THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

December 9, 2010

Via email: finlegis@fin.gc.ca
information@osfi-bsif.gc.ca

Ms. Jane Pearse
Director, Financial Institutions Division
Department of Finance
L'Esplanade Laurier
15th floor, East Tower
140 O'Connor Street
Ottawa, ON K1A 0G5

Office of the Superintendent of Financial Institutions Canada
255 Albert Street
Ottawa, ON K1A 0H2

Dear Ms. Pearse and To Whom It May Concern:

Re: Priority Conflicts between Security under Federal *Bank Act* and Provincial and Territorial Laws

I write on behalf of the Business Law Section (the CBA Section) of the Canadian Bar Association (the CBA).

The CBA is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The CBA's primary objectives include improvement in the law and in the administration of justice. The CBA Section is composed of lawyers from across Canada who practice law affecting business, commerce, trade, mercantile pursuits and banking

The CBA Section suggests that government should adopt recommendations made by the Uniform Law Conference of Canada ("ULCC") as well as the Law Commission of Canada together with the CBA, seeking repeal of sections 427 to 429 of the *Bank Act* (Canada) (the "Act").

The CBA Section previously wrote to the Minister of Finance in June 2006 on this matter and now writes to reiterate the recommendation made at that time. For ease of reference, a copy of this 2006 letter is enclosed. The ULCC previously made the same recommendation based on its work on Federal Security Interests done by the ULCC's working group jointly with the Law Commission of Canada ("LCC").

Problems with conflicting priority rules between federal personal property security law and provincial and territorial personal property security law was highlighted in November 2010 by two decisions from the Supreme Court of Canada. *BMO v. Innovation Credit Union* [2010] SCC 47 and *Royal Bank of Canada v. Radius Credit Union Limited* [2010] SCC 48 demonstrate difficulties inherent in resolving priority disputes in insolvency situations in competitions between the federally regulated powers of banks and security under the *Bank Act*. Title and ownership concepts are important to the federal regime while, in the nine provinces and three territories with *Personal Property Security* legislation, provincial and territorial regimes ignore title in determining priority.

Since the Government is now undertaking a review of the *Bank Act* as a whole, the CBA Section believes this is an ideal time for you to address this ongoing priority problem by repealing sections 427 to 429 of that Act.

Yours sincerely,

(original signed by Rebecca Bromwich for Ross Swanson)

Ross Swanson
Chair, Business Law Section
Encl./

THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN
The Voice of the Legal Profession
La voix de la profession juridique

June 30, 2006

The Honourable James M. Flaherty, P.C., M.P.
Minister of Finance
L'Esplanade Laurier
140 O'Connor Street
Ottawa, ON K1A 0G5

Dear Minister:

Re: Repeal of *Bank Act* sections 427 to 429

I am writing on behalf of the National Business Law Section of the Canadian Bar Association to recommend the collateral security provisions in sections 427 to 429 of the *Bank Act* be repealed. In so doing, we endorse the recommendation of the Law Commission of Canada in its 2004 report entitled, *Modernizing Canada's Secured Transactions Law: The Bank Act Security Provisions.*

Bank Act security served Canadians well when it was first developed in the 1890s to enable farmers, fishers, loggers and others to raise funds using their specified assets as security for loans.

In the absence of adequate provincial and territorial secured transactions regimes, the *Bank Act* security provided a mechanism to allow Canadian chartered banks to lend to resource-based businesses and more recently, to manufacturers and vendors of inventory. The historic vacuum is now gone. As of the late 1990's, nine provinces and three territories had adopted personal property security statutes, and Quebec had revised its legislation with comparable security over moveables. The continuance of *Bank Act* security in the presence of the provincial and territorial security regimes causes two problems:

(i) an unequal playing field among financial institutions with only chartered banks entitled to obtain *Bank Act* security, valid across all of Canada; and

(ii) difficulties in resolving priority disputes in insolvency situations with competition between the federally-regulated powers of banks and security based on title concepts, as against provincially-regulated security interests that, in personal property security jurisdictions, ignore title in determining priority.

500 - 865 Carling, Ottawa, **ONTARIO** Canada K1S 5S8
Tel/Tél. : (613) 237-2925 **Toll free/Sans frais :** 1-800-267-8860 **Fax/Télécop. :** (613) 237-0185
Home Page/Page d'accueil : www.cba.org **E-Mail/Courriel :** info@cba.org

The historic need for *Bank Act* security is gone. Sections 427 to 429 of the *Bank Act* should be repealed to level the playing field among lenders and assist with certainty in determining priority among secured creditors.

We would be pleased to discuss this proposal in greater detail with your officials.

Yours very truly,

(*Original signed by Tamra Thomson on behalf of Catherine Wade*)

Catherine E. Wade
Chair
National Business Law Section

cc: Nicholas Le Pan, Superintendent of Financial Institutions Canada