January 1989

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Legal Aspects of Organizing and Raising Capital for Innovation in Canada

J. Michael Robinson*

I. INTRODUCTION

Almost daily one can find press statements mentioning how Canada lags behind virtually all Organization for Economic Cooperation and Development ("OECD") countries, and others in innovation. Indeed, the President of the National Research Council of Canada, Dr. Larkin Kerwin was recently quoted in discussing Canada's innovation quotient that "Few Canadian companies (about 2% of them) behave as though they mean to be in business in the year 2,000."

The percentage of gross national product devoted to research and development ("R&D") in Canada has stagnated at about 1.3% while Canada's competitors have forged ahead steadily and doggedly to 2% and even 3%. Dr. Kerwin believes this is the major reason for loss of Canadian markets in manufactured goods to other countries. Canada continues to be embarrassed by its riches in national resources, giving it an undeservedly high standard of living compared to its share of technology and ability to innovate.

The Canadian Institute for Advanced Research, in a survey published in 1988, measured Canada's science and technology performance in a number of categories against that of the United States, Germany, France, Sweden, the United Kingdom, the Netherlands and Japan. In ten categories of science and technology competitiveness ranging from gross R&D expenditures as a percentage of gross domestic product ("GDP") to numbers of patents and advanced degrees awarded, Canada ranked the lowest in five, the second lowest in three more and in the middle in two others.

The Canadian Labour Market and Productivity Centre, in its bulletin of November 1988, discussed the trends in R&D expenditures in Canada from 1971 to 1988 which demonstrated a decline for the third consecutive year 1985 through 1987. OECD data for 1985, the most recent available, showed that the Canadian R&D to GDP ratio was less than one-half that of the United States and Japan, Canada's two principal trading partners.

* Partner, Fasken & Calvin and Fasken Martineau Walker, Toronto, Ontario.
Is it any wonder that Canadians still tend to be regarded by many of their competitors abroad as hewers of wood and drawers of water?

How much, if at all, does the legal regime for financing innovation frustrate Canada's growth? This is a very difficult question, but I will throw out a few suggestions during this brief review of the Canadian legal environment for raising capital for innovation.

II. THE VEHICLES

The Canadian commercial and corporate legal system resembles closely that of the United States. For example, the federal jurisdiction and most provinces have modern business corporation statutes permitting incorporation, organization and operation of companies with a minimum of formality and the maximum of flexibility. Equity and debt capital can be established and issued simply and with essentially no restrictions. All the other usual business vehicles are also available under Canadian provincial law, namely the partnership, the limited partnership, the corporate joint venture, the contractual joint venture, the mutual fund and the no share capital, non-profit corporation.

III. PRINCIPAL SOURCES OF FINANCING

A. General

It is trite but important to remember that the more junior and untested the inventor or innovator, the fewer the sources of funding that are available to him. He can rarely gain access to the broad public markets. No underwriter of any consequence will take him public without a track record of some profitability, usually three to five years. Notwithstanding Canada's reputation as a hot bed of junior mining and other speculative underwritings, particularly through the Vancouver Stock Exchange, the market has not significantly broadened to include the innovator in the manufacturing sector.

The inventor or innovator in Canada has two principal sources of funding available to him, namely governments, federal and provincial, and private venture capitalists. Traditional sources of loan capital, the chartered banks, both Schedule I and II (Canadian and foreign owned) have been extremely conservative, although each has a "capital markets" or "venture capital" division with a certain, and usually relatively small, amount of funds allocated to it for high risk loans to the more, but not the most, junior companies. These capital divisions or departments always require some equity participation, by way of options, convertible debt or "cheap" equity sweeteners.

B. Venture Capitalists

One has only to look at the relatively small number of venture capitalists in Canada, compared to the United States, to realize that it is an
investors' market. The Association of Canadian Venture Capital Companies numbers fifty-seven members and not all of them are very serious risk takers.

In such a market, the Canadian venture capitalist has traditionally been in a position to demand and receive not only significant equity participation, directly by way of options, warrants etc., but also virtual control of the business through comprehensive restrictive covenants in the loan or investment agreements putting the venture capitalists in at least a veto position over all major corporate decisions. Often that veto becomes control in fact, either at the outset or upon the occurrence of listed events which trigger the right to buy more shares cheaply.

The innovator who has a patented or patentable invention is not usually in a much better position since the venture capitalists will require a transfer into, rather than merely a licensing of the patent to the new investment vehicle in which venture capitalists invest.

Frequently the venture capitalist commits only to a minimum equity investment, with additional investment conditional on his remaining satisfied with the progress of research or the movement toward production of the new product. The capitalist thereby controls his investment level and works toward building up his equity position over time, as he chooses. This arrangement is analogous to "earning in" under mining exploration and production agreements, except that it is rare if ever that the venture capitalist runs any risk of losing his investment, or being diluted, if he declines to meet the next call for funds. The capitalist usually insists that additional equity investment be conditional upon meeting criteria which are so comprehensive as to constitute, in effect, subjective approval at each stage of development or production.

A recent development is Venture Link, a sort of "clearing center" or matching bureau for inventors and start-up situations. Its success is yet to be seen, but it already has one or two imitators, which is encouraging.

C. Government Programs (Incentives)

Having painted this somewhat dismal picture of Canadian venture capitalists, perhaps I should turn to the government to see if more or better opportunities are available. Here we find an alluring array of government plans to assist the innovator.

First, and in general, the government has sought to encourage investment by giving a preferential tax rate on capital gains and a $100,000 lifetime capital gains tax exemption, which increases to $500,000 in the event of disposition of certain equity in qualifying closely held corporations.

Canadian retirement tax shelters can invest in shares of private Canadian corporations. The funds in these retirement vehicles, called RRSPs and RRIFs are, in effect, made available to finance virtually any project that is in a corporate structure, notwithstanding the degree of
risk. Plans which are allowed to do this are "self-directed" (i.e. not operated by a trustee or fund manager with investment discretion).

In addition, the federal government makes available attractive tax concessions for investment by pension plans in small business investment corporations and investment by any person in small business investment limited partnerships. To attempt to ensure that these tax sheltered vehicles and pension plans will benefit Canada, a country always starved for new investment capital, the federal government has limited investment by these vehicles in foreign securities to 10% of the portfolio, on an original cost basis. Canadian fund managers and others have been lobbying the federal government for years to remove this restriction, but the fear is that too much of Canadian savers' funds will be diverted into foreign investments, particularly those in the United States.

Tax credits for scientific research have been made available for many years often on an industry by industry basis (e.g. ship design and construction).

Canadian controlled private companies ("CCPCs") benefit from a significantly lower tax rate on the first $200,000 of taxable income. It has been suggested that the CCPC category is discriminatory against foreign investors and, were it not for the fact that taxation is virtually left out of the Canada-U.S. Free Trade Agreement ("FTA"), one would think that the CCPCs were open to attack under the FTA as not in its spirit of national treatment. However, the definition of control, for purposes of the CCPC, actually means not controlled by a non-Canadian, so a true fifty-fifty U.S.-Canadian joint venture does get the benefit of the low rate.

One attractive vehicle, which proved not to have been well thought through and not to be subject to adequate controls, was the scientific research tax credit ("SRTC"). Introduced by the federal government in 1985, these credits, which were transferable, came to be marketed as tax shelters more than bona fide investment vehicles and a number of scandals, some involving fraud, caused the plan to be withdrawn, but not before many doctors, lawyers, dentists and others had participated in syndicated SRTCs at a cost of hundreds of millions of dollars to the Federal Treasury.

A 1985 budget proposal was designed to enable the billions of dollars in registered pension plans to be used for investment in small business investment corporations ("SBICs") and the correlative small business investment limited partnership ("SBILP"). An original proposal that the investment be limited to 30% of the common shares was removed after objection and the asset ceiling for any one investment is $10 million in a company, the assets of which must not exceed $35 million. The pension fund is still limited to 7% of the book value of its total assets in SBICs.

A correlative change, using the carrot and stick approach, was to created a "bulge" in the 10% limit on foreign property investments. For
every dollar invested in an SBIC or SBLIP, the registered pension plan would be entitled to invest three dollars in foreign property. The initial reaction of pension funds to this bribe was quite negative.

Discovering some way to allow the pension and retirement plans conveniently to invest a reasonable amount of their funds, estimated to be close to $100 billion in assets, in Canadian junior companies, many of them vehicles for innovation and invention, is a task still to be accomplished. We can anticipate that the funds will continue to pressure the government to remove the 10% foreign property limit and one can hope that some trade-off, designed to stimulate more investment in the junior companies, will result. Based on a $1 billion estimate, we are talking about $7 billion of surplus capital which has been enjoying tax free treatment in registered pension plans and which, from the perspective of the innovators and inventors, should be "paying its way" to help stimulate lagging R&D investment in Canada.

Another innovation was a federal tax credit of up to $700 for individuals who invested in labor-sponsored venture capital corporations. This tax credit applies to shares purchased in a venture capital fund up to 20% of the cost of the shares. The monies raised by the funds must be invested in medium and small business and at least 60% would have to be equity. The origin of the plan was one established in Quebec in 1983 by the Quebec Federation of Labour.

In 1987 the limit on claimable research development tax credits was raised to 75%, but buildings were rendered ineligible. Tax credit refunding to the full 100% is available for small companies in Canada with taxable income in the preceding year not exceeding $200,000.

The definition of research and development was also liberalized as part of the 1985 budget and a Revenue Canada Circular was issued in the summer of 1986 (No. 86-4) to make the definition more comprehensible. The Circular itself takes thirty-four pages to explain the new definition!

D. Government Programs (Loans and Grants)

The Small Business Loans Act, for companies with annual revenues not in excess of $2 million, is still available for loans of up to $100,000 at reasonable interest rates. The government guarantees 85% of these loans and there is a broad list of qualifying businesses. The loans are made through chartered banks and the government adds its guarantee.

Direct aid in the form of grants is available from the National Research Council of Canada ("NRC") under a number of programs. These programs have generally been well regarded by industry, and by government watchdogs. The NRC officials seem to understand the high risk nature of research and development and can also offer informed assistance and advice in designing an R&D program for business. The acronyms for all the various NRC programs look like alphabet soup and I will not burden you with them here. They even include assistance for
Canadian business to go abroad to bring in technology and technical experts, as well as funding of domestic programs.

The Federal Department of Regional Industrial Expansion ("DRIE") operates the Industrial and Regional Development Programs. These programs are designed to stimulate economic activity in areas suffering the highest unemployment and operate in conjunction with provincial governments. In effect, DRIE looks after central Canada while Maritime and Western regional offices have been created under joint management with the provinces, which is consistent with the Conservative government's objectives of encouraging local incentives. DRIE now makes an effort to plug the innovative businessman into the NRC, whose programs tend to be more specifically suited to the innovator and inventor.

A federal organization providing loan capital is the Federal Business Development Bank ("FBDB"), an organization over forty years old. The FBDB tends to be relatively conservative and is usually not willing to finance "grass roots" innovators and inventors, although it does have a venture capital division. It also offers management training and counseling under a number of programs.

Many Canadian inventors and innovators have tapped into the Defence Industry Productivity Program administered by DRIE which assists with the development of defense-related products, giving R&D assistance, assistance with acquisition of advanced production machinery, feasibility studies and so forth, but all in the defense industry and for defense-related products.

An organization which clients of mine have tapped very successfully is Canadian Patents and Development Limited ("CPDL"), a Crown corporation which funds research and then builds an inventory of patents and other technology, which is available under license for commercial exploitation. It is usual for CPDL to require that all manufacturing be done in Canada. This has occasionally created some problems for clients of mine doing foreign joint ventures and wishing to penetrate offshore markets with new Canadian products. The foreign joint venture partner often wishes to put some of the production in its offshore facilities or in cheap labor markets.

In the energy area, the Industry Energy Research Development Program ("IERD") provides assistance for up to 50% of eligible costs associated with the development of processes, products or systems which increase energy efficiency in industry. The Federal Department of Energy also operates bio-energy, solar energy and general energy conservation programs which support R&D in these areas.

Generally, federal programs have relatively short lives. Some die in a blaze of adverse publicity like the SRTCs. These probably cost the federal government close to $3 billion during its sixteen months of existence. Some, like FBDB, survive for many years. Some of the plans I
mentioned may have expired as I speak and new ones may have replaced them. I trust you will be sympathetic to my efforts in trying to assemble a current list, being a simple lawyer.

E. **Ontario Provincial Funding**

I should also mention the programs offered by my home province, Ontario. Other provinces, particularly Quebec, offer different and innovative programs, but time does not permit me to deal with all of them.

A popular Ontario vehicle is the Small Business Development Corporation ("SBDC"), created in 1980. An SBDC invests in the voting shares of small businesses or start-up companies in certain defined areas and the SBDC investor then gets back a cash grant or Ontario tax credit of a percentage of the amount invested, usually 25%. The minimum investment is $25,000 (except for certain depressed areas of the province) and the minimum capital is $100,000, maximum $10 million.

The new business investment must be in new equity, up to a maximum of $2.5 million in any particular business and the range of permitted business activities in which an SBDC can invest is very broad, the conditions not onerous (e.g. not more than 150 employees, must pay 75% of wages in Ontario, etc.). The SBDC program has been quite successful in Ontario, although I do not have any statistics to give you. I am an investor in one myself which has funneled its money into development of an advanced laser erasable computer storage system.

Ontario also has four development corporations, three with specific responsibilities for geographic areas. The fourth, Innovation Ontario Corporation ("IOC") promotes the development of technology-based companies. The loans available are up to $500,000 so it is mainly junior companies that are financed, usually by direct term loans and loan guarantees. There is also a program to assist export by financing foreign receivables. IOC is also a true venture capital corporation, making investments of up to $250,000 in new start-up companies with high technology to develop. The maximum investment is $250,000 or 25% of the equity.

One of Ontario's most ambitious programs was the establishment by the Premier's Council of technology "Centres of Excellence" connected to universities and with a Technology Fund of $1 billion. Seven of these have been established to date with Ontario government funding. They operate as non-profit corporations with the objective of producing new proprietary technology by stimulating research. Our office represents one of the Centres (outer space research) and it has been interesting to study its development. As one might imagine, one of the first hurdles encountered was to decide who would own the new technology. The universities assumed that, in the usual manner, they would own the technology, notwithstanding the government funding. The government had another idea and wanted to be sure that it would enjoy at least royalties.
and possibly significant control over the exploitation of the technology and its fruits. Several of the Centres of Excellence almost foundered during these difficult negotiations.

In parallel with the Centres of Excellence is the Ontario Technology Fund, administered by the Premier’s Council. Another client of mine was the beneficiary of one of the first fifteen grants made under this program. More grants are still being made. The program supports research leading to production of new products (assuming success of the research) for established companies with good “track records” in research and production. The government reimburses 50% of eligible expenditures (broadly defined) and successful applicants must submit a detailed proposal showing how they believe their research will result in production in Ontario of commercial goods. Amounts of money available have been significant. Our client, for example, will receive approximately $19 million, to be matched by its own investment, for development of its “super sniffers” (mass spectrometers which can detect trace elements of chemicals, drugs, explosives, etc. in the air).

It was interesting to be involved in the process of settling the grant documentation. The agreement itself (with the political title “Ontario Competitiveness Agreement”) was executed only one year and two days after the grant was announced. In the negotiating process the government tried hard to attach royalties (to recoup the grants), add clauses to turn the grant into a loan if certain performance criteria or other conditions were not met, etc. They did not succeed, at least not with my client. The Ontario government, still smarting from the high profile failure of its grant program through the Idea Corporation (a micro SRTC) was taking pains to write “tight” grant agreements requiring ongoing supervision, vetting and auditing.

Ontario also operates mainly advisory technology centers in connection with specific industries where technical assistance is made available by experts at little or nominal charge. The Centre for Resource Machin- ery Technology actually makes venture capital investments of up to $750,000 for the construction of prototypes, but this is the exception for resource centers.

Northern development has always been a problem in Ontario and additional funds are available for small business development in non-resource based manufacturing and business service centers under the “Nor-Dev” program.

One problem I foresee in future is countervail being asserted against products financed with help from the Ontario Technology Fund, on the basis that the grants are subsidies. The profile of the Premier’s Council and Technology Fund is very high and it is difficult to imagine U.S. competitors not bringing trade actions against such products, if they are seriously competitive.
IV. PARTICULAR FINANCING METHODS

A. History and Background

Canada has a tradition of stimulating junior resource development going back to the days of the Ontario Mining Exchange which combined with the Toronto Stock Exchange in the late 1940s. The ability to raise funds for speculative mining ventures, quickly and with little concern for investor protection, made Toronto legendary, or infamous, in the period from the end of the Second World War until the mid-1960s. It is rumored that mining bucket shop operators, driven from New York by the Securities and Exchange Commission, moved directly north. It is also rumored that when the Ontario Securities Commission drove them from Toronto, they went to Vancouver and perhaps from there to Australia.

Fortunately, the tradition of “seed capital” exemptions from securities law compliance has been preserved in the Securities Acts of most Canadian provinces. I will deal only with Ontario, the “lead” province in the area.

B. Securities Regulation

Canadian securities laws differ from those in the United States in several respects. They are laws of the provinces as there is no federal securities law of general application nor a federal securities commission. The statutes contain detailed lists of securities and transactions which are exempt from the requirement for registration of the issuer, and the preparation, clearance with Securities Commission and delivery to the potential investor of a preliminary prospectus and prospectus providing the usual “full, true and plain disclosure” concerning the issuer and the securities being issued. The ones of most interest to junior innovators are found in section 71(1)(p) and section 72(1)(a). Section 71(1)(p) is the “seed capital” exemption which permits an issuer to solicit not more than fifty prospective purchasers and sell to not more than twenty-five of them over the course of six months, with no minimum or maximum sale price. Section 72(1)(a) is the “private company” exemption (maximum fifty shareholders, transfers restricted and no general offering).

The problem with the seed capital exemption is that the purchaser must have “access to substantially the same information concerning the issuer that a prospectus filed under [the Securities Act] would provide” and this often presents a very difficult standard to meet or verify. In addition, the investor (unless a relative) must be one who “by virtue of his net worth and investment experience or by virtue of consultation with or advice from a person or company who is not a promoter of the issuer . . . is able to evaluate the . . . investment.” Again, this criterion is difficult to meet and can be embarrassing when viewed with hindsight (i.e. after the investment has gone sour and the investor complains to the securities regulator).

Additional exemptions were created by regulations to the Securities
Act to deal with various “tax shelter” investment vehicles. Section 14 of Part III of the Ontario Securities Act Regulations adds the category of “government incentives securities.” Under this exemption, the prospective purchasers that may be solicited are limited to seventy-five, to result in sales to not more than fifty. However, again we run into the problem of the condition that an offering memorandum be provided and that each investor have access to substantially the same information concerning the issuer that a prospectus would provide. Here also, the investor (unless a relative) must be of such net worth and sophistication that he is able to properly evaluate the investment.

B. Restrictions on Exemptions

In both of the exemptions discussed, a great deal of subjective judgment must be made by the innovator or issuer, his lawyer and the underwriters. The standards of information availability and net worth are often met in the breach and not the observance. However, the number of tax shelter vehicles which are sold under that exemption has been quite extraordinary, too many for the Securities Commission to police.

The problem for the innovator is that a disgruntled investor can, with hindsight, complain and test the exemption against these difficult standards. If the issuer fails the test, the purchasers’ rights of rescission revive (and, indeed, do not commence until a proper prospectus is filed). In practice, this means that the investor can recover his investment and have a personal action against the issuer and the promoter of the security for recovery.

C. The “Closed System”

Some mention should be made of the Canadian “closed system,” the flip side of the specific list of exempt transactions and securities.

The closed system means that most securities issued based on an exemption cannot be resold into the public market until certain stringent criteria are met. They can be resold within the closed system in another exempt transaction (e.g. to another purchaser of not less than $150,000 worth of the securities, one of the other most used exemptions for “private placements”). The criteria for breaking out of the closed system require the issuer to become a “respectable” public, reporting company. The first trade after the exempt one is deemed to be a distribution to the public unless: 1) the issuer becomes a reporting issuer; 2) the issuer is not in default under securities law; 3) no unusual effort is made to prepare the market or create a demand; 4) no extraordinary commission or consideration is paid; and, most importantly, 5) the securities have been held for periods, depending on their investment grade, of six months, a year or eighteen months. The investment grade is determined by reference to various out-of-date statutes regulating life insurance companies, trust and loan companies and various registered pension and retirement funds.
This statutes set "objective" criteria related to income, as a percentage of capital, dividend payments or interest and asset coverage, which can be verified objectively. The tests under federal law will soon be replaced by general prudential standards, according to announced federal government policy.

In Canada there is a "prompt offering system" ("POP") for very large issuers allowing them, in effect, to do what is like a shelf registration in the United States. An annual information form ("AIF") is filed with the Securities Commission, but not reviewed as to its adequacy by the regulators. It must be renewed annually, as its name implies, and under it the large issuers qualifying can file a very short form prospectus which cross-references to the AIF and, thereby, greatly shorten the period required for bringing an issue to market. Few innovators and no start-up companies will ever have access to the POP system.

V. SECURITY HOLDER'S RIGHTS IN CANADA:
A BALKANIZED SYSTEM

Although an innovator rarely has significant "hard" assets to encumber in favor of lenders, some understanding of the Canadian system for taking security is probably useful.

Canada's system for taking security on personal property and chose in action reflects the structure of Canada, a Confederation with a complex division of powers. That is rarely a tidy way to run a country or a security system.

To the provinces are reserved all matters relating to "property and civil rights within the province." The federal government has exclusive jurisdiction over banks and banking and trade and commerce of a national character (between the provinces).

Therefore, despite the best efforts of Canada's Law Reform Commission, the Canadian Bar Association and particularly of Professor Jacob Ziegel of the University of Toronto to standardize the security system, we have four levels of security over personal property in Canada namely:

1) A special security interest reserved to banks under Section 178 and related sections of the Bank Act over the inventory and work-in-process of specified categories of borrowers and, pursuant to judicial extension, accounts receivable arising from the sale or other disposition of the inventory;
2) In three provinces and one territory (Ontario, Manitoba, Saskatchewan and the Yukon Territory) and soon to be in two more provinces (Alberta and British Columbia), a modern Personal Property Security Act ("PPSA") modeled on the Uniform Commercial Code Article 9, but not, unfortunately, uniform among the present and prospective participating jurisdictions;
3) An old system based on antiquated statutes which may be familiar to the more aged U.S. lawyers, namely the Chattel Mortgages Act,
the Conditional Sale Act, the Bills of Sale Act and another, not familiar to U.S. lawyers of any age, the Corporations Securities Registration Act for debentures (fixed or floating charges) and trust deeds; and

4) A system peculiar to the province of Quebec, that province like no others, which is based mainly on French Civil Law, with particular statutory and judicial glosses thereon and which lacks any comprehensive registration or notice system.

As one might imagine, the Balkanized system produces significant work and revenue for the lawyers who receive the calls from the foreign clients wishing to establish national Canadian secured financing schemes for leasing, floor planning etc. Some major law firms, like Fasken & Calvin and Fasken Martineau Walker, have whole departments specializing in creating four-part packages of security documents and manuals for the use and administration thereof in a national setting. What a bonanza!

It is particularly unfortunate that the PPSA provinces are themselves Balkanized. Professor Jacob Ziegel has, for many years, spearheaded the effort to persuade the provinces to adopt a model Uniform Commercial Code, based in part upon the U.S. UCC Article 9 with the 1972 amendments (and, in my view, significantly improving thereon) and adapting it to the different Canadian system which includes, as a core security document, the floating charge debenture. Some of you will be aware that this latter creative device, invented by English solicitors in the eighteenth century to avoid the problem of taking security on after acquired property, exists in Canada and, indeed, is still the core security document used by the "Big Six" Canadian chartered banks and other traditional commercial lenders.

In Canada, there are also significant differences between the PPSA of Ontario, about to be significantly revised as of autumn 1989, and those of the western provinces, although there appears to be a salutary movement in the western provinces toward uniformity, at least among Alberta and British Columbia.

Perhaps as a mirror of Canadian federalism, we have still not resolved the question of priority as between the Bank Act security and the provincial schemes. Cooperation and sharing of jurisdictions to accomplish this will be necessary and has not yet been forthcoming, notwithstanding the efforts of the Canadian Bankers' Association and others to propose what appear to be reasonable compromises.

In addition, the federal system creates a lacuna with respect to taking security on certain intellectual and industrial property interests, particularly trade marks, which are in the federal domain. The Trade Mark Registrar for many years refused to recognize or accept the deposit of any security interests on his Federal Registrar and most solicitors decline to give an opinion that taking a charge on intangibles such as trade marks in a general security agreement under provincial law was adequate. Careful solicitors required the cumbersome technique of taking a
formal assignment of the trade mark in favor of the secured creditor and licensing back the use thereof to the real owner by way of another peculiar Canadian instrument, the registered user agreement. Under Canadian law, an owner of a trade mark who permits its use by a licensee, even its subsidiary, must enter into and file on the register in Ottawa a registered user agreement, failing which the owner will be deemed to have allowed the mark to enter the public domain and it will be lost.

Taking security over know-how and other intellectual property interests not regulated by statute (e.g. neither trade marks, copyrights, patents nor industrial designs) is particularly problematic, but this is not peculiar to Canada.

In summary, I believe our Balkanized and somewhat antiquated security system for personalty and intangibles, particularly those valuable intangibles associated with innovation, has acted as a disincentive to the financing of innovation in Canada. We can only hope that Professor Ziegler and others will carry on their campaign for modernization, harmonization and unification.