change the established method of perfecting a pledge of directly-held certificated securities: possession is control. With respect to security entitlements, the creditor may, with the debtor's consent, obtain control by entering into an agreement with the debtor's intermediary to act on the creditor's instructions, or by having the security entitlements transferred into the creditor's own account.

PROPOSED PPSA CHANGES AND WORKING GROUP'S ASSESSMENT

[46] Set out below are the changes to the PPSAs that have been proposed by the CSA Task Force, and the Working Group's assessment of those changes. Additional changes put forward by the Working Group are also noted. Unless otherwise indicated, the Working Group recommends the adoption of the Task Force proposals. The differences between the Ontario PPSA and the CCPPSL Act require that the two models be addressed separately, as indicated by headings. References to the CCPPSL Act are to the model PPSA prepared by the Canadian Conference on Personal Property Security Law, which provided the basis for all provincial PPSAs other than the those of the Yukon and Ontario. References to section numbers are to the Alberta version of the CCPPSL Act.

[47] CSA Task Force changes to the existing Acts are underlined or indicated by strike through in the case of deletions. ULCC Working Group changes to Task Force changes and Working Group changes to the existing Act are italicized. Some slight modification to this scheme is found in the conflicts section as noted there. Except as otherwise indicated, CSA Task Force changes are recommended by the Working Group**.**

Definitions

CCPPSL MODEL PERSONAL PROPERTY SECURITY ACT

1(1) In this Act,

> **(b) "account" means a monetary obligation not evidenced by chattel paper or an instrument, whether or not it has been earned by performance, <u>but does not include investment property</u> *or a monetary obligation evidenced by investment property;***

Working Group Comment or Recommendation

[48] The additional words are required to remove any ambiguity with respect to investment property in the form of debt obligations.[1]

> **(c.1) <u>"broker" means a broker as defined in the Uniform Securities Transfer Act;</u>**
> **(e.1) <u>"certificated security" means a certificated security as defined in the Uniform Securities Transfer Act;</u>**

[1] The Task Force is of the view that the wording recommended by the Group may create ambiguity.

(h.1) "commodity account" means an account maintained by a commodity intermediary in which a commodity contract is carried for a commodity customer;

(h.2) "commodity contract" means a commodity futures contract, a commodity futures option or other similar contract that is

(i) traded on or subject to the rules of a commodity futures exchange recognized or otherwise regulated by the Alberta Securities Commission or by a securities regulatory authority of another province, or

(ii) traded on a foreign commodities futures exchange and is carried on the books of a commodity intermediary for a commodity customer;

(h.3) "commodity customer" means a person for which a commodity intermediary carries a commodity contract on its books;

(h.4) "commodity intermediary" means a person that

(i) is registered as a dealer permitted to trade in commodity contracts, whether as principal or agent, under the Securities Act or the securities laws or commodity futures laws of another province, or
(ii) in the ordinary course of its business provides clearance or settlement services for a commodity futures exchange recognized or otherwise regulated by the Alberta Securities Commission or by a securities regulatory authority in another province;

Working Group Comment or Recommendation

[49] The USTA does not deal with commodity contracts since they are not "securities"

or "financial assets" (USTA s. 20) and they are not transferred in the normal sense. However, there is a need to address security interests in commodity contracts and commodity accounts and the concept of "control" works well in this context. Consequently, many of the proposed changes to the PPSAs applicable to securities should be applied to security interests in commodity contracts. See the proposed new definition of "investment property" in section (x.1).

(o.1) "entitlement holder" means an entitlement holder as defined in the Uniform Securities Transfer Act;

(o.2) "entitlement order" means an entitlement order as defined in the Uniform Securities Transfer Act;

(p.1) "financial asset" means a financial asset as defined in the Uniform Securities Transfer Act;

[Delete the word **"security"** in clauses **(v) "goods"**; **(w) "instrument"**; **(x) intangible"]**

(x.1) "investment property" means a security, whether certificated or uncertificated, security entitlement, securities account, commodity contract, or commodity account;

(gg) "personal property" means goods, chattel paper, ~~a security~~ investment property, a document of title, an instrument, money or an intangible;

(jj) "proceeds" means identifiable or traceable personal property, including…
(c) rights arising out of, or property collected on, or distributed on account of, collateral that is investment property;

Working Group Comment or Recommendation

[50] The indicated amendment of the definition of "proceeds" was accepted by the Group on the basis that it applies only to investment property. In any other context, the concept of "proceeds" entails property resulting from a dealing with original collateral. Here, "rights arising out of" investment property may include, for example, the right to payment of a dividend once declared, even though the underlying securities have not been dealt with by the debtor.

(ll) "purchase-money security interest" means

(i) a security interest taken or reserved in collateral, other than investment property, to secure payment of all or part of its purchase price,

(ii) a security interest taken in collateral, other than investment property, by a person who gives value for the purpose of enabling the debtor to acquire rights in the collateral, to the extent that the value is applied to acquire those rights

(qq.1) "securities account" means a securities account as defined in the Uniform Securities Transfer Act;

(qq.2) "securities intermediary" means a securities intermediary as defined in the Uniform Securities Transfer Act;

(rr) [Delete definition of **"security"** and substitute**] "security" means a security as defined in the Uniform Securities Transfer Act;**

(ss.1) "security certificate" means a security certificate as defined in the Uniform Securities Transfer Act;

(ss.2) "security entitlement" " means a security entitlement as defined in the Uniform Securities Transfer Act;

(tt) "security interest" means an interest in goods, chattel paper, ~~a security~~ investment property, a document of title, an instrument, money or an intangible that secures payment or performance of an obligation ….

(vv.1) "uncertificated security" means an uncertificated security as defined in the Uniform Securities Transfer Act;

(ww) "value" means any consideration sufficient to support a simple contract, and includes an antecedent debt or antecedent liability.

Working Group Comment or Recommendation

[51] The Group considered and rejected the recommendation of the Task Force that the PPSA definition of "value" parallel that in the USTA. The USTA definition is not an improvement over the PPSA definition, and its adoption would affect transactions involving all forms of collateral. It was noted that the definition adopted by the USTA is used generally in the UCC (its source is Article 1), and is not specific to securities.

(1.1) For the purposes of this Act

(a) a secured party has control of a certificated security if the secured party has

control in the manner provided for under section 30 of the Uniform Securities Transfer Act;

(b) a secured party has control of an uncertificated security if the secured party has control in the manner provided for under section 31 of the Uniform Securities Transfer Act;

(c) a secured party has control of a security entitlement if the secured party has control in the manner provided for under section 32 or 33 of the Uniform Securities Transfer Act;

(d) a secured party has control of a commodity contract if

(i) the secured party is the commodity intermediary with which the commodity contract is carried; or

(ii) the commodity customer, secured party, and commodity intermediary have agreed that the commodity intermediary will apply any value

distributed on account of the commodity contract as directed by the secured party without further consent by the commodity customer;

(e) a secured party having control of all security entitlements or commodity contracts carried in a securities account or commodity account has control over the securities account or commodity account.

ONTARIO PERSONAL PROPERTY SECURITY ACT

1. (1) In this Act,
"account" means any monetary obligation not evidenced by chattel paper, or an instrument , whether or not it has been earned by performance, but does not include investment property *or a monetary obligation evidenced by investment property*.

Working Group Comment or Recommendation

[52] The additional words in the definition of "account" are required to remove any ambiguity with respect to investment property in the form of debt obligations.[2]

"broker" means a broker as defined in the Uniform Securities Transfer Act;

"certificated security" means a certificated security as defined in the Uniform Securities Transfer Act;

"commodity account" means an account maintained by a commodity intermediary in which a commodity contract is carried for a commodity customer;

"commodity contract" means a commodity futures contract, a commodity futures option or other similar contract that is, (a) traded on or subject to the rules of a commodity futures exchange recognized or otherwise regulated by the Ontario Securities Commission or by a securities regulatory authority of another province, or

(b) traded on a foreign commodity futures exchange and is carried on the books of a commodity intermediary for a commodity customer;

[2] The Task Force is of the view that the wording recommended by the Group may create ambiguity.

and, in this definition, "commodity futures contract", "commodity futures option" and "commodity futures exchange" have the meanings given to such terms in the Commodity Futures Act;

"commodity customer" means a person for which a commodity intermediary carries a commodity contract on its books;

"commodity intermediary" means a person that,

(a) is registered as a dealer under the Commodity Futures Act,

(b) is registered as a dealer permitted to trade in commodity contracts, whether as principal or agent, under the securities laws or commodity futures laws of another province, or

(c) in the ordinary course of its business provides clearance or settlement services for a commodity futures exchange recognized or otherwise regulated by the Ontario Securities Commission or by a securities regulatory authority of another province;

Working Group Comment or Recommendation

[53] The USTA does not deal with commodity contracts since they are not "securities" or "financial assets" (USTA s. 20) and they are not transferred in the normal sense. However, there is a need to address security interests in commodity contracts and commodity accounts and the concept of "control" works well in this context.

Consequently, many of the proposed changes to the PPSAs applicable to securities should be applied to security interests in commodity contracts. See the proposed new definition of "investment property" in subsection 1(1).

"entitlement holder" means an entitlement holder as defined in the Uniform Securities Transfer Act;

"entitlement order" means an entitlement order as defined in the Uniform Securities Transfer Act;

"financial asset" means a financial asset as defined in the Uniform Securities Transfer Act;

"intangible" means all personal property, including choses in action, that is not goods, chattel paper, documents of title, instruments, money or investment property;

"investment property" means a security, whether certificated or uncertificated, security entitlement, securities account, commodity contract, or commodity account;

"personal property" means chattel paper, documents of title, goods, instruments, intangibles, money and investment property and includes fixtures but does not include building materials that have been affixed to real property;

"proceeds" means identifiable or traceable personal property in any form derived directly or indirectly from any dealing with, ~~or rights arising from~~, collateral or the proceeds therefrom, and includes,

(a) any payment representing indemnity or compensation for loss of or damage to the collateral or proceeds therefrom,

(b) any payment made in total or partial discharge or redemption of [an intangible, chattel paper, an instrument or] investment property, and

(c) rights arising out of, or property collected on, or distributed on account of, collateral that is investment property;

"purchase-money security interest" means,

(a) a security interest taken or reserved in collateral, other than investment property, to secure payment of all or part of its price, or

(b) a security interest taken in collateral, other than investment property, by a person who gives value for the purpose of enabling the debtor to acquire rights in or to the collateral to the extent that the value is applied to acquire the rights,

"securities account" means a securities account as defined in the Uniform Securities Transfer Act;

"securities intermediary" means a securities intermediary as defined in the Uniform Securities Transfer Act;

"security" means a security as defined in the Uniform Securities Transfer Act;

"security certificate" means a security certificate as defined in the Uniform Securities Transfer Act;

"security entitlement" means a security entitlement as defined in the Uniform Securities Transfer Act;

"uncertificated security" means an uncertificated security as defined in the Uniform Securities Transfer Act;

Working Group Comment or Recommendation

[54] The Group considered and rejected the recommendation of the Task Force that the PPSA definition of "value" parallel that in the USTA. The USTA definition is not an improvement over the PPSA definition, and its adoption would affect transactions involving all forms of collateral. It was noted that the definition adopted by the USTA is used generally in the UCC (its source is Article 1), and is not specific to securities.

1.(1.1) For the purposes of this Act,

(a) a secured party has control of a certificated security if the secured party has control in the manner provided for under section 30 of the Uniform Securities Transfer Act,

(b) a secured party has control of an uncertificated security if the secured party

has control in the manner provided for under section 31 of the Uniform Securities Transfer Act,

(c) a secured party has control of a security entitlement if the secured party has control in the manner provided for under section 32 or 33 of the Uniform Securities Transfer Act,

(d) a secured party has control of a commodity contract if

(i) the secured party is the commodity intermediary with which the commodity contract is carried, or

(ii) the commodity customer, secured party, and commodity intermediary have agreed that the commodity intermediary will apply any value distributed on account of the commodity contract as directed by the secured party without further consent by the commodity customer, and

(e) a secured party having control of all security entitlements or commodity contracts carried in a securities account or commodity account has control over the securities account or commodity account.

~~(2) For the purposes of this Act, fungible goods are goods of which any unit is, by nature or usage of trade, the equivalent of any other like unit, and includes unlike units to the extent that they are treated as equivalents under a security agreement. R.S.O. 1990, c. P.10, s. 1 (2).~~

Working Group Comment or Recommendation

[55] The Task Force and the Group agreed that subsection 1(2) should be removed since it serves no particular function other than to define a term that is used in only one provision of the Act.

Scope and Applicable Law

CCPPSL MODEL PERSONAL PROPERTY SECURITY ACT

4 Except as otherwise provided under this Act, this Act does not apply to the following:

(c) the creation or transfer of an interest or claim in or under any ~~contract of annuity or~~ policy of insurance, except the transfer of a right to money or other value payable under a policy of insurance as indemnity or compensation for loss of or damage to collateral;

(c.1) a transfer of an interest in or claim in or under a contract of annuity, other than a contract of annuity held by a securities intermediary for another person in a securities account

Working Group Comment or Recommendation

[56] The Working Group noted that while there are presently no tradeable annuities in Canada, annuities are a common investment vehicle in both Canada and the US. Even if they are not traded, annuities fall within the definition of financial asset in the USTA. When used as an investment vehicle, annuities would be issued in the name of CDS, bringing them within the indirect holding system. The securities intermediary would be responsible for delivery of the benefits associated with the annuity to the entitlement holder. The insurance company would be the ultimate obligor.

[57] The Group concluded that the current PPSA exclusion of annuities should not apply to a financial asset falling within the USTA. The proposed amendment will permit a security interest to be taken in indirectly held annuities, like any financial asset.

(g) the creation or transfer of an interest in a right to payment that arises in connection with an interest in land, including an interest in rental payments payable under a lease of land, but not including a right to payment evidenced by ~~a security~~ investment property or an instrument;

ONTARIO PERSONAL PROPERTY SECURITY ACT

4. (1) This Act does not apply,

(c) to a transfer of an interest or claim in or under any policy of insurance or contract of annuity; other than an contract of annuity held by a securities intermediary for another person in a securities account.

Working Group Comment or Recommendation

[58] The Working Group noted that Canadian insurance companies are considering issuing annuities in a way comparable to the practice of U.S. companies. Even if they are not traded, these will fall within the definition of financial asset in the USTA. Annuities would be issued in the name of CDS, bringing them within the indirect holding system. The securities intermediary would be responsible for delivery of the benefits associated with the annuity to the entitlement holder. The insurance company would be the ultimate obligor. The current PPSA exclusion of annuities should not apply to a financial asset falling within the USTA. The exclusion raises a barrier against take a security interest in indirectly held annuities.

Choice of Law Rules

[59] The draft provisions set out below embody both (i) changes required by adoption of the USTA and (ii) the general recommendations of the Working Group (discussed earlier in this report) as they apply to investment property. In the event that the PPSAs are, in conjunction with the enactment of the USTA, amended to incorporation these provisions, several of the general conflict of laws provisions of the PPSAs must be amended to similar effect in order to maintain consistency in the overall structure of the PPSA conflicts rules. In this section**,** CSA Task Force changes to the existing Acts are underlined or indicated by strike through in the case of deletions. ULCC Working Group changes to Task Force changes and Working Group changes to the existing Act are italicized, or represented by strikethrough in the case of deletions. To the extent that the Working Group's recommendations for changes to the PPSA conflicts provisions summarized earlier in this Report (see paras 16-25 above) affect provisions that are also affected by the USTA - related changes, the Working Group has also made these changes, as indicated by double strikethrough, in the case of deletions. Except as otherwise indicated, CSA Task Force changes are recommended by the Working Group.

CCPPSL Model Personal Property Security Act

5. (1) Subject to sections 6 and 7 ~~this Act~~, the validity~~, perfection and effect of perfection or non-perfection~~ of

(a) a security interest in goods, and

(b) a possessory security interest in chattel paper, a ~~security,~~ negotiable document of title, an instrument or money, is governed by the law of the jurisdiction where the collateral is situated at the time the security interest attaches.

Working Group Comment or Recommendation

[60] Deletion of the term "security" implements the recommendation of the CSA Task Force to have a new independent choice of law rule for all aspects of investment property (see new section 7.1 below). The deletion of the reference to "perfection and effect of perfection or non-perfection" is designed to separate the issue of the law applicable to validity from that applicable to the third party effects of security, with the former remaining stable and the latter changing with any change in the location of the collateral:

see further new section 5.1 below. This change ensures consistency with the approach taken in the new USTA-inspired choice of law rule in section 7.1 below and also implements the independent recommendation of the Group.

~~**5. (2) For the purposes of subsection (1) a security with a clearing agency is situated where the records of the clearing agency are kept.**~~

Working Group Comment or Recommendation

[61] This clause is deleted because its function is overtaken by the addition of new section 7.1 below.

7. (1) For the purposes of this section ~~and section 7.1~~, a debtor is ~~deemed to be~~ located

~~**(a) at the debtor's place of business if the debtor has a place of business,**~~

~~**(b) at the debtor's chief executive office, if the debtor has more than one place of business, and**~~

(~~c~~ a) in the jurisdiction where ~~at~~ the debtor's principal residence is located, if the debtor has no place of business ;

(b) if the debtor has a place of business, in the jurisdiction

(i) [where the debtor's registered office is located if the debtor is an entity incorporated or otherwise constituted solely under a law of Canada or a law of a province or territory of Canada that establishes a public record that discloses the incorporation or constitution of entities of that kind

and the location of the office from which the entity's legal affairs are administered;] or

(ii) where the debtor's chief executive office [centre of administration] is located in any case not falling within clause (i).

Working Group Comment or Recommendation

[62] The amendments to the test for locating a debtor in current section 7(1) are meant to implement the recommendation set out in para 16 above. Clause (i) is placed in square brackets to signal that the wording is merely meant to show the general intent of the new test and that further refinement may be needed. In the interests of transparency, the cross-reference to section 7.1 is deleted here and replaced by a cross-reference to this section in section 7.1(3)(a) below.

7. (2) The validity~~, perfection and effect of perfection or non-perfection~~ of . . .

(b) a non-possessory security interest in chattel paper, ~~a security~~ a negotiable document of title, an instrument or money,

is governed by the law, ~~including the conflict of laws rules,~~ of the jurisdiction where the debtor is located at the time the security interest attaches.

Working Group Comment or Recommendation

[63] The deletion of the clause "including the conflict of law rules" implements the recommendation of the Group made earlier in this report. See further new section 8.1 below. The deletion of the reference to the law governing perfection reflects the Group's general recommendation, in line with the USTA-inspired new choice of law rule for perfection and priority in section 7.1, to separate the issue of the law applicable to validity from that applicable to the third party effects of security.

7.1. (1) The validity of a security interest in investment property is governed by the law of the jurisdiction

(a) where the certificate is located if the collateral is a certificated security,

(b) where the issuer is located if the collateral is an uncertficated security,

(c) where the securities intermediary is located if the collateral is a securities entitlement or a securities account,

(d) where the commodities intermediary is located if the collateral is a commodities contract or a commodities account,

when the security interest attaches.

Working Group Comment or Recommendation

[64] Subsection 7.1(1) extends the choice of law rules on the proprietary effects of the various categories of investment property to the issue of the initial validity of a security right (with the exception that the law governing validity does not change even when the connecting factor changes). Although this rule was not directly recommended by the Task Force, the current PPSA choice of law rules cover the issue of validity (unlike UCC Article 9) for all categories of assets, and should do so also for investment property. (This approach is also consistent with current section 5(1)(b) which addresses the choice

of law for the validity of a "security" as currently defined).

~~**7.1. (1)** **Except as otherwise provided in subsection (7), while a security certificate is located in a jurisdiction, the law, other than the rules governing the conflicts of laws, of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in the certificated security represented thereby~~**.**

~~**(2)** **Except as otherwise provided in subsection (7), the law, other than the rules governing the conflicts of laws, of the issuer's jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in an uncertificated security.~~**

~~**(3)** **Except as otherwise provided in subsection (7), the law, other than the rules governing the conflicts of laws, of the securities intermediary's jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in a security entitlement or securities account~~.**

~~**(4)** **Except as otherwise provided in subsection (7), the law, other than the rules governing the conflicts of laws, of the commodity intermediary's jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in a commodity contract or commodity account.**~~

7.1. (2) Except as otherwise provided in subsection (4), perfection, the effect of perfection or non-perfection, and the priority of a security interest in investment property is governed by the law of the jurisdiction:

(a) where the certificate is located if the collateral is a certificated security,

(b) where the issuer is located if the collateral is an uncertificated security,

(c) where the securities intermediary is located if the collateral is a security entitlement or a securities account,

(c) where the commodities intermediary is located if the collateral is a commodity contract or a commodity account .

Working Group Comment or Recommendation

[65] The Working Group recommends replacement of sections 7.1(1)-(4) as drafted by the CSA Task Force with new section 7.1(2) as set out immediately above. This recommendation does not result in any substantive difference. Rather, the aim is to bring the general UCC Article 9 formulation and style that was used by the Task Force into

conformity with the style used in the PPSAs. The deletion of the multiple references to "other than the rules governing the conflicts of law" results from the Working Group's broader recommendation set out in para 25 (third bulleted item) above to include a comprehensive provision, along the lines of that now found in the CCQ, explicitly rejecting the application of the doctrine of renvoi in respect of all the choice of law rules in the PPSAs – see further new section 8.1 below.

7.1. ***(3)*** **For the purposes of this section,**

(a) the location of a debtor shall be determined in accordance with subsection 7(1);

(b) **~~(5)~~*the location of an issuer and a securities intermediary shall be determined by* the rules for determining the issuer's jurisdiction and the securities intermediary's jurisdiction ~~are~~ specified in sections 51 and 52, respectively, of the Uniform Securities Transfer Act;**

~~(6)~~ For the purposes of this section, the following rules determine the location of a commodity intermediary 's jurisdiction shall be determined by the following rules:

~~(a) if an agreement between the commodity intermediary and commodity customer governing the commodity account expressly provides that a particular jurisdiction is the commodity intermediary's jurisdiction for purposes of this Act, that jurisdiction is the commodity intermediary's jurisdiction;~~

~~(b) if subclause (a) does not apply and an agreement between the commodity intermediary and commodity customer governing the commodity account expressly provides that the agreement is governed by the law of a particular jurisdiction, that jurisdiction is the commodity intermediary's jurisdiction;~~

~~(c) if neither subclause (a) (i) nor (b) (ii) applies and an agreement between the commodity intermediary and commodity customer governing the commodity account expressly provides that the commodity account is maintained at an office in a particular jurisdiction, that jurisdiction is the commodity intermediary's jurisdiction;~~

~~(d) if none of the preceding subclauses applies, the commodity intermediary's jurisdiction is the jurisdiction in which the office identified in an account statement as the office serving the commodity customer's account is located;~~

~~(e) if none of the preceding subclauses applies, the commodity intermediary's jurisdiction is the jurisdiction in which the chief executive office of the~~

~~commodity intermediary is located.~~

(c) the location of a commodity intermediary is:

(i) where an agreement between the commodity intermediary and the commodity customer governing the account expressly specifies the commodity intermediary's jurisdiction for purposes of this Act, the jurisdiction specified;

(ii) if subclause (i) does not apply, where an agreement between the commodity intermediary and the commodity customer governing the account expressly specifies that the agreement is governed by the law of a particular jurisdiction, the jurisdiction specified;

(iii) if neither subsclause (i) nor (ii) applies, where an agreement between the commodity intermediary and commodity customer governing the commodity account expressly provides that the commodity account is maintained at an office in a particular jurisdiction, that jurisdiction;

(iv) if none of the preceding subclauses apply, the jurisdiction in which the office identified in an account statement as the office serving the commodity customer's account is located;

(v) if none of the preceding subclauses apply, the jurisdiction in which the chief executive office of the commodity intermediary is located

7.1. *(4)* ~~(7)~~ *Except as otherwise provided in subsection (7),* **t~~T~~he law~~, other that the rules governing the conflicts of laws,~~ of the jurisdiction in which the debtor is located governs** *perfection, the effect of perfection or non-perfection, and the priority of*

(a) ~~perfection of~~ a security interest in investment property *perfected* **by registration** *of a financing statement or equivalent notice in a public registry established for the purpose of publicizing the grant of security***;**

(b) ~~automatic perfection of~~ a security interest in investment property granted by a broker or securities intermediary *where the secured creditor relies on attachment of the security interest as sufficient perfection***; and**

(c) ~~automatic perfection of~~ a security interest in a commodity contract or commodity account granted by a commodity intermediary *where the secured creditor relies on attachment of the security interest as sufficient perfection***.**

Working Group Comment or Recommendation

[66] The deletion of the reference to "other than the rules governing the conflict of laws" is not a substantive change – the inapplicability of renvoi throughout the conflicts provisions is now covered by a new general provision – see s. 8.1 below. The

recommendation to include the effects of perfection and priority within the scope of the issues covered by this rule reflects the general recommendation of the Group set out earlier in this report to maintain a unitary choice of law approach to perfection and priority versus the general UCC Article 9 rule bifurcating the choice of law for perfection and priority.[3] The clarification of the term "perfected by registration" seeks to accommodate the differences between the Canadian context and the UCC context from which the Task force derived its proposed wording. Whereas the term "registration" clearly refers to perfection by way of registration of an Article 9 financing statement in the context of the UCC and the PPSAs, its meaning is more ambiguous in the context of the CCQ and in an international context. Similarly, while the term "automatic perfection" is an understood term of art in a purely UCC context (see Art 9-309), it requires "translation" in a PPSA, CCQ and international context. On the relationship between this provision and subsection 7.1(3), see the comment to proposed new subsection 7.1(7) below.

7.1 (8) A security interest perfected pursuant to the law of the jurisdiction designated in subsection (7) remains perfected until the earliest of

(a) the time perfection would have ceased under the law of that jurisdiction;

(b) the expiration of four months after a change of the debtor's location to another jurisdiction; or

(c) the expiration of one year after a transfer of collateral to a person that thereby becomes a debtor and is located in another jurisdiction.

(9) If a security interest described in subsection (8) becomes perfected under the law of the other jurisdiction before the earliest time or event described in that subsection, it remains perfected thereafter.

(10) If a security interest described in subsection (8) does not become perfected under the law of the other jurisdiction before the earliest time or event described in that subsection, it becomes unperfected and is deemed never to have been perfected as against a purchaser of the collateral for value.

7.1. (5) If the debtor relocates to the Province, a security interest referred to in subsection (4) that was previously perfected in accordance with the applicable law as

[3] The Task Force has expressed concern regarding the effect of this feature of subsection 7.1(4). In its view, the provision creates uncertainty for creditors who choose to rely upon registered security interests.

provided in subsection (4) continues perfected in the Province if it is perfected in the Province;

(a) not later than 60 days after the day the debtor relocates,

(b) not later than 15 days after the day the secured party has knowledge that the debtor has relocated, or

(c) prior to the day that perfection ceases under the previously applicable law,

whichever is the earliest.

Working Group Comment or Recommendation

[67] The Group recommends a new subsection (5) as set out above in place of subsections (8), (9) and (10) as proposed by the Task Force. The change is mainly stylistic and is intended to adapt the Article 9 style to the PPSA style of drafting in relation to this issue. The principal substantive change is to bring the time periods for automatic continued perfection for investment property into consistency with the PPSA rules applicable to other categories of collateral. The time periods used by the Task Force are not unique to investment property but are used throughout Article 9 for all categories of property.

[68] The Working Group feels that it would be inconsistent and anomalous for Canadian law to adopt the UCC general time periods in relation to only one type of asset. The other difference from the Task Force version is that the provision proposed by the Group

is restricted to situations where the debtor relocates to the enacting province as opposed to any other jurisdiction. This is not a substantive change.

[69] The Group's proposed formulation of the choice of law rule in subsection 7.1(4) provides that the law of the debtor's current location governs perfection, priority etc. (a formulation recommended above for all the PPSA choice of law rules which is already used in the CCQ and which is consistent with the Task Force's approach). By referring to the current location, it follows that the effect of a relocation to anywhere other than the enacting province will be settled by the law of that other jurisdiction. This ensures that the consequences of relocation to any particular jurisdiction are governed by the equivalent provision in the secured transactions law of that jurisdiction. So, for example,

if a debtor relocates to Ontario from Quebec, Quebec law will decide the period of automatic continued perfection available. This rule avoids a conflict in the event that different jurisdictions adopt different grace periods. In such situations, the law of the jurisdiction where the debtor is located should be paramount and this is indeed the effect of the Group's approach.

7.1. (11) A possessory security interest in a certificated security remains continuously perfected if

(a) the collateral is located in one jurisdiction and subject to a security interest perfected under the law of that jurisdiction;

(b) thereafter the collateral is brought into another jurisdiction; and

(c) upon entry into the other jurisdiction, the security interest is perfected under the law of the other jurisdiction.

Working Group Comment or Recommendation

[70] Under the Group's proposed formulation in new subsection (3), the law of the jurisdiction where a certificate is located governs perfection and priority. Consequently, if the certificate is moved to another jurisdiction, it is that other jurisdiction's law that will determine the effect of the relocation. That other jurisdiction will generally require instant reperfection as a matter of substantive law as do the PPSAs, the CCQ and Article 9. Accordingly, the Group considers proposed subsection (11) to be unnecessary and potentially confusing – see further the comment to subsection 7.1(5) above.

7.1 (12) A security interest in investment property which is perfected under the law of the issuer's jurisdiction, the securities intermediary's jurisdiction or the commodity intermediary's jurisdiction, as applicable, remains perfected until the earlier of

(a) the time perfection would have ceased under the law of that jurisdiction, or

(b) the expiration of four months after a change of the applicable jurisdiction to another jurisdiction.

(13) If a security interest described in subsection (12) becomes perfected under the law of the other jurisdiction before the earlier of the time or the end of the period described in that subsection, it remains perfected thereafter.

~~(14)~~ ~~If a security interest described in subsection (12) is not perfected under the law of the other jurisdiction before the earlier of the time or the end of the period described in that subsection, it becomes unperfected and is deemed never to have been perfected as against a purchaser of the collateral for value.~~

7.1. (6) If an issuer, a securities intermediary, or a commodity intermediary relocates to the Province, a security right that was previously perfected according to the law of the jurisdiction in which the issuer or the intermediary was located pursuant to subsection (3) continues perfected in the Province if it is perfected in the Province;

(a) not later than 60 days after the day the debtor relocates,

(b) not later than 15 days after the day the secured party has knowledge that the debtor has relocated, or

(c) prior to the day that perfection ceases under the previously applicable law,

whichever is the earliest.

Working Group Comment or Recommendation

[71] The reasons why the Group proposes substituting new subsection (7) above for subsections (12)-(14) as proposed by the Task Force are the same as those given in the Comment to the Group's proposed new subsection 7.1(5) above.

7.1. (7) The effects of perfection or non-perfection and the priority of a security right referred to in subsection (4) are governed by the law of the jurisdiction designated by the rules in subsection (3) as against a competing interest in the investment property acquired by [possession or control or its equivalent].

Working Group Comment or Recommendation

[72] The Group proposes the addition of the above provision to deal with situations where a security right in an item of investment property that is perfected by registration comes into competition with the interest of a secured creditor or purchaser or other third party whose rights in the same asset were acquired by possession or control or its equivalent. In that event, subsections (2) and (4) would end up referring to different and potentially conflicting applicable laws to settle the issue of priority. To resolve this potential conflict, subsection (7) above provides that the law designated in subsection (2)

is the primary governing law.[4] This recognizes the fact that those taking an interest in investment property by way of possession or control or their equivalent enjoy a first priority over competing interests as a matter of substantive law virtually everywhere. The proposed provision is similar in effect to the recommendation made in para 25 (fourth bulleted item) earlier in the Report. (Note that the use of square brackets in the concluding words of the section is meant merely to indicate that the precise wording may require further refinement to ensure that the concept of control is understood in a non technical way so as to accommodate the use of different terminology in non PPSA and non Article 9 legal systems.)

8. (1) Notwithstanding sections 5, 6, 7 and 7.1,

(a) procedural issues involved in the enforcement of the rights of a secured party against collateral ~~other than an intangible, commodity account, commodity contract, securities account, security entitlement, or uncertificated security,~~ are governed by the law of the jurisdiction in which the collateral is located at the time of the exercise of the rights,

~~(b) procedural issues involved in the enforcement of the rights of a secured party against an intangible, commodity account, commodity contract, securities account, security entitlement, or uncertificated security,~~ are governed by the law of the ~~forum~~ jurisdiction in which the enforcement rights are exercised, and

***(b)*~~(c)~~ substantive issues involved in the enforcement of the rights of a secured party against collateral are governed by the proper law of the contract between the secured party and the debtor.**

Working Group Comment or Recommendation

[73] The changes here are intended to implement the general recommendation of the Working Group that procedural issues relating to enforcement of a security right against assets be governed by the law of the jurisdiction in which the enforcement action is pursued. This principle would apply to all forms of collateral, including investment property.

[4] The Task Force has expressed the view that it is not clear that 7.1(7) determines what law governs the critical question of whether a buyer of a security, or a person who acquires a security entitlement, takes subject to a registered security interest. The perceived weakness is in the phrase "the effects of perfection or non-perfection and the priority of a security right". The proposed PPSA cut-off rules are not priority rules.

8.1. For the purposes of sections 5 to 8, a reference to the law of a jurisdiction means the internal law of that jurisdiction but not its conflict of law rules with the exception of any rules providing for the continued perfection under the internal law of that jurisdiction of a security interest for which perfection was previously governed by a different law.

Working Group Comment or Recommendation

[74] This provision (rejecting the applicability of the doctrine of renvoi) implements the recommendation set out in para 25 above and also reflects the policy proposed by the Task Force for choice of law in investment property.

Ontario Personal Property Security Act

5. (1) Except as otherwise provided in ~~this Act~~ sections 6 and 7, the validity~~, perfection and effect of perfection or non-perfection~~ of,

(a) a security interest in goods, and

(b) a possessory security interest in ~~a security~~ an instrument, a negotiable document of title, money and chattel paper,

shall be governed by the law of the jurisdiction where the collateral is situated at the time the security interest attaches.

Working Group Comment or Recommendation

[75] The deletion of the term "security" implements the recommendation of the CSA Task Force to have a new independent choice of law rule for all aspects of investment property (see new section 7.1 below). The deletion of the reference to "perfection and effect of perfection or non-perfection" is designed to separate the issue of the law applicable to validity from that applicable to the third party effects of security with the former remaining stable and the latter changing with any change in the location of the collateral: see further new section 5.1 below. This change ensures consistency with the approach taken in the new USTA-inspired choice of law rule in section 7.1 below and also implements the independent recommendation of the Group.

7. (1) The validity, ~~perfection and effect of perfection or non-perfection,~~ of

(a) a security interest in goods;

(b) a non-possessory security interest in ~~a security~~, an instrument, a negotiable document of title, money and chattel paper,

shall be governed by the law of the jurisdiction where the debtor is located at the time the security interest attaches.

Working Group Comment or Recommendation

[76] Deletion of the term "security" implements the recommendation of the CSA Task Force to have a new independent choice of law rule for all aspects of investment property (see new section 7.1 below). The deletion of the reference to "perfection and effect of perfection or non-perfection" is designed to separate the issue of the law applicable to validity from that applicable to the third party effects of security, with the former remaining stable and the latter changing with any change in the location of the collateral: see further new section 5.1 below. This change ensures consistency with the approach taken in the new USTA-inspired choice of law rule in section 7.1 below and also implements the independent recommendation of the Group.

~~7 (4) For the purpose of this section~~ and section 7.1, ~~a debtor shall be 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, and otherwise at the debtor's principal place of residence.~~

(4) For the purposes of this section, a debtor is located

(a) in the jurisdiction where the debtor's principal place of residence is located, if the debtor has no place of business~~.~~ ;

(b) if the debtor has a place of business, in the jurisdiction

(i) *[where the debtor's registered office is located if the debtor is an entity incorporated or otherwise constituted solely under a law of Canada or a law of a province or territory of Canada that establishes a public record that discloses the incorporation or constitution of entities of that kind and the location of the office from which the entity's legal affairs are administered*;] or

***(ii) where the debtor's chief executive office [centre of administration] is located in any case not falling within clause* (i).**

Working Group Comment or Recommendation

[77] The amendments to the test for locating a debtor in current section 7(4) are meant to implement the recommendation set out in para 16 above. Clause (i) is placed in square brackets to signal that the wording is merely meant to show the general intent of the new test and that further refinement may be needed.

7.1. (1) The validity of a security interest in investment property is governed by the law of the jurisdiction

(a) where the certificate is located if the collateral is a certificated security,

(b) where the issuer is located if the collateral is an uncertficated security,

(c) where the securities intermediary is located if the collateral is a securities entitlement or a securities account,

(d) where the commodities intermediary is located if the collateral is a commodities contract or a commodities account,

when the security interest attaches.

Working Group Comment or Recommendation

[78] Subsection 7.1(1) extends the choice of law rules on the proprietary effects of the various categories of investment property to the issue of the initial validity of a security right (with the exception that the law governing validity does not change even when the connecting factor changes). Although this rule was not directly recommended by the

Task Force, the current PPSA choice of law rules cover the issue of validity (unlike UCC Article 9) for all categories of assets, and should do so also for investment property. (This approach is also consistent with current section 5(1)(2) which addresses the choice of law for the validity of a "security" as currently defined).

7. 1 (1) Except as otherwise provided in subsection (7), while a security certificate is located in a jurisdiction, the law, other than the rules governing the conflicts of laws, of that jurisdiction governs perfection, the effect of perfection or non-perfection, and the priority of a security interest in the certificated security represented thereby.

(2) Except as otherwise provided in subsection (7), the law, other than the rules governing the conflicts of laws, of the issuer's jurisdiction governs perfection, the effect of perfection or non-perfection, and the priority of a security interest in an uncertificated security.

(3) Except as otherwise provided in subsection (7), the law, other than the rules governing the conflicts of laws, of the securities intermediary's jurisdiction governs perfection, the effect of perfection or non-perfection, and the priority of a security interest in a security entitlement or securities account.

~~(4) Except as otherwise provided in subsection (7), the law, other than the rules governing the conflicts of laws, of the commodity intermediary's jurisdiction governs perfection, the effect of perfection or non-perfection, and the priority of a security interest in a commodity contract or commodity account.~~

7.1. (2) Except as otherwise provided in subsection (4), perfection, the effect of perfection or non-perfection, and the priority of a security interest in investment property are governed by the law of the jurisdiction:

(a) where the certificate is currently located if the collateral is a certificated security;

(b) where the issuer is currently located if the collateral is an uncertificated security;

(c) where the securities intermediary is currently located if the collateral is a security entitlement or a securities account;

(c) where the commodities intermediary is currently located if the collateral is a commodity contract or a commodity account.

Working Group Comment or Recommendation

[79] The Working Group recommends replacement of sections 7.1(1)-(4) as drafted by the CSA Task Force with new section 7.1(2) as set out immediately above. This recommendation does not result in any substantive difference. Rather, the aim is to bring the general UCC Article 9 formulation and style that was used by the Task Force into conformity with the style used in the PPSAs. The deletion of the multiple references to "other than the rules governing the conflicts of law" results from the Working Group's broader recommendation set out in para 25 (third bulleted item) above to include a comprehensive provision, along the lines of that now found in the CCQ, explicitly rejecting the application of the doctrine of renvoi in respect of all the choice of law rules in the PPSAs – see further new section 8.1 below.

7.1. (3) ~~(5)~~ For the purposes of this section,

(a) the location of a debtor shall be determined in accordance with subsection 7(4);

(b) the location of an issuer and a securities intermediary shall be determined by **the rules for determining the issuer's jurisdiction and the securities**

intermediary's jurisdiction ~~are~~ specified in sections 51 and 52, respectively, of the Uniform Securities Transfer Act.

~~(6) For the purposes of this section, the following rules determine the location of a commodity intermediary 's jurisdiction shall be determined by the following rules:~~

~~(a) if an agreement between the commodity intermediary and commodity customer governing the commodity account expressly provides that a particular jurisdiction is the commodity intermediary's jurisdiction for purposes of this Act, that jurisdiction is the commodity intermediary's jurisdiction;~~

~~(b) if subclause (a) does not apply and an agreement between the commodity intermediary and commodity customer governing the commodity account expressly provides that the agreement is governed by the law of a particular jurisdiction, that jurisdiction is the commodity intermediary's jurisdiction;~~

~~(c) if neither subclause (a) (i) nor (b) (ii) applies and an agreement between the commodity intermediary and commodity customer governing the commodity account expressly provides that the commodity account is maintained at an office in a particular jurisdiction, that jurisdiction is the commodity intermediary's jurisdiction;~~

~~(iv) (d) if none of the preceding subclauses applies, the commodity intermediary's jurisdiction is the jurisdiction in which the office identified in an account statement as the office serving the commodity customer's account is located;~~

~~(v) (e) if none of the preceding subclauses applies, the commodity intermediary's jurisdiction is the jurisdiction in which the chief executive office of the commodity intermediary is located.~~

(c) the location of a commodity intermediary is:

(i) where an agreement between the commodity intermediary and the commodity customer governing the account expressly specifies the commodity intermediary's jurisdiction for purposes of this Act, the jurisdiction specified;

(ii) if subclause (i) does not apply, where an agreement between the commodity intermediary and the commodity customer governing the account expressly specifies that the agreement is governed by the law of a particular jurisdiction, the jurisdiction specified;

(iii) if neither subsclause (i) nor (ii) applies, where an agreement between the commodity intermediary and commodity customer governing the commodity account expressly provides that the commodity account is maintained at an office in a particular jurisdiction, that jurisdiction;

(iv) if none of the preceding subclauses apply, the jurisdiction in which the office identified in an account statement as the office serving the commodity customer's account is located;

(v) if none of the preceding subclauses apply, the jurisdiction in which the chief executive office of the commodity intermediary is located

(4) **~~(7)~~ Except as otherwise provided in subsection (7), t~~The law, other that the rules governing the conflicts of laws,~~ of the jurisdiction in which the debtor is currently located governs** ***perfection, the effect of perfection or non-perfection, and the priority of***

(a) ~~perfection of~~ a security interest in investment property ***perfected*** **by registration** ***of a financing statement or equivalent notice in a registry established for the purpose of publicizing the grant of security*****,**

(b) ~~automatic perfection of~~ a security interest in investment property granted by a broker or securities ***intermediary*** ***where the secured creditor relies on attachment of the security interest as sufficient perfection*****; and**

(c) ~~automatic perfection of~~ a security interest in a commodity contract or commodity account granted by a commodity intermediary ***where the secured creditor relies on attachment of the security interest as sufficient perfection*****.**

Working Group Comment or Recommendation

[80] The deletion of the reference to "other than the rules governing the conflict of laws" is not a substantive change – the inapplicability of renvoi throughout the conflicts provisions is now covered by a new general provision – see s. 8.1 below. The recommendation to include the effects of perfection and priority within the scope of the issues covered by this rule reflects the general recommendation of the Group, set out earlier in this report, to maintain a unitary choice of law approach to perfection and priority versus the general UCC Article 9 rule bifurcating the choice of law for perfection and priority.[5] The clarification of the term "perfected by registration" seeks to accommodate the differences between the Canadian context and the UCC context from which the Task force derived its proposed wording. Whereas the term "registration" clearly refers to perfection by way of registration of an Article 9 financing statement in the context of the UCC and the PPSAs, its meaning is more ambiguous in the context of the CCQ and in an international context. Similarly, while the term "automatic perfection" is an understood term of art in a purely UCC context (see art 9-309), it

[5] The Task Force has expressed concern regarding the effect of this feature of subsection 7.1(4). In its view, the provision creates uncertainty for creditors who choose to rely upon registered security interests.

requires "translation" in a PPSA, CCQ and international context. On the relationship between this provision and subsection 7.1(3), see the comment to proposed new subsection 7.1(7) below.

~~7.1. (8) A security interest perfected pursuant to the law of the jurisdiction designated in subsection (7) remains perfected until the earliest of~~

~~(a) the time perfection would have ceased under the law of that jurisdiction;~~

~~(b) the expiration of four months after a change of the debtor's location to another jurisdiction; or~~

~~(c) the expiration of one year after a transfer of collateral to a person that thereby becomes a debtor and is located in another jurisdiction.~~

~~(9) If a security interest described in subsection (8) becomes perfected under the law of the other jurisdiction before the earliest time or event described in that subsection, it remains perfected thereafter.~~

~~(10) If a security interest described in subsection (8) does not become perfected~~

~~under the law of the other jurisdiction before the earliest time or event described in that subsection, it becomes unperfected and is deemed never to have been perfected as against a purchaser of the collateral for value.~~

7.1. (5) If the debtor relocates to Ontario, a security interest referred to in subsection (4) that was previously perfected in accordance with the applicable law as provided in subsection (4) continues perfected in Ontario if it is perfected in Ontario;

(a) not later than 60 days after the day the debtor relocates,

(b) not later than 15 days after the day the secured party has knowledge that the debtor has relocated, or

(c) prior to the day that perfection ceases under the previously applicable law,

whichever is the earliest.

Working Group Comment or Recommendation

[81] The Group recommends a new subsection (5) as set out above in place of subsections (8), (9) and (10) as proposed by the Task Force. The change is mainly stylistic and is intended to adapt the Article 9 style to the PPSA style of drafting in relation to this issue. The principal substantive change is to bring the time periods for

automatic continued perfection for investment property into consistency with the PPSA rules applicable to other categories of collateral (see section 5(2) above). The time periods used by the Task Force are not unique to investment property but are used throughout Article 9 for all categories of property.

[82] The Working Group feels that it would be inconsistent and anomalous for Canadian law to adopt the UCC general time periods in relation to only one type of asset. The other difference from the Task Force version is that the provision proposed by the Group is restricted to situations where the debtor relocates to the enacting province as opposed to any other jurisdiction. This is not a substantive change.

[83] The Group's proposed formulation of the choice of law rule in subsection 7.1(4) provides that the law of the debtor's current location governs perfection, priority etc. (a formulation recommended above for all the PPSA choice of law rules which is already used in the CCQ and which is consistent with the Task Force's approach). By referring to the current location, it follows that the effect of a relocation to anywhere other than the enacting province will be settled by the law of that other jurisdiction. This ensures that the consequences of relocation to any particular jurisdiction are governed by the equivalent provision in the secured transactions law of that jurisdiction. So, for example, if a debtor relocates to Ontario from Quebec, Quebec law will decide the period of automatic continued perfection available. This rule avoids a conflict in the event that different jurisdictions adopt different grace periods. In such situations, the law of the jurisdiction where the debtor is located should be paramount and this is indeed the effect of the Group's approach.

7.1. (11) A possessory security interest in a certificated security remains continuously perfected if

(a) the collateral is located in one jurisdiction and subject to a security interest perfected under the law of that jurisdiction;

(b) thereafter the collateral is brought into another jurisdiction; and

(c) upon entry into the other jurisdiction, the security interest is perfected under the law of the other jurisdiction.

Working Group Comment or Recommendation

[84] Under the Group's proposed formulation in new subsection (3), the law of the jurisdiction where a certificate is currently located governs perfection and priority. Consequently, if the certificate is moved to another jurisdiction, it is that other jurisdiction's law that will determine the effect of the relocation. That other jurisdiction will generally require instant reperfection as a matter of substantive law as do the PPSAs, the CCQ and Article 9. Accordingly, the Group considers proposed subsection (11) to be unnecessary and potentially confusing – see further the comment to subsection 7.1(5) above.

~~7.1. (12) A security interest in investment property which is perfected under the law of the issuer's jurisdiction, the securities intermediary's jurisdiction or the commodity intermediary's jurisdiction, as applicable, remains perfected until the earlier of~~

~~(a) the time perfection would have ceased under the law of that jurisdiction, or~~

~~(b) the expiration of four months after a change of the applicable jurisdiction to another jurisdiction.~~

~~(13) If a security interest described in subsection (12) becomes perfected under the law of the other jurisdiction before the earlier of the time or the end of the period described in that subsection, it remains perfected thereafter.~~

~~(14) If a security interest described in subsection (12) is not perfected under the law of the other jurisdiction before the earlier of the time or the end of the period described in that subsection, it becomes unperfected and is deemed never to have been perfected as against a purchaser of the collateral for value.~~

7.1. (6) If an issuer, a securities intermediary, or a commodity intermediary relocates to Ontario, a security right that was previously perfected according to the law of the jurisdiction in which the issuer or the intermediary was located pursuant to subsection (3) continues perfected in Ontario if it is perfected in Ontario;

(a) not later than 60 days after the day the debtor relocates,

(b) not later than 15 days after the day the secured party has knowledge that the debtor has relocated, or

(c) prior to the day that perfection ceases under the previously applicable law,

whichever is the earliest.

Working Group Comment or Recommendation

[85] The reasons why the Group proposes substituting new subsection (7) above for subsections (12)-(14) as proposed by the Task Force are the same as those given in the Comment to the Group's proposed new subsection 7.1(5) above.

7.1(7) The effects of perfection or non-perfection and the priority of a security right referred to in subsection (4) are governed by the law of the jurisdiction designated by the rules in subsection (2) as against a competing interest in the investment property acquired by [possession or control or its equivalent].

Working Group Comment or Recommendation

[86] The Group proposes the addition of the above provision to deal with situations where a security right in an item of investment property that is perfected by registration comes into competition with the interest of a secured creditor or purchaser or other third party whose rights in the same asset were acquired by possession or control or its equivalent. In that event, subsections (2) and (4) would end up referring to different and potentially conflicting applicable laws to settle the issue of priority. To resolve this potential conflict, subsection (7) above provides that the law designated in subsection (2) is the primary governing law.[6] This recognizes the fact that those taking an interest in investment property by way of possession or control or their equivalent enjoy a first priority over competing interests as a matter of substantive law virtually everywhere. The proposed provision is similar in effect to the recommendation made in para 25 (fourth bulleted item) earlier in the Report. (Note that the use of square brackets in the concluding words of the section is meant merely to indicate that the precise wording may require further refinement to ensure that the concept of control is understood in a non technical way so as to accommodate the use of different terminology in non PPSA and non Article 9 legal systems.)

8. (1) Despite sections 5, 6, 7 and 7.1,

(a) procedural issues affecting the enforcement of the right of a secured party in respect of collateral ~~other than intangibles, commodity accounts, commodity contracts, securities accounst, security entitlements, or uncertificated securities,~~

[6] The Task Force has expressed the view that it is not clear that 7.1(7) determines what law governs the critical question of whether a buyer of a security, or a person who acquires a security entitlement, takes subject to a registered security interest. The perceived weakness is in the phrase "the effects of perfection or non-perfection and the priority of a security right". The proposed PPSA cut-off rules are not priority rules.

~~**are governed by the law of the jurisdiction in which the collateral is located at the time of the exercise of those rights,**~~

~~**(b) procedural issues affecting in the enforcement of the rights of a secured party against intangibles, commodity accounts, commodity contracts, securities accounts, security entitlements, or uncertificated securities,**~~ **are governed by the law of the ~~forum~~ jurisdiction in which the enforcement rights are exercised, and**

~~**(c)**~~ **(b) substantive issues involved in the enforcement of the rights of a secured party against collateral are governed by the proper law of the contract between the secured party and the debtor.**

Working Group Comment or Recommendation

[87] The changes here are intended to implement the general recommendation of the Working Group that procedural issues relating to enforcement of a security right against assets be governed by the law of the jurisdiction in which the enforcement action is pursued. This principle would apply to all forms of collateral, including investment property.

8.1. For the purposes of sections 5 to 8, a reference to the law of a jurisdiction means the internal law of that jurisdiction but not its conflict of law rules with the exception of any rules providing for the continued perfection under the internal law of that jurisdiction of a security interest for which perfection was previously governed by a different law.

Working Group Comment or Recommendation

[88] This provision (rejecting the applicability of the doctrine of renvoi) implements the recommendation set out in para 25 above and also reflects the policy proposed by the Task Force for choice of law in investment property.

Validity of Security Agreements and Rights and Duties of Parties

CCPPSL Model Personal Property Security Act

10(1) Subject to subsection (2), ~~a security~~ and subject to section 12.1, a security interest is enforceable against a third party only where

(a) the collateral is not a certificated security and is in the possession of the secured party,

(a.1) the collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under section 79 *of the Uniform Securities Transfer Act pursuant to the debtor's security agreement,*

(a.2) the collateral is investment property and the secured party has control under section 1(1.1) pursuant to the debtor's security agreement, or

(b) the debtor has signed a security agreement that contains

(i.i) a description of collateral that is a security entitlement, securities account, or commodity ~~contract~~ account if it describes the collateral by those terms or as "investment property" or if it describes the underlying financial asset or commodity contract,

(iii) a statement that a security interest is taken in all of the debtor's present and after-acquired personal property except specified items or kinds of personal property or except personal property described as "goods", "chattel paper" ~~securities~~ "investment property", "documents of title", "instruments", "money" or "intangibles".

Working Group Comment or Recommendation

[89] The italics indicate minor clarification changes made to the Task Force proposal by the Working Group.

12(1) A security interest, including a security interest in the nature of a floating charge, attaches when

(a) value is given,

(b) the debtor has rights in the collateral or power to transfer rights in the collateral to a secured party

(4) The attachment of a security interest in a securities account is also attachment of a security interest in the security entitlements carried in the securities account.

(5) The attachment of a security interest in a commodity account is also attachment

of a security interest in the commodity contracts carried in the commodity account.

12.1(1) A security interest in favour of a securities intermediary attaches to a person's security entitlement if:

(a) the person buys a financial asset through the securities intermediary in a transaction in which the person is obligated to pay the purchase price to the securities intermediary at the time of the purchase; and

(b) the securities intermediary credits the financial asset to the buyer's securities account before the buyer pays the securities intermediary.

(2) The security interest described in subsection (1) secures the person's obligation to pay for the financial asset.

(3) A security interest in favour of a person that delivers a certificated security or other financial asset represented by a writing attaches to the security or other financial asset if:

(a) the security or other financial asset is

(i) in the ordinary course of business transferred by delivery with any necessary endorsement or assignment, and

(ii) delivered under an agreement between persons in the business of dealing with such securities or financial assets, and

(b) the agreement calls for delivery against payment.

(4) The security interest described in subsection (3) secures the obligation to make payment for the delivery.

~~**17.1 A secured party having control under subsection 1(1.1) of investment property as collateral**~~

~~**(a) may hold as additional security any proceeds, except money or funds, received from the collateral; and**~~

~~**(b) shall apply money or funds received from the collateral to reduce the secured obligation, unless remitted to the debtor; and**~~

~~**(b) with the consent of the debtor, may create a security interest in the collateral, dispose of it or otherwise deal with it.**~~

17(1) Unless otherwise agreed by the parties and notwithstanding section 17, a secured party having control of investment property as collateral as provided by subsection 1(1.1),

(a) may hold as additional security any proceeds received from the collateral,

(b) shall either apply money or funds received from the collateral to reduce the secured obligation or remit such money or funds to the debtor;

(c) may not sell, create a security interest in or otherwise deal with the collateral upon terms that may impair the debtor's right to redeem it.

Working Group Comment or Recommendation

[90] This section should reflect current practices in the securities industry, under which debtors may in some instances permit the secured party to deal with the collateral in any manner. Accordingly, the redrafted section provides default rules governing a secured party's dealings with investment property as collateral, which can be modified by agreement between the debtor and the secured party. Subsection (2) in the OPPSA equivalent of this provision penalizes the secured party for violation of these rules. A parallel subsection is not required in the CCPPSL Model Act, since its general provision regarding non-performance of statutory obligations would have the same effect as OPPSA subsection (2) in this context. See APPSA s. 67(1).

~~18.1(1) This section applies if~~

~~(a) there is no outstanding secured obligation, and~~

~~(b) the secured party is not committed to make advances, incur obligations, or otherwise give value.~~

~~(2) Within 10 days after receiving a written demand by the debtor, a secured party having control of investment property under section 32(1)(b) of the Uniform Securities Transfer Act or section 1(1.1)(d) shall send to the securities intermediary or commodity intermediary with which the security entitlement or commodity contract is maintained a written record that releases the securities intermediary or commodity intermediary from any further obligation to comply with entitlement orders or directions originated by the secured party.~~

Working Group Comment or Recommendation

[91] The provision proposed by the Task Force should be reconfigured and moved to section 50.

Ontario Personal Property Security Act

~~9(4) A description of [collateral in a security agreement that is] a security entitlement, securities account, or commodity contract is sufficient if it describes the collateral by those terms or as "investment property" or if it describes the underlying financial asset or commodity contract.~~

Working Group Comment or Recommendation

[92] The Working Group rejected the Task Force's proposed new subsection 9(4). The Task Force may have interpreted subsection 9(3) as a rule addressing the sufficiency of general terms used to describe collateral in a security agreement, analogous to the CCPPSL Model PPSA s.10(1)(b). In fact, s. 9(3) is only a saving provision that operates to prevent an incomplete collateral description in a security agreement from rendering the agreement invalid with respect to collateral that is properly described. Proposed s.9(4) sets out substantive rules respecting the terminology by which "investment property" may be described in security agreements. This is neither necessary nor desirable. The OPPSA does not contain provisions comparable to CCPPSL Model Act s. 10(1)(b). Rather, it provides in s. 11(2)(c)(i) simply that a security interest attaches when "the debtor signs a security agreement that contains a description of the collateral sufficient to enable it to be identified." Introducing s.9(4) as a rule to determine the sufficiency of a description of only one classification of collateral, given that no such rules exist with respect to other types of collateral, may result in confusion.

11. (1) A security interest is not enforceable against a third party unless it has attached.

(2) A security interest, including a security interest in the nature of a floating charge, attaches ~~to collateral only~~ when,

~~(a) the secured party or a person on behalf of the secured party other than the debtor or the debtor's agent obtains possession of the collateral or when the debtor signs a security agreement that contains a description of the collateral sufficient to enable it to be identified;~~

(a) value is given;

(b) the debtor has rights in the collateral ~~or the power to transfer rights in the collateral to a secured party; and~~

~~(c) one of the following conditions is met:~~

~~(i) the debtor signs a security agreement that contains a description of the collateral sufficient to enable it to be identified;~~

~~(ii) the collateral is not a certificated security and is in the possession of the secured party or a person on behalf of the secured party, other than the debtor or the debtor's agent pursuant to the debtor's security agreement;~~

~~(iii) the collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under section 79 of the Uniform Securities Transfer Act pursuant to the debtor's security agreement; or~~

~~(iv) the collateral is investment property and the secured party has control under subsection 1(1.1) pursuant to the debtor's security agreement,~~

unless the parties have agreed to postpone the time for attachment, in which case the security interest attaches at the agreed time. [Source UCC 9-203(b)]

(3) For the purpose of subsection (2), the debtor has no rights in,

(a) crops until they become growing crops;

(b) fish until they are caught;

(c) the young of animals until they are conceived;

(d) minerals or hydrocarbons until they are extracted; or

(e) timber until it is cut.

~~(4) Subsection (2) is subject to section 13.1 on security interests in investment property.~~

Working Group Comment or Recommendation

[93] The Working Group adopted some of the suggestions put forward by the Task Force, but decided to further reconfigure this section, as indicated below, to incorporate

features of UCC § 9-108(d). [Task Force recommendations in s. 11 above are shown with both underlining and strikeout, to indicate the Group's rejection of the proposed restructuring of the provision taken in its entirety. The recommendations of the Task Force accepted and incorporated in the reconfigured s. 11 below are shown by underlining, while new wording proposed by the Working Group is indicated in italics. Words shown with strikeout would be deleted in accordance with the recommendation of the Task Force, with the exception of subsection (3), the deletion of which is recommended by the Working Group]

11. (1) A security interest is not enforceable against a third party unless it has attached.

(2) A security interest, including a security interest in the nature of a floating charge, attaches to collateral only when,

~~(a) the secured party or a person on behalf of the secured party other than the debtor or the debtor's agent obtains possession of the collateral;~~

(a) value is given;

(b) the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and

(c) one of the following conditions is met:

(i) the debtor has signed a security agreement that contains:

(A) a description of the collateral sufficient to enable it to be identified;

(B) a description of collateral that is a security entitlement, securities account or commodity account, if it describes the collateral by those terms or as investment property, or if it describes the underlying financial asset or commodity contract;

(ii) the collateral is not a certificated security and is in the possession of the secured party or a person on behalf of the secured party, other than the debtor or the debtor's agent pursuant to the debtor's security agreement;

(iii) the collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under section 79 of the Uniform Securities Transfer Act *pursuant to the debtor's security agreement;* or

(iv) the collateral is investment property and the secured party has control under subsection 1(1.1) pursuant to the debtor's security agreement, or

unless the parties have agreed to postpone the time for attachment, in which case the security interest attaches at the agreed time.

~~**(3) For the purpose of subsection (2), the debtor has no rights in,**~~

~~**(a) crops until they become growing crops;**~~

~~**(b) fish until they are caught;**~~

~~**(c) the young of animals until they are conceived;**~~

~~**(d) minerals or hydrocarbons until they are extracted; or**~~

~~**(e) timber until it is cut.**~~

(3) Subsection (2) is subject to section 11.1 on security interests in investment property.

(4) The attachment of a security interest in a securities account is also attachment of a security interest in the security entitlements carried in the securities account.

(5) The attachment of a security interest in a commodity account is also attachment of a security interest in the commodity contracts carried in the commodity account.

Task Force alternative draft section 11 [NOT RECOMMENDED by the Working Group]

11. (1) A security interest attaches to collateral when it becomes enforceable against the debtor with respect to the collateral, unless an agreement expressly postpones the time of attachment. [Source: UCC 9-203(a)]

(2) Except as otherwise provided in this section and subject to section 13.1, a security interest, including a security interest in the nature of a floating charge, is enforceable against the debtor and third parties with respect to the collateral only if,

(a) value is given;

(b) the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and

(c) one of the following conditions is met:

(i) the debtor signs a security agreement that contains a description of the collateral sufficient to enable it to be identified;

(ii) the collateral is not a certificated security and is in the possession of the secured party or a person on behalf of the secured party, other than the debtor or the debtor's agent;

(iii) the collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under section 79 of the Uniform Securities Transfer Act pursuant to the debtor's security agreement; or

(iv) the collateral is investment property and the secured party has control under subsection 1(1.1) pursuant to the debtor's security agreement.

[Source UCC 9-203(b)]

(3) For the purpose of subsection (2), the debtor has no rights in,

(a) crops until they become growing crops;

(b) fish until they are caught;

(c) the young of animals until they are conceived;

(d) minerals or hydrocarbons until they are extracted; or

(e) timber until it is cut.

(4) The attachment of a security interest in a securities account is also attachment of a security interest in the security entitlements carried in the securities account.

[Source: UCC 9-203(h)]

(5) The attachment of a security interest in a commodity account is also attachment of a security interest in the commodity contracts carried in the commodity account.

[Source: UCC 9-203(i)]

11.1(1) A security interest in favour of a securities intermediary attaches to a person's security entitlement if

(a) the person buys a financial asset through the securities intermediary in a transaction in which the person is obligated to pay the purchase price to the securities intermediary at the time of the purchase; and

(b) the securities intermediary credits the financial asset to the buyer's securities account before the buyer pays the securities intermediary.

(2) The security interest described in subsection (1) secures the person's obligation to pay for the financial asset.

(3) A security interest in favour of a person that delivers a certificated security or other financial asset represented by a writing attaches to the security or other financial asset if

(a) the security or other financial asset is

(i) in the ordinary course of business transferred by delivery with any necessary endorsement or assignment; and

(ii) delivered under an agreement between persons in the business of dealing with such securities or financial assets, and

(b) the agreement calls for delivery against payment.

(4) The security interest described in subsection (3) secures the obligation to make payment for the delivery.

Working Group Comment or Recommendation

[94] The new section 13.1 recommended by the Task Force has been moved up as section 11.1.

~~17.1 (1) A secured party having control under subsection 1(1.1) of investment property as collateral,~~

~~(a) may hold as additional security any proceeds, except money or funds, received from the collateral;~~

~~(b) shall apply money or funds received from the collateral forwith upon its receipt to reduce the secured obligation , unless remitted to the debtor; and~~

~~(c), may create a security interest in the collateral.~~

17(1) Unless otherwise agreed by the parties and notwithstanding section 17, a secured party having control of investment property under subsection 1(1.1) as collateral,

(a) may hold as additional security any proceeds received from the collateral,

(b) shall either apply money or funds received from the collateral to reduce the secured obligation or remit such money or funds to the debtor;

(c) may not sell, create a security interest in or otherwise deal with the collateral upon terms that may impair the debtor's right to redeem it.

(2) A secured party is liable for any loss or damage caused by the secured party's actions with respect to investment property held as collateral otherwise than as authorized by subsection (1).

Working Group Comment or Recommendation

[95] This section should reflect current practices in the securities industry, under which debtors may in some instances permit the secured party to deal with the collateral in any manner. Accordingly, the redrafted section provides default rules governing a secured party's dealings with investment property as collateral, which can be modified by agreement between the debtor and the secured party. Subsection (2) is included in the OPPSA version but not the CCPPSL Model Act. The latter contains a general provision regarding non-performance of statutory obligations having the same effect as (2). See APPSA s. 67(1).

~~18.1 (1) This section applies if,~~

~~(a) there is no outstanding secured obligation; and~~

~~(b) the secured party is not committed to make advances, incur obligations, or otherwise give value.~~

~~(2) Within 10 days after receiving a written demand by the debtor, a secured party having control of investment property under section 32(1)(b) of the Uniform Securities Transfer Act or subsection 1(1.1)(d) shall send to the securities intermediary or commodity intermediary with which the security entitlement or~~

~~commodity contract is maintained a written record that releases the securities intermediary or commodity intermediary from any further obligation to comply with entitlement orders or directions originated by the secured party.~~

Working Group Comment or Recommendation

[96] The Working Group concluded that this provision should be moved to section 56. See proposed section 56(10).

Perfection And Priorities

CCPPSL Model Personal Property Security Act

19 ~~Except as otherwise provided in sections 19.1 and 19.2,~~ a security interest is perfected when

(a) it has attached, and

(b) all steps required for perfection under this Act have been completed,

regardless of the order of occurrence.

Working Group Comment or Recommendation

[97] The proposed excepting words at the beginning of s. 19 – i.e., "Except as otherwise provided in sections 19.1 and 19.2" should not be added. Sections 19.1 and 19.2 simply define a "step required for perfection" falling within s. 19(b).

19.1(1) Perfection of a security interest in a securities account also perfects a security interest in the security entitlements carried in the securities account.

(2) Perfection of a security interest in a commodity account also perfects a security interest in the commodity contracts carried in the commodity account.

19.2 (1) A security interest arising in the delivery of a financial asset under section 12.1(3) is perfected when it attaches.

(2) A security interest in investment property created by a broker or securities intermediary is perfected when it attaches.

(3) A security interest in a commodity contract or a commodity account created by a commodity intermediary is perfected when it attaches.

20. A security interest

(b) in goods, chattel paper, ~~a security~~, a negotiable document of title, an instrument, an intangible or money is subordinate to the interest of a transferee who

(i) acquires the interest under a transaction that is not a security agreement,

(ii) gives value, and

(iii) acquires the interest without knowledge of the security interest and before the security interest is perfected.

24 (1) [Delete **"a security"** from subclause **(c)]**

(3) Subject to section 19, a secured party may perfect a security interest in a certificated security by taking delivery of the certificated security under section 79 of the Uniform Securities Transfer Act.

(**4) Subject to section 19, a security interest in a certificated security in registered form is perfected by delivery when delivery of the certificated security occurs under section 79 of the Uniform Securities Transfer Act and remains perfected by delivery until the debtor obtains possession of the security certificate**.

Working Group Comment or Recommendation

[98] The Task Force suggested that the prefatory words, "subject to section 19", of s. 24(1) either be deleted from the CCPPSL Model Act or added to the OPPSA. The Working Group concluded that neither course should be taken, since this provision, which addresses the perfection of a security interest by taking possession of the collateral, is one of general application that represents an established approach to the drafting and structure of the respective Acts.

24.1(1) A security interest in investment property may be perfected by control of the collateral under section 1(1.1).

(2) A security interest in investment property is perfected by control under section 1(1.1) from the time the secured party obtains control and remains perfected by control until

(a) the secured party does not have control; and

(b) one of the following occurs:

(i) if the collateral is a certificated security, the debtor has or acquires

possession of the security certificate;

(ii) if the collateral is an uncertificated security, the issuer has registered or registers the debtor as the registered owner; or

(iii) if the collateral is a security entitlement, the debtor is or becomes the entitlement holder.

Working Group Comment or Recommendation

[99] The deletion of "securities" from section 24(1) and the new provisions in sections 24 and 24.1 address the perfection of a security interest in investment property by possession, delivery or control, as may be appropriate to the type of investment property involved.

26(1) A security interest perfected under section 24 in

(a) an instrument or <u>a certificated</u> security that a secured party delivers to the debtor for the purpose of

(i) ultimate sale or exchange,

(ii) presentation, collection or renewal, or

(iii) registering a transfer,

(b) ……..

remains perfected, notwithstanding section 10, for the first 15 days after the collateral comes under the control of the debtor.

28 (1.1) The limitation of the amount secured by a security interest as provided in subsection (1) does not apply where the collateral and proceeds are both investment property.

Working Group Comment or Recommendation

[100] Section 28(1), *inter alia*, limits a secured party's right to recover both from collateral and from proceeds generated by a dealing with that collateral to the value of the collateral at the time of the dealing by which the proceeds were generated. In response to the concern of the Task Force that this provision would be a problem in the context of a securities account, the Working Group endorsed a limited exception. The Task Force, took the position that the exception should apply when the original collateral is investment property and the proceeds are any kind of property. However, the Working Group concluded that the exception should apply only where both the original collateral and the proceeds are investment property.

30(9) A buyer of a certificated security or an uncertificated security who

(a) gives value;

(b) does not know that the sale constitutes a breach of a security agreement in which a security interest was granted in the certificated security or the uncertificated security; and

(c) obtains control of the certificated security or the uncertificated security,

acquires the certificated security or the uncertificated security free from the security interest.

[(10) A buyer referred to in subsection (9) is not required to determine whether a security interest has been granted in the certificated security or the uncertificated security or whether the sale constitutes a breach of a security agreement.]

Working Group Comment or Recommendation

[101] The Act must include a cut-off rule to protect buyers of certificated or uncertificated securities who give value and acquire the securities without knowledge that they are subject to security interests. The approach contained in the new provision parallels that applicable to buyers of goods in the ordinary course of business of the seller. The Working Group was unable to reach unanimity as to the need for subsection (10). Several members felt that the position that its inclusion would create ambiguity with respect to other sections of the Act in which "knowledge" is a relevant factor, but no elaboration comparable to subsection (10) is provided. They were of the view that the subsection is not required, since its content is implicit in the expression "does not know" and should not be adopted. The Act contains a general provision stipulating the circumstances in which a person "knows or has knowledge." See APPSA s. 1(2).

[102] Other members of the Group felt very strongly that the provision should be included in order to remove any doubt as to the conclusion that the buyer of a security is not obliged to search the registry or otherwise investigate to determine whether the

security is subject to a security interest. They wanted to avoid the ambiguities that are associated with current OPPSA section 28(6)-(7).

30(10/11) A person who acquires a security entitlement in a financial asset

(a) for value, and

(b) who does not know that the acquisition constitutes a breach of a security agreement that creates or provides a security interest in the financial asset or in a security entitlement in the financial asset,

acquires the security entitlement free of such security interest.

(11/12) A person who acquires a security entitlement in a financial asset is not required to determine whether

(a) a security interest has been granted in the financial asset or in a security entitlement in the financial asset, or

(b) the acquisition constitutes a breach of a security agreement.

[(12/13 If a person acquires a security entitlement in a financial asset free of a security interest in accordance with subsection (10/11), then a purchaser of the security entitlement also acquires a security entitlement free of the security interest or an interest in it.]

Working Group Comment or Recommendation

[103] The new subsection (10/11) proposed by the Working Group provides in the context of the indirect holding system the same protection for a person acquiring a security entitlement through a transaction with an entitlement holder who has given a security interest as is provided by subsection (9) for a buyer of a certificated or uncertificated security. However, the unique nature of the rights associated with the indirect holding system requires a somewhat different approach to the wording of this provision. The opinion of the Group members diverged as to the need for subsection (12/13). Several members took the position that, under well-established PPSA principles, a cut-off rule protects not only immediate buyers but also subsequently buyers or purchasers. [Note that the numbering of these provisions depends upon whether proposed subsection (10) is adopted.]

31. [delete all references to **"security"** in this section**]**

[31.1(1) This Act does not limit the rights of a protected purchaser of a security under the Uniform Securities Transfer Act.

(2) This Act does not limit the rights of or impose liability on a person to the extent that the person is protected against the assertion of an adverse claim under the Uniform Securities Transfer Act.]

~~**(3) Registration of a financing statement under this Act does not constitute notice of a claim to a purchaser or person mentioned in subsections (1), (2) or (3).**~~

Working Group Comment or Recommendation

[104] Section 31.1 overlaps with subsections 30(9) – (11). The Group was not able to reach a final conclusion as to the need for this section. However, the Task Force suggested its inclusion on the basis that users of the legislation do not have a perfect understanding of the USTA may otherwise have difficulty appreciating the interface between the PPSA cut-off rules and the USTA protected purchaser provisions. Proposed subsection 31.1(3) should, however, be deleted. A rule of general application contained in section 47 deals with this matter and repetition in this unique context may only introduce confusion.

35.1(1) The rules in this section govern priority among conflicting security interests in the same investment property.

(2) A security interest of a secured party having control of investment property under section 1(1.1) has priority over a security interest of a secured party that does not have control of the investment property.

(3) A security interest in a certificated security in registered form which is perfected by taking delivery under section 24(3) and not by control under section 24.1 has priority over a conflicting security interest perfected by a method other than control.

(4) Except as otherwise provided in paragraphs (5) and (6), conflicting security interests of secured parties each of which has control under section 1(1.1) rank according to priority in time of:

(a) if the collateral is a security, obtaining control;

(b) if the collateral is a security entitlement carried in a securities account:

(i) the secured party's becoming the person for which the securities account is maintained, if the secured party obtained control under section 32(1)(a) of the Uniform Securities Transfer Act;

(ii) the securities intermediary's agreement to comply with the secured party's entitlement orders with respect to security entitlements carried or to be carried in the securities account, if the secured party obtained control under section 32(1)(b) of the Uniform Securities Transfer Act; or

(iii) if the secured party obtained control through another person under section 32(1)(c) of the Uniform Securities Transfer Act, the time on which priority would be based under this paragraph if the other person were the secured party; or

(c) if the collateral is a commodity contract carried with a commodity intermediary, the satisfaction of the requirement for control specified in section 1(1.1)(d)(2) with respect to commodity contracts carried or to be carried with the commodity intermediary.

(5) A security interest held by a securities intermediary in a security entitlement or a securities account maintained with the securities intermediary has priority over a conflicting security interest held by another secured party.

(6) A security interest held by a commodity intermediary in a commodity contract or a commodity account maintained with the commodity intermediary has priority over a conflicting security interest held by another secured party.

(7) Conflicting security interests granted by a broker, securities intermediary, or commodity intermediary which are perfected without control under section 1(1.1) rank equally.

(8) In all other cases, priority among conflicting security interests in investment property is governed by section 35.

Ontario Personal Property Security Act

19. ~~Except as otherwise provided in sections 19.1 and 19.2, a~~/A security interest is perfected when,

(a) it has attached; and

(b) all steps required for perfection under any provision of this Act have been completed,

regardless of the order of occurrence.

Working Group Comment or Recommendation

[105] The proposed excepting words at the beginning of s. 19 – i.e., "Except as otherwise provided in sections 19.1 and 19.2" should be deleted. Sections 19.1 and 19.2 simply define a "step required for perfection" falling within s. 19(b).

19.1 (1) Perfection of a security interest in a securities account also perfects a security interest in the security entitlements carried in the securities account.

(2) Perfection of a security interest in a commodity account also perfects a security interest in the commodity contracts carried in the commodity account.

19.2 (1) A security interest arising in the delivery of a financial asset under section 13.1(3) is perfected when it attaches.

(2) A security interest in investment property created by a broker or securities intermediary is perfected when it attaches.

(3) A security interest in a commodity contract or a commodity account created by a commodity intermediary is perfected when it attaches.

20. (1) Except as provided in subsection (3), until perfected, a security interest,

(a) in collateral is subordinate to the interest of,

(i) a person who has a perfected security interest in the same collateral or who has a lien given under any other Act or by a rule of law or who has a priority under any other Act, or

(ii) a person who ~~assumes control of the collateral~~ causes the collateral to be seized through execution, attachment, garnishment, charging order, equitable execution or other legal process, or

(iii) all persons entitled by the Creditors' Relief Act or otherwise to participate in the distribution of the property over which a person described in subclause (ii) has assumed control, or the proceeds of such property;

(b) in collateral is not effective against a person who represents the creditors of the debtor, including an assignee for the benefit of creditors and a trustee in bankruptcy;

(c) in chattel paper, documents of title, instruments or goods is not effective against a transferee thereof who takes under a ~~transfer~~ transaction that does not secure payment or performance of an obligation and who gives value and receives delivery thereof without knowledge of the security interest;

(d) in intangibles other than accounts is not effective against a transferee thereof ~~who takes~~ under a ~~transfer~~ transaction that does not secure payment or performance of an obligation and who gives value without knowledge of the security interest.

Working Group Comment or Recommendation

[106] The change indicated in subsection 20(1)(a)(ii) above, while not directly related to interests arising under the USTA, is recommended as necessary to avoid confusion with the specialized meaning of "control" in the USTA and related PPSA amendments. Minor changes in word order have been made by the Working Group in subsection 20(1)(d).

[Delete **"securities"** from subsection 22(1)(d)**]**

22. (2) A secured party may perfect a security interest in a certificated security by taking delivery of the certificated security under section 79 of the Uniform Securities Transfer Act.

(3) A security interest in a certificated security in registered form is perfected by delivery when delivery of the certificated security occurs under section 79 of the Uniform Securities Transfer Act and remains perfected by delivery until the debtor obtains possession of the security certificate.

Working Group Comment or Recommendation

[107] The Task Force suggested that the prefatory words, "subject to section 19", either be added to s. 22(1) of the OPPSA or deleted from s. 24(1) of the CCPPSL Model Act. The Working Group concluded that neither course should be taken, since this provision, which addresses the perfection of a security interest by taking possession of the collateral, is one of general application that represents an established approach to the drafting and structure of the respective Acts.

22.1 (1) A security interest in investment property may be perfected by control of the collateral under section 1(1.1).

(2) A security interest in investment property is perfected by control under section 1(1.1) from the time the secured party obtains control and remains perfected by control until

(a) the secured party does not have control; and

(b) one of the following occurs:

(i) if the collateral is a certificated security, the debtor has or acquires possession of the security certificate;

(ii) if the collateral is an uncertificated security, the issuer has registered or registers the debtor as the registered owner; or

(iii) if the collateral is a security entitlement, the debtor is or becomes the entitlement holder.

Working Group Comment or Recommendation

[108] The deletion of "securities" from section 22(1) and the new provisions in sections 22 and 22.1 address the perfection of a security interest in investment property by possession, delivery or control, as may be appropriate to the type of investment property involved.

~~**24. (1) A security interest in instruments, certificated securities or negotiable documents of title is a perfected security without [registration] or the taking of possession for the first ten days after it attaches to the extent that it arises for new value secured by a written security agreement.**~~

Working Group Comment or Recommendation

[109] The Working Group recommends that the temporary perfection provision in subsection 24(1) be deleted from the OPPSA. There is no equivalent in the CCPPS Model Act and experts on the OPPSA have observed that the section is of little commercial significance.

~~**24. (2) A security interest perfected by possession in**~~

~~**(a) an instrument or a certificated security that a secured party delivers to the debtor for,**~~

~~**(i) ultimate sale or exchange,**~~

~~**(ii) presentation, collection or renewal, or**~~

~~**(iii) registration of transfer; or**~~

(2) A security interest perfected in,

(a) an instrument, by possession, or a certificated security, by delivery or control, which instrument or certificated security the secured party delivers to the debtor for,

(i) ultimate sale or exchange,
(ii) presentation, collection or renewal, or

(iii) registration of transfer; or

(b) a negotiable document of title or goods held by a bailee that are not covered by a negotiable document of title, *by possession,* which document of title or goods the secured party makes available to the debtor for the purpose of,

(i) ultimate sale or exchange,

(ii) loading, unloading, storing, shipping or trans-shipping, or

(iii) manufacturing, processing, packaging or otherwise dealing with goods in a manner preliminary to their sale or exchange,

remains perfected for the first ten days after the collateral comes under the control of the debtor.

Working Group Comment or Recommendation

[110] Section 24(2) should be revised to accommodate perfection of a security interest in a certificated security by delivery or control.

25. (4) If a security interest in collateral was perfected otherwise than by registration, the security interest in the proceeds becomes unperfected ten days after the debtor acquires an interest in the proceeds unless the security interest in the proceeds is otherwise perfected under this Act by any of the other methods and under the circumstances permitted under this Act for collateral of the same kind .

Working Group Comment or Recommendation

[111] Since the proposed revision addresses a matter that is not unique to the USTA and the existing wording sufficiently addresses the requirement of reperfection, the revision should not be adopted.

28. (6) A good faith purchaser of a security, whether in the form of a security certificate or an uncertificated security, who has taken possession of it, has priority over any security interest in it perfected by registration or temporarily perfected under section 23 or 24.

(7) A purchaser of a security, whether in the form of a security certificate or an uncertificated security, who purchases the security in the ordinary course of business and has taken possession of it, has priority over any security interest in it perfected by registration or temporarily perfected under section 23 or 24, even though the purchaser knows of the security interest, if the purchaser did not know the purchase constituted a breach of the security agreement.

(8) For the purposes of subsections (6) and (7),

~~**"good faith purchaser", "purchaser", "security", "security certificate" and "uncertificated security" have the same meaning as in sections 53 and 85 of the Business Corporations Act.**~~

28(6) A buyer of a certificated security or an uncertificated security who

> ***(a) gives value;***
>
> ***(b) does not know that the sale constitutes a breach of a security agreement in which a security interest was granted in the certificated security or uncertificated security; and***
>
> ***(c) obtains control of the certificated security or uncertificated security,***

acquires the certificated security or uncertificated security free from the security interest.

[(7) A buyer referred to in subsection (6) is not required to determine whether a security interest has been granted in the certificated security or uncertificated security or whether the sale constitutes a breach of a security agreement. **]**

Working Group Comment or Recommendation

[112] The Act must include a cut-off rule to protect buyers of certificated or uncertificated securities who give value and acquire the securities without knowledge that they are subject to security interests. The approach contained in the new provision parallels that applicable to buyers of goods in the ordinary course of business of the seller.

[113] The Working Group was unable to reach unanimity as to the need for subsection (7). Some members took the position that its inclusion would create ambiguity with respect to other sections of the Act in which "knowledge" is a relevant factor, but no elaboration comparable to subsection (7) is provided. They were of the view that the subsection is not required and should not be adopted, since its content is implicit in the expression "does not know". The Act contains a general provision stipulating the circumstances in which a person "knows" information. See OPPSA s. 69.

[114] Other members of the Group felt very strongly that the provision should be included in order to remove any doubt as to the conclusion that the buyer of a security is not obliged to search the registry or otherwise investigate to determine whether the

security is subject to a security interest. They wanted to avoid the ambiguities that are associated with current OPPSA section 28(6)-(7).

28(7/8) A person who acquires a security entitlement in a financial asset

> ***(a) for value, and***
>
> ***(b) who does not know that the acquisition constitutes a breach of a security agreement that creates or provides a security interest in the financial asset or in a security entitlement in the financial asset,***

acquires the security entitlement free of such security interest.

(8/9) A person who acquires a security entitlement in a financial asset is not required to determine whether

> ***(a) a security interest has been granted in the financial asset or in a security entitlement in the financial asset, or***
>
> ***(b) the acquisition constitutes a breach of a security agreement.***

[(9/10) If a person acquires a security entitlement in a financial asset free of a security interest in accordance with subsection (7/8), then a purchaser of the security entitlement also acquires a security entitlement free of the security interest or an interest in it.]

Working Group Comment or Recommendation

[115] The new subsection (7/8) proposed by the Working Group provides in the context of the indirect holding system the same protection for a person acquiring a security entitlement through a transaction with an entitlement holder who has given a security interest as is provided by subsection (6) for a buyer of a certificated or uncertificated security. However, the unique nature of the rights associated with the indirect holding system requires a somewhat different approach to the wording of this provision. The opinion of the Group members diverged as to the need for subsection (9/10). Several members took the position that, under well-established PPSA principles, a cut-off rule protects not only immediate buyers but also subsequently buyers or purchasers. [Note that the numbering of these provisions depends upon whether proposed subsection 28(7) is adopted.]

[28.1 (1) This Act does not limit the rights of a protected purchaser of a security under the Uniform Securities Transfer Act.

(2) A protected purchaser of a security under the Uniform Securities Transfer Act takes priority over an earlier security interest, even if perfected, to the extent provided in that Act.]

~~**(3) Registration of a financing statement under this Act does not constitute notice of a claim to a purchaser or person mentioned in subsections (1), (2) or (3).**~~

Working Group Comment or Recommendation

[116] Section 28.1 overlaps with sections 28(6)-(9/10). The Group was not able to reach a final conclusion as to the need for this section. However, the Task Force suggested its inclusion on the basis that users of the legislation do not have a perfect understanding of the USTA may otherwise have difficulty appreciating the interface between the PPSA cut-off rules and the USTA protected purchaser provisions. Proposed subsection 28.1(3) should, however, be deleted. A rule of general application contained in section 46(5) deals with this matter and repetition in this unique context may only introduce confusion.

30.1 (1) The rules in this section govern priority among conflicting security interests in the same investment property.

(2) A security interest of a secured party having control of investment property under section 1(1.1) has priority over a security interest of a secured party that does not have control of the investment property.

(3) A security interest in a certificated security in registered form which is perfected by taking delivery under subsection 22(2) and not by control under section 22.1 has priority over a conflicting security interest perfected by a method other than control.

(4) Except as otherwise provided in subsections (5) and (6), conflicting security interests of secured parties each of which has control under section 1(1.1) rank according to priority in time of

(a) if the collateral is a security, obtaining control;

(b) if the collateral is a security entitlement carried in a securities account:

(i) the secured party's becoming the person for which the securities account is maintained, if the secured party obtained control under section 32(1)(a) of the Uniform Securities Transfer Act;

(ii) the securities intermediary's agreement to comply with the secured party's entitlement orders with respect to security entitlements carried or to be carried in the securities account, if the secured party obtained control under section 32(1)(b) of the Uniform Securities Transfer Act; or

(iii) if the secured party obtained control through another person under section 32(1)(c) of the Uniform Securities Transfer Act, the time on which priority would be based under this paragraph if the other person were the secured party; or

(c) if the collateral is a commodity contract carried with a commodity intermediary, the satisfaction of the requirement for control specified in section 1(1.1)(d)(ii) with respect to commodity contracts carried or to be carried with the commodity intermediary.

(5) A security interest held by a securities intermediary in a security entitlement or a securities account maintained with the securities intermediary has priority over a conflicting security interest held by another secured party.

(6) A security interest held by a commodity intermediary in a commodity contract or a commodity account maintained with the commodity intermediary has priority over a conflicting security interest held by another secured party.

(7) Conflicting security interests granted by a broker, securities intermediary, or commodity intermediary which are perfected without control under section 1(1.1) rank equally.

(8) In all other cases, priority among conflicting security interests in investment property is governed by section 30.

Registration, Rights and Remedies on Default and Transition

CCPPSL Model Personal Property Security Act

50(11) Where there is no outstanding secured obligation, and the secured party is not committed to make advances, incur obligations, or otherwise give value, a secured party having control of investment property under section 32(1)(b) of the Uniform Securities Transfer Act or subsection 1(1.1)(d) [(2) shall send to the securities intermediary or commodity intermediary with which the security entitlement or commodity contract is maintained a written record within 10 days after receipt of a written demand by the debtor that releases the securities intermediary or commodity intermediary from any further obligation to comply with entitlement orders or directions originated by the secured party .

Working Group Comment or Recommendation

[117] The Group concluded that this provision should be relocated. See page 51, *supra*.

56(1) Where the debtor is in default under a security agreement,

(a) except as provided by subsection (2), the secured party has against the debtor the rights and remedies provided in the security agreement, the rights, remedies and obligations provided in this Part and in sections 36, 37 and 38 and when in possession or control of the collateral, the rights, remedies and obligations provided in sections 17 or 17.1, as the case may be, and

(b) the debtor has against the secured party, the rights and remedies provided in the security agreement, the rights and remedies provided by any other Act or rule of law not inconsistent with this Act and the rights and remedies provided in this Part and in sections 17 and 17.1.

(2) Except as provided in sections 17, 17.1, 60, 61 and 63, no provision of section 17, section 17.1 or sections 58 to 67, to the extent that it gives rights to the debtor or imposes obligations on the secured party, can be waived or varied by agreement or otherwise.

78(1) The provisions of the Uniform Securities Transfer Act, including any consequential amendments made to this Act, do not affect an action or proceeding commenced before [effective date of amendments consequential to USTA].

(2) No further action is required to continue perfection of a security interest in a security if

(a) the security interest in the security was a perfected security interest immediately prior to [effective date of amendments consequential to USTA], and

(b) the action by which the security interest was perfected would suffice to

perfect the security interest under this Act.

(3) A security interest in a security remains perfected for a period of 4 months from [effective date of amendments consequential to USTA] and continues to be perfected thereafter where appropriate action to perfect the security interest under this Act is taken within that period, if

(a) the security interest in the security was a perfected security interest immediately prior to [effective date of amendments consequential to USTA], but

(b) the action by which the security interest was perfected would not suffice to perfect the security interest under this Act.

(4) A financing statement or financing change statement ~~signed by the secured party instead of the debtor~~ may be registered within the 4-month period referred to in subsection (3) to continue that perfection or thereafter to perfect, if
(a) the security interest was a perfected security interest immediately prior to [effective date of amendments consequential to USTA], and

(b) the security interest can be perfected by registration under this Act.

Working Group Comment or Recommendation

[118] The Canadian systems do not require the signature of a debtor on a financing statement.

Ontario Personal Property Security Act

56(7)Where there is no outstanding secured obligation, and the secured party is not committed to make advances, incur obligations, or otherwise give value, a secured party having control of investment property under section 32(1)(b) of the Uniform Securities Transfer Act or subsection 1(1.1)(d) ~~(~~(2) shall send to the securities intermediary or commodity intermediary with which the security entitlement or commodity contract is maintained a written record within 10 days after receipt of a written demand by the debtor that releases the securities intermediary or commodity intermediary from any further obligation to comply with entitlement orders or directions originated by the secured party .

Working Group Comment or Recommendation

[119] This provision should be relocated. See page 58, *supra*.

59. (1) Where the debtor is in default under a security agreement, the secured party has the rights and remedies provided in the security agreement and the rights and remedies provided in this Part and, when in possession or control of the collateral, the rights, remedies and duties provided in sections 17 or 17.1, as the case may be.

(5) Despite subsection (1), the provisions of sections 17,17.1 and sections 63 to 66, to the extent that they give rights to the debtor and impose duties upon the secured party, shall not be waived or varied except as provided by this Act.

84. (1) The provisions of the Uniform Securities Transfer Act, including any consequential amendments made to this Act, do not affect an action or proceeding commenced before [effective date of amendments consequential to USTA].

(2) No further action is required to continue perfection of a security interest in a security if

(a) the security interest in the security was a perfected security interest immediately prior to [effective date of amendments consequential to USTA], and

(b) the action by which the security interest was perfected would suffice to perfect the security interest under this Act.

(3) A security interest in a security remains perfected for a period of 4 months from [effective date of amendments consequential to USTA] and continues to be perfected

thereafter where appropriate action to perfect the security interest under this Act is taken within that period, if

(a) the security interest in the security was a perfected security interest immediately prior to [effective date of amendments consequential to USTA], but

(b) the action by which the security interest was perfected would not suffice to perfect the security interest under this Act.

(4) A financing statement or financing change statement ~~signed by the secured party instead of the debtor~~ may be registered under this Act within the 4-month period referred to in subsection (3) to continue that perfection or thereafter to perfect, if

(a) the security interest was a perfected security interest immediately prior to [effective date of amendments consequential to USTA], and

(b) the security interest can be perfected by registration under this Act.

Working Group Comment or Recommendation

[120] The Canadian systems do not require the signature of a debtor on a financing statement.

OTHER ISSUES RELATING TO THE USTA ADDRESSED BY THE WORKING GROUP

Definitions of Notice and Knowledge in the PPSA

[121] The Task Force recommended that the definitions of the terms "notice" and "knowledge" in the PPSAs should be changed to parallel the definition of those terms in the USTA. The Working Group decided not to accept this recommendation. The USTA definitions of these terms were taken from provisions of the UCC that are of general application. They would add nothing by way of clarity to Canadian law and may potentially have the contrary result. However, the Group was cognizant of the potential for confusion if different definitional approaches were contained in the PPSA and the USTA where security interests in securities are involved. Consequently, the Group recommends that section 11 of the USTA be replaced with the PPSA rules relating to knowledge, notice and service – i.e., ss. 68 and 69 OPPSA or ss. 1(2) and 72 of the APPSA (which, though differently structured, accomplish substantially the same result).

US Commentary to Article 8 as a Source of Guidance

[122] The Working Group conveyed to the Task Force a deep concern regarding the appropriateness and workability of this approach to interpretation of the USTA and the accompanying modified provisions of the PPSAs. It was noted that the need for the commentary as an aid to interpretation is a result of the complexity of the concepts of the USTA and the degree of generality in the drafting of UCC Article 8, which is also reflected in the USTA and existing Canadian securities transfer legislation based on previous versions of Article 8.

[123] The Working Group is of the view that in order to achieve substantial uniformity with the UCC Article 8, the USTA copies text that that often cannot be understood on its face. The Group recognizes that the proposed section 2 of the USTA is a matter falling only peripherally within its mandate. However, it was concluded that the expression of an opinion on the desirability of a formal reference to the Article 8 commentary was appropriate in view of the extent to which the Group itself has struggled with the difficulty of resolving issues of interpretation using the commentary as an aid. The Working Group suggested to the Task Force that it prepare a Canadian commentary

elucidating points of particular obscurity and addressing uniquely Canadian aspects of the legislation and its effect.

[124] The Task Force has given serious consideration to the Working Group's views on proposed USTA section 2 and its suggestions regarding a Canadian commentary. It recognizes the concerns expressed by the Working Group and in response has attempted to develop a format offering more extensive and more useful commentary. The Task Force is currently in the process of finalizing arrangements with the holders of the copyright to the UCC official comment that will allow the Task Force to quote extensively from the UCC official comment and prefatory note in a Canadian commentary for consultation purposes. That should enable the Canadian commentary to explain why corresponding USTA provisions are intended to have the same (or a

different) substantive effect as the Article 8 equivalent, which should considerably assist Canadian users of the USTA to understand it.

Credit Balances in Securities Accounts

[125] The Working Group raised and deliberated the issue of whether the definition of "financial asset" in the USTA encompasses credit balances in a securities account (i.e., "cash" on deposit in the account, especially when the account is opened). It concluded that it should. However, such credit balances should not be subject to the PPSA rules applicable to accounts.

[126] It was noted that in the United States, in practice rarely are cash credit balances in a securities account. What might otherwise be "cash" is normally placed in a money market fund or similar investment vehicle. Accordingly, the issue is of little practical significance there. However, there are important differences between Canada and the U.S. in how securities intermediaries are regulated with respect to the use of free cash balances. In Canada, an intermediary can use a percentage of clients' free cash balances provided appropriate disclosure is made and the percentage that cannot be so used is held in segregated form.

[127] The Task Force has indicated that they recognize the concern of the Working Group on this point and is considering whether it can be addressed by amending the definition of "financial asset" in the USTA.

The USTA and Judgment Enforcement

[128] The Working Group was cognizant of the work of the ULCC Working Group on Civil Enforcement in relation to the enforcement of judgments against investment property. The PPSA Working Group addressed a number of issues arising in the context of a competition between a judgment creditor and a security creditor, both claiming investment property.

[129] The Working Group recommends as follows:

- The holder of a security interest in certificated securities who acquires possession of the security certificates after default for purposes of realization should not be treated as thereby acquiring perfection of its security interest by delivery or by control for purposes of determining priorities. Specifically, seizure of securities certificates for purposes of enforcement of a security interest does not enable a secured party to obtain priority over an enforcement creditor who has previously established priority over the secured party by having registered a judgment in the Personal Property Registry before the secured party's registered of a financing statement.
- After seizure of uncertificated securities by an enforcement creditor through notice to the issuer, a secured party should not be able to achieve priority over the enforcement creditor by perfecting a security interest in the securities through control (i.e., by entering into a control agreement with the issuer or by becoming the registered owner of the securities).

The USTA and The Hague Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary (PRIMA)

[130] In the context of addressing the changes proposed by the USTA Task Force to the conflicts provisions of the PPSAs, the Working Group briefly examined the choice of law approach adopted in the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary.

[131] In his presentation to the Group on the subject, Mr. Bradley Crawford suggested that in view of the differences on some issues between the Convention choice of law rules and the USTA-inspired rules, on some issues, it might be preferable to exclude the application of the PPSA rules in situations governed by the Convention.

[132] Eric Spink expressed to the Working Group the view of the CSA Task Force that ratification of the Convention will not require changes to the USTA or the PPSAs (see memo to PPSA Committee dated April 22, 2003). It is their belief that the Convention will accommodate the application of internal choice of law rules in harmony with the Convention rules.

[133] The matter was extensively discussed by the Group, with some members expressing the view that if and when the Convention becomes law, it may be necessary to revise the USTA and PPSA approaches to ensure harmony and to avoid the risk of a

direct conflict between the two sets of rules in a situation involving priority rights against a third party. No final conclusions were reached on the extent of the disharmony, if any, between the Convention and the choice of law rules for indirectly held investment property proposed in the USTA and PPSAs. The Working Group concluded that this matter should be reconsidered once Canada indicates its clear intention to ratify the Convention as part of the general review process normally taken by the Department of Justice and the ULCC in advance of the adoption of any international instrument.

FUTURE WORK OF THE GROUP

[134] Time did not permit the Group to address fully all of the issues that arise in connection with the interface between the PPSA and the USTA. Further meetings with representatives of the Task Force will be required to complete this process.

[135] The need to devote a very significant amount of time to the changes to the PPSA required in connection with the USTA meant that the Group made very little progress on that aspect of its mandate involving examination of the issues raised in the Cuming-Walsh *Discussion Paper On Potential Changes To The Model Personal Property Security Act Of The Canadian Conference On Personal Property Security Law* presented to the ULCC in 2000. This aspect of the mandate will be pursued during the 2003-04 work period.