The Lending and Secured Finance Review

Editor
Azadeh Nassiri

Law Business Research

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This article was first published in The Lending and Secured Finance Review - Edition 1
(published in August 2015 – editor Azadeh Nassiri)

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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-909830-59-2

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

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ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ALLEN & OVERY

ANDERSON MŌRI & TOMOTSUNE

BONELLIEREDE

BREDIN PRAT

DE BRAUW BLACKSTONE WESTBROEK

GOODMANS LLP

HENGELER MUELLER, PARTNERSCHAFT VON RECHTSANWÄLTEN MBB

LENZ & STAEHELIN

PAKSOY

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

PINHEIRO NETO ADVOGADOS

SLAUGHTER AND MAY

URÍA MENÉNDEZ ABOGADOS, SLP

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EDITOR'S PREFACE

This first edition of *The Lending and Secured Finance Review* comes on the heels of a strong few years for the loan markets. During this period, despite some volatility and bumps in the road, lending conditions have generally continued to improve against a backdrop of greater economic stability and the return of M&A activity in Europe and globally.

It is difficult to ignore, however, that there has been a significant change in the way corporates access funding since the financial crisis and that diversification of financing sources (both in terms of products and markets) has been a key global trend for corporate treasurers. Unable to rely to the same extent as previously on their relationship lenders, and with liquidity in the European loan markets constrained, many corporate treasurers turned to the debt capital markets in the aftermath of the financial crisis and, in particular, the US high-yield and private placement markets. This trend has continued, driven in part by new regulatory reforms increasing capital requirements for banks, as well as new industry regulations and guidance impacting the leverage multiples that some banks are able to offer.

Nonetheless, loans (secured and unsecured) remain the predominant source of funding for corporates globally. While traditional banks still play an important and active role in the loan markets and remain dominant in the investment grade market, in other sectors (particularly in the leveraged, real estate and infrastructure finance markets) institutional investors, many of whom also participate in the debt capital markets, are more prominent. The last few years have also seen the rise of alternative finance providers such as direct lending funds, particularly in the mid-market.

The combination of the competition from these alternative finance providers and the high-yield market, the willingness of US investors to invest in European assets and the convergence of the European and US markets more generally, especially in the leveraged space, has resulted in a crossover of US terms and structures (particularly from the high-yield and term loan B markets). It is now not uncommon, for example, to see call protection included for term loans in a leveraged facility agreement and since

2013, covenant-lite and covenant-loose loans have re-emerged to become a reasonably significant feature of the European loan market.

It is difficult to predict how the markets will fare, in particular given underlying concerns about the depth of the global economic recovery, but growth of direct lending funds, private placements and other alternatives to traditional loan finance seems set to continue. It will be interesting to see whether competition from these alternative sources and the high-yield and term loan B markets will result in further crossover of US terms into the European leveraged loan market, including the mid-market. It will also be interesting to see how banks and other investors continue to react to the changing regulatory landscape and the political and economic risks and uncertainties in certain parts of the eurozone and the emerging markets.

The Lending and Secured Finance Review contains contributions from leading practitioners in 14 different countries and I would like to thank each of the contributors for taking the time to share their expertise on the developments in the corporate lending and secured finance markets in their respective jurisdictions and on the challenges and opportunities facing market participants. I would also like to thank our publishers, and in particular Nick Barette, Shani Bans and Adam Myers, without whom this publication would not have been possible.

I hope that the commentary that follows will serve as a useful source for practitioners and other readers.

Azadeh Nassiri
Slaughter and May
London
August 2015

Chapter 2

CANADA

Jean E Anderson, David Nadler, Carrie B E Smit, Brendan O'Neill and David Wiseman[1]

I OVERVIEW

i General

The corporate lending market in Canada continues to be very active. Syndicated loans are frequently used by Canadian borrowers to fund a number of activities, including acquisitions, capital expenditures, dividend recapitalisations, refinancing of existing debt and ongoing operations. Continuing low interest rates, substantial liquidity in the North American market and the easing of credit terms have contributed to the attractiveness of leveraged loans for Canadian borrowers.

ii Standardised terms

The Canadian Bankers Association has published Model Credit Agreement Provisions to be used in syndicated loan transactions in Canada. The goal of the Provisions was to standardise selected provisions of loan agreements to more easily facilitate secondary market trading and include standard provisions relating to assignments and loan trading. The Provisions are based on provisions prepared by the Loan Syndication and Trading Association, Inc. Use of the Provisions is not mandatory, but they are commonly used in syndicated loan transactions where the administration agent is a major Canadian bank.

iii Recent Canadian deal activity

Deal volume in the Canadian merger and acquisition market in 2014 increased by 13 per cent from 2013, with a total of 2,869 deals announced.[2] These transactions totalled

1 Jean E Anderson, David Nadler, Carrie B E Smit, Brendan O'Neill and David Wiseman are partners at Goodmans LLP.

2 Crosbie & Company, Canadian M&A 2014 Yearly Report, p.1, online: www.crosbieco.com/ma/index.html. Note: Crosbie and Company sets a minimum deal value of $5 million for inclusion in its data.

C$238 billion, a five-year high for the Canadian market and a 23 per cent increase from 2013.[3] Deal volume peaked in the second quarter of 2014 (with 768 announced deals), and declined for the next two quarters and into the first quarter of 2015 (with 733, 708 and 656 announced deals, respectively).[4] Mega deals, namely transactions over C$1 billion, drove the increased pace and value of acquisitions in 2014, with the mid-market segment remaining relatively stable. There were 42 mega deal transactions in 2014, with a total value of C$153 billion.[5] This trend continued into the first quarter of 2015, with eight mega deals announced carrying an aggregate value of C$26 billion.[6] For the 11th consecutive quarter, the real estate sector remained the most active. Despite the active real estate sector, the energy industry still had the highest industry deal value (representing 24 per cent of a total Canadian deal value of C$206.1 billion), notwithstanding low oil prices.[7] Overall, 2014 was a strong year for Canadian merger and acquisition activity. The increase in activity has been driven by strong valuations, continued low lending costs and growing confidence in US markets, all of which outweighed the negative impact of slower activity in the mining sector.[8]

iv Canadian financing sources

Canadian companies continued to finance their operations over the past 18 months in a variety of ways. Day-to-day operations and cash management is generally financed with operating loans or liens of credit which are entered into with a company's primary financial institution. Asset-based loans, financed on the security of a company's working capital assets, also continues to be a frequently used source of financing for many Canadian companies, particularly in the manufacturing, distribution and retail sectors. In many cases, a significant portion of the consideration for acquisitions was funded through various types of debt obtained from a variety of sources. Sources include senior secured credit facilities provided by domestic and foreign financial institutions, second lien credit facilities, unsecured credit facilities, streaming arrangements, high-yield notes and mezzanine debt. For example, Burger King used a C$9.5 billion loan facility led by JPMorgan Chase & Co and Wells Fargo & Co to help finance its acquisition of Tim Hortons. Amaya Gaming financed its acquisition of Poker Stars with a combination of debt and convertible preferred shares. Stornoway Diamond Corporation financed its Renard diamond mine project with financing that combined senior and subordinated debt facilities, equity issuances, an equipment financing and a streaming agreement providing for the forward sale of diamonds.

3 Crosbie & Company, footnote 2, *supra*.

4 Crosbie & Company, footnote 2, *supra*.

5 Crosbie & Company, footnote 2, *supra*.

6 Crosbie & Company, Canadian M&A Q1 2015, online: www.crosbieco.com/ma/index.html.

7 PWC, *Capital Markets Flash – Canadian M&A Deals Quarterly* – Q1 2015, p.1, online: www.pwc.com/ca/en/managing-in-a-downturn/capital-markets-flash/publications/pwc-cmf-2015-02-05-en.pdf.

8 PWC, footnote 7, *supra*.

II LEGAL AND REGULATORY MATTERS

i Lender-related regulatory requirements

Canadian borrowers regularly obtain financing and leveraged finance products from a broad range of lenders including domestic and foreign financial institutions, private equity and hedge funds and through the issuance of public debt, including high-yield debt. Canadian and foreign banks are very active in this area and provide a wide variety of debt products to Canadian borrowers. The key regulatory issue for lenders dealing with Canadian borrowers is whether the lender would be considered a bank for Canadian regulatory purposes. The activities of Canadian banks and foreign lenders affiliated with foreign banks that are carrying on banking business in Canada are subject to regulation under the federal Bank Act. Lenders that are banks or affiliated with foreign banks must obtain the necessary approvals under the Bank Act in order to establish a presence in Canada, and must comply with certain operational requirements of the Bank Act on an ongoing basis.

Foreign lenders affiliated with foreign banks that do not have a presence in Canada may lend to Canadian borrowers without obtaining regulatory approvals from federal banking regulators if the lending relationship is established in a way that would not involve the lender being viewed as carrying on business in Canada. Generally speaking, a loan that is made by a lender located outside of Canada, and that is approved, negotiated and documented outside of Canada with payments being made to an entity outside of Canada, should satisfy this test.

Without connection to a bank, foreign and other lenders that are not otherwise regulated as financial institutions in Canada (e.g., insurance companies, trust companies and credit unions) do not require any special licences or regulatory approvals to make a loan to a Canadian borrower. Such lenders will, however, be subject to laws of general application that apply to the taking and enforcement of security in certain provinces. For example, a lender may require an extra-provincial licence under provincial legislation to hold and enforce a mortgage on real estate in that province. Lenders that lend on the security of real property may also need to obtain a mortgage brokerage licence under provincial legislation if it is not a financial institution exempted from compliance.

Although not a Canadian regulatory issue *per se*, foreign lenders entering the Canadian market will also need to consider their ability to fund loans in Canadian dollars as many Canadian borrowers require Canadian dollar borrowings.

ii Borrower-related regulatory requirements

The activities of many Canada borrowers are subject to some degree of government regulation, and often a particular government licence or approval is a key component of the borrower's business operations. Lenders to such borrowers should ensure that the borrower obtains all necessary governmental consents required to grant security on its assets to secure the proposed financing and to permit the lender to realise on its security. In addition, any transfer of a regulated borrower's assets (including any applicable licences) as part of the realisation process may well require further governmental approvals, including approval of the proposed acquirer.

iii Canadian anti-money laundering legislation

The Proceeds of Crime (Money Laundering) and Terrorist Financing Act makes it mandatory for certain entities (including lenders) to ascertain the identity of Canadian borrowers and related parties before accepting them as clients, to report a variety of transactions to the Financial Transactions and Reports Analysis Centre of Canada and to maintain certain client and transaction records. These requirements are designed to assist in the detection and deterrence of money laundering and the financing of terrorist activity in Canada and around the world. Lenders should ensure that their due diligence requirements include a request for the information necessary to ensure compliance with this legislation.

iv Basel III

In 2015, the Basel III liquidity rules will start to be phased in as part of Canada's commitment to have the rules progressively phased in by 2019. There are two minimum rules for liquidity: the liquidity coverage ratio that has a 30-day horizon, and the net stable funding ratio that has a one-year horizon. Both rules are designed to ensure adequate liquidity for banks during periods of stress. Canada's banks remain among the most well capitalised in the world in terms of quality and quantity of capital.

III TAX CONSIDERATIONS

Canadian tax issues also need to be considered when structuring financing and leveraged finance products.

i Withholding tax

Under the Income Tax (the Tax Act), interest paid by a Canadian resident debtor to an arm's-length non-resident creditor will not generally be subject to the Canadian withholding tax, provided that the interest is not participating (e.g., contingent or dependent on the use of or production from property in Canada or computed with reference to revenue, profit, cash flow, commodity price or similar criterion or by reference to dividends paid). Where interest is subject to withholding tax under the provisions of the Tax Act (either because it is paid to a non-arm's length creditor or is participating), the terms of an applicable bilateral tax treaty may apply to reduce the rate of withholding tax from the Canadian domestic rate of 25 per cent. Under the provisions of the Canada–US Income Tax Treaty, the rate is reduced to 15 per cent if the interest is participating, or otherwise to zero per cent. Most other treaties reduce the rate of withholding tax on interest to 10 per cent.

ii Interest deductibility

Interest is only deductible to a Canadian resident debtor where it meets certain technical requirements set out in the Tax Act. In particular, interest (not in excess of a reasonable amount) is generally deductible on:

a borrowed money used for the purpose of earning income from a business or property; or

b an amount payable for property which is acquired for the purpose of gaining or producing income from a business or property.

Interest payable on financing incurred to fund the acquisition of an asset to be used in the debtor's business should generally be deductible. Similarly, interest payable on financing incurred to fund the acquisition of shares of a company (where there is a reasonable expectation of income from the shares) should also generally be deductible. Where the Canadian resident debtor incurs debt to finance the acquisition of shares, and it then amalgamates with, or winds up, the target company, the interest payable on that debt will generally continue to be deductible (on the basis that the income producing shares are now replaced with income-producing assets).

iii Thin capitalisation rules

Under the Tax Act, interest payable by a Canadian resident debtor may not be deductible to the debtor, and also may be subject to Canadian withholding tax on an accrual basis, if the Canadian thin capitalisation rules are applicable. These rules generally apply where:

a a non-resident creditor owns or has a right to acquire (or is non-arm's length with a person who owns or has the right to acquire) shares of the debtor representing 25 per cent or more of the votes or value of the debtor's capital stock; and

b the debt-equity ratio of the debtor is in excess of 1.5:1.

The thin capitalisation rules may apply in a situation where financing is undertaken by a non-resident parent corporation which then on-lends the funds to its Canadian subsidiary.

iv Consolidation issues

Canadian resident corporations do not file consolidated tax returns (unlike in certain other jurisdictions, such as the United States). As a result, interest payable by a Canadian resident corporation is only deductible by that particular corporation and can only offset income earned by that particular corporation. Where the taxable income of the debtor corporation is not sufficient to offset the interest deductions, other transactions may need to be undertaken to efficiently use the interest deductions in the corporate group. In particular, when an acquirer incurs debt to finance the acquisition of a target corporation, additional steps (such as the amalgamation of the acquirer with the target) may need to be undertaken to facilitate the deduction of the interest on the acquisition financing against the target's operating income.

v Stamp and documentary taxes

There are no stamp or other documentary taxes in Canada to which loan or securitisation documentation or loan trading documentation might be subject.

vi Foreign Account Tax Compliance Act

Under the US Foreign Account Tax Compliance Act (FATCA), payments made to foreign creditors under Canadian financing or leveraged finance arrangements may, in certain circumstances, be subject to a 30 per cent US withholding tax. Where there is

a risk of FATCA withholding, the applicable loan or debt financing instrument will typically require the foreign creditor to provide such documentation as may be necessary for the debtor to comply with its obligations under FATCA and to determine whether the creditor has complied with its obligations under FATCA, or to determine the amount of FATCA withholding tax that will be deductible from payments made under the instrument. A Canadian debtor will typically not provide a gross up to the foreign creditor for amounts deducted on account of FATCA withholding tax.

IV CREDIT SUPPORT AND SUBORDINATION

Secured loans are commonly used in the Canadian debt market to finance working capital, acquisitions and longer-term borrowing needs. The forms of security and quasi-security (such as guarantees) most commonly used in the Canadian market to secure personal and real property assets, as well as the regime for taking security under the Civil Code of Quebec (CCQ) and the common law applicable in the other provinces and territories are discussed below.[9]

i Security

Personal property – tangible moveable property – common law provinces

Each of the common law provinces and territories in Canada has a personal property security statute (collectively, the PPSAs) that is modelled on Article 9 of the Uniform Commercial Code in the United States. Under the PPSAs, tangible moveable property consists of goods, chattel paper, documents of title and investment property. In secured financings in the Canadian market, tangible moveable property normally means goods that are equipment or inventory.

Security in this type of property is created when a debtor grants to the creditor a security interest in that property. The granting clause in the security agreement will expressly describe the collateral that the security interest attaches to. Quite often, secured creditors are given a general security interest that secures all of the debtor's existing and after-acquired personal property, both tangible and intangible.

A security interest in tangible property must be perfected if a creditor is to have priority over the interests of other creditors and third parties. Registration of a financing statement in the province or territory where tangible assets are physically located is necessary to perfect a security interest in those assets. The PPSAs are publicly accessible, searchable databases and a registered financing statement serves as a public notice that a debtor's assets have been encumbered in favour of a secured creditor. The cost to file a financing statement in the various PPSAs is nominal and varies slightly with the length of the filing term. Secured parties must file under the PPSAs in every province or territory where the debtor's assets are located if they wish to be perfected against all of those assets.

9 The common law provinces and territories in Canada are: British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland, Nunavut, the Yukon Territories and the Northwest Territories.

Certain types of tangible personal property such as chattel paper, instruments, money, documents of title and large goods can also be perfected by possession.

Personal property – tangible moveable property – Quebec
Security over tangible moveable property in Quebec is created by a hypothec. Registration at the Register of Personal and Moveable Real Rights (RPMRR) perfects the hypothec. The cost to register at the RPMRR is nominal and varies slightly with the length of the filing term. No written agreement is needed where a hypothec is taken with delivery (i.e., a pledge). Perfection occurs when the pledged collateral is physically delivered to the pledgee.

Personal property – tangible moveable property – federal jurisdiction
Security in aircraft, ships and most railways is governed in Canada by federal legislation. While security interests in these types of assets can be taken under the PPSAs or the CCQ, secured parties are well advised to consider any applicable federal legislation and to take any additional steps prescribed therein to establish a first-ranking claims on such assets.

Personal property – intangible property (general) – common law provinces
Intangible personal property includes claims and receivables, contractual rights, intellectual property rights (IP rights) and investment property.[10] Generally, creditors secure intangibles similarly to tangibles, by way of a security agreement and perfection by registration under the PPSAs.[11] The law of the jurisdiction where the debtor is located[12] at the time the security interest attaches governs the validity, perfection and priority of a security interest in intangible personal property.

IP rights are governed by federal legislation in Canada, but these rights are personal property under the PPSAs and are considered intangibles. A security interest is created in IP rights through a grant of security under a security agreement, and is perfected by registration. In addition, it is common practice for secured creditors with a security interest in Canadian trademarks, copyright or patents to file a copy of or notice of the security agreement with the Canadian Intellectual Property Office.

10 The PPSAs expressly exclude an interest in or claim under any insurance policy or annuity contract from their scope. Secured debtors must take steps outside of the PPSAs to secure an interest in an insurance policy. The PPSAs do, however, provide that a previous security interest in other secured personal property assets extends to the proceeds of insurance on such assets. In Quebec, insurance policies can be charged by a hypothec.

11 Certain government receivables payable by the federal government of Canada and the provincial and territorial governments cannot be assigned or transferred as security unless secured parties comply with certain conditions prescribed by statute.

12 If a debtor has more than one place of business, a debtor is located (under the PPSAs) where it has its chief executive office.

Personal property – intangible property (general) – Quebec

Under the CCQ, the law of the jurisdiction where the grantor is domiciled (i.e., where its registered office is located) governs the validity and perfection of security over intangibles. Intangibles (incorporeal moveable property) such as claims, receivables, contractual rights and IP rights owned by a debtor domiciled in Quebec are secured under the CCQ by way of a hypothec that is perfected by filing in the RPMRR.

Personal property – intangible property (investment property)

Financial assets such as shares and other securities are considered investment property under the PPSAs. Almost all of the common law provinces and territories have a Securities Transfer Act or similar legislation (STAs) that is based on revised Article 8 of the Uniform Commercial Code. The STAs work together with the PPSAs to govern the creation and perfection of security interests in investment property. The CCQ also contains provisions specific to investment property.

Investment property under the PPSAs and STAs includes securities (uncertificated and certificated), securities entitlements, securities accounts, futures contracts and futures accounts. In secured financings in Canada, the type of investment property seen most commonly is certificated securities. A borrower or guarantor would typically pledge the certificated shares it holds directly in a subsidiary to a lender to secure its obligations owing to that lender.

In addition to execution of a security agreement and filing under the PPSAs to perfect an interest in investment property as an intangible, secured creditors can also establish 'control' or possession over such property. Control is the best method for perfecting such an interest as it gives the secured party a higher priority than a security interest perfected by registration alone.

Where investment property is held directly by a debtor, a secured party obtains control of certificated securities by taking possession of the certificates and either taking an endorsement or having the securities registered in its name. For uncertificated securities, control is achieved by either registering the securities in the name of the secured party or by obtaining a control agreement from the issuer of the securities. A control agreement is a tripartite agreement among the issuer, the debtor and the secured party and provides that the issuer agrees to comply with instructions from the secured party with respect to the securities without the debtor's further consent.

Where the investment property consists of securities entitlements held indirectly by the debtor through a securities intermediary, the secured party obtains control by:

a arranging for the securities intermediary[13] to record the secured party as the entitlement holder;

b obtaining a control agreement from the securities intermediary; or

c having a third party obtain control on its behalf.

13 For example, a clearing house, retail investment broker or bank.

Real property

The most common forms of security over real estate in the Canadian market are mortgages, debentures, hypothecs and trust deeds. Real estate in the common law provinces and territories includes land (together with buildings and fixtures), airspace above land, crops, forests, non-navigable waters, easements, subsurface land rights, rental income and other profits derived from land and leasehold interests. Real estate under the CCQ includes land; any constructions and works of a permanent nature located on the land and anything forming an integral part of the land; plants and minerals that are not separated or extracted from the land; personal property that is permanently physically attached and joined to an immoveable and that ensures its utility and real rights in immoveable property; as well as actions to assert such rights or to obtain possession of immoveables. Each province and territory in Canada has a real property title registration system. Secured creditors perfect interests in real property by filing a mortgage, debenture, hypothec or trust deed against the title to the debtor's real property. Generally, registration fees for real property mortgages in Canada are nominal. However, in several provinces and territories (Alberta, Newfoundland, Northwest Territories, Yukon Territories and Nunavut) registration costs can be higher as they are calculated based on varying formulas that take into account the principal amount of the mortgage that is being registered. Lastly, it is worth noting that there are several special statutes in Canada that govern most federally regulated facilities such as airports, prisons and major shipping ports, and these should be assessed when taking security involving such facilities.

Security over all or substantially all of the debtor's assets

Security over all of a debtor's present and after-acquired property is commonly taken in Canada by secured parties. To do so, standard practice is generally to take separate security agreements, some for personal property (for example, general security agreements, stock pledge agreements and sometimes intellectual property security agreements) and another for real property (for example, a hypothec or debenture) that together, encumber all of the debtor's property. While it is possible to secure both real and personal property in single documents such as a debenture, the practise is seen less often in the Canadian market and primarily on real-estate based transactions.

ii Guarantees and other forms of credit support

Guarantees are a common feature of secured lending structures for financings in the Canadian market. Typically, a guarantor (e.g., a parent or corporate affiliate of the borrower) will enter into a stand-alone guarantee with a lender that guarantees the obligations of the borrower to the lender. In the acquisition context it is not uncommon for the obligations of a sole-purpose acquisition entity to be guaranteed by an equity sponsor or controlling parent company. In Quebec, suretyships are used frequently in secured lending.

Financial assistance

Corporate legislation in Canada has eliminated outright restrictions on financial assistance. It is permitted without restrictions of any kind in several provinces, including

Ontario and Nova Scotia. In other provinces and territories, financial assistance is also permitted generally but is subject to a solvency test or disclosure requirements. This more relaxed regime has provided increased flexibility to lenders in Canada when structuring security packages that include guarantees.

Corporate benefit

There is no corporate benefit requirement under Canadian corporate law statutes. However, a financing transaction that does not provide any apparent benefit to a corporation may be challenged as oppressive by creditors or minority shareholders or may result in an allegation that the fiduciary duties of the corporate directors approving the transaction have been breached. Guarantees supporting the debt of affiliated entities are generally enforceable and valid in Canada as long as the debt is of benefit to the corporate group as a whole.

Agency concept

The concept of agency is recognised in all Canadian jurisdictions and is commonly used in secured loan structures in Canada. Agents are often used to represent lenders in a syndicate or to hold collateral on behalf of lenders.

In Quebec, the agent must be formally appointed as the hypothecary representative for all present and future creditors of the obligations. The deed of hypothec must be executed before a Quebec notary. As the party holding the hypothec, the agent, in its capacity as hypothecary representative, can enforce all of the rights under the hypothec.

Challenging security under Canadian law

Under Canadian law, there are several ways that a creditor or court-appointed officer could challenge security both before or after the commencement of insolvency or restructuring proceedings. Remedies for 'reviewable transactions' are available under federal insolvency legislation and provincial legislation.

In the context of insolvency proceedings, a trustee in bankruptcy[14] can challenge preferences and other transactions at undervalue under the federal Bankruptcy and Insolvency Act (BIA). Under Section 95 of the BIA, a trustee in bankruptcy can challenge a preference – namely a transaction with a debtor or payment made by a debtor which has the effect of preferring one creditor over another. If the preference is proven, the transaction or payment is void against the trustee in bankruptcy. Under Section 96 of the BIA, a trustee in bankruptcy can attack transactions between the debtor and persons who provided the debtor with inadequate consideration for assets, goods or services provided by the debtor. Courts can order that transfers at undervalue are void against the trustee in bankruptcy or, alternatively, that the parties to the transfer pay to the debtor's estate the difference between the consideration received by the debtor and the consideration given by the debtor. To the extent that transactions are rendered void as against a trustee in

14 Where a trustee refuses or neglects to take proceedings after being requested to do so by a creditor, then that creditor may make an application to the court for an order authorising it to take the proceedings in question in its own name and at its own expense and risk.

bankruptcy and the property in question has been further transferred, the BIA provides that the proceeds from the transfer of the property shall be deemed to be the property of the trustee. These sections of the BIA also apply (with any modifications that the circumstances require) to corporate restructuring proceedings under Canada's other major insolvency and restructuring statute, the Companies' Creditors Arrangement Act (CCAA).[15]

Provincial legislation is also available to creditors or trustees to attack preferential transactions. While there are differences among the various provincial statutes, most provinces allow a creditor to attack fraudulent conveyances and unjust preferences.[16] In general terms, fraudulent conveyances are transactions where conveyances of real or personal property are made with the intent to defeat, hinder, delay or defraud creditors or others. Unjust preferences are preferential payments or transactions made when the debtor was in insolvent circumstances, unable to pay their debts or knew they were on the eve of insolvency. Transactions found to be fraudulent conveyances or unjust preferences can be voided as against creditors. Finally, in almost all Canadian provinces and territories, creditors may use the oppression remedy under provincial corporate law to challenge security given by a corporation. This would involve a transaction where the corporation or its directors effected a result or acted in a manner that was oppressive, unfairly prejudicial to or unfairly disregarded the interests of certain parties (including creditors). Where oppressive conduct is found, Canadian courts have broad discretion to grant any remedy they deem appropriate in the circumstances.

iii Priorities and subordination

Priorities

In Canada, the priority of a the claim of a creditor of an insolvent corporation will depend upon the nature of the claim and the insolvency proceedings applicable to the borrower. The enforcement of security for an acquisition financing may occur in the context of a proceeding under the CCAA or the BIA. An insolvent corporate borrower may reorganise itself under the CCAA or BIA or petition itself into bankruptcy under the BIA. In a Canadian insolvency proceeding, certain claims maybe afforded priority over a secured lender in a court order and the priority of these claims will be determined by the courts based on the facts of each case. In addition, certain statutory charges will continue to have priority over a secured lender's claim in a bankruptcy including claims for unremitted employee source deductions, certain employee claims that are paid by the Canadian federal government under the Wage Earner Protection Act and certain employee and employer pension plan contributions that are due and unpaid. It should also be noted that a number of the Canadian federal and provincial statutory-deemed trust and charges that can prime a lender's security outside of a bankruptcy for unpaid

15 See Section 36.1(1) of the Companies' Creditors Arrangement Act.

16 Court appointed officers and other parties seeking to challenge a transaction or grant of security may rely on these provincial statutes both within insolvency proceedings under the Bankruptcy and Insolvency Act or Companies' Creditors Arrangement Act and outside of such proceedings.

amounts such as vacation pay and sale taxes will be reversed in a bankruptcy for the insolvent borrower.

In a CCAA restructuring, generally speaking, the restructuring plan for the insolvent borrower must provide for the payment of certain employee and other claims unless otherwise agreed by the relevant parties. In addition, the court may grant a charge in priority to the security of existing lenders in the assets of the debtor to secure the claims of critical suppliers, debtor-in-possession lenders, corporate directors' indemnities and professional administration fees.

As noted above, certain pension claims may rank in priority to a lender's security in the event of a borrower's insolvency. The Supreme Court of Canada decision in *Indalex Limited (Re)*,[17] however, has created some doubt as to the priority afforded to the amount of any funding deficiency arising in connection with the wind-up (a 'wind-up deficiency') of a borrower's defined benefit pension plan. Prior to this decision it was generally thought that the deemed trust provisions of the applicable pension legislation would not apply to a wind-up deficiency. Although the Supreme Court made it clear that a deemed trust could apply to a wind-up deficiency and that the claim for such amount would be subordinate to a court ordered charge securing a debtor-in-possession financing for the insolvent borrower, the Court did not opine on the relative priority of liens on the accounts receivable and inventory securing indebtedness in existence at the time that a CCAA order is made. Lenders providing financing to a Canadian borrower that has a defined benefit plan registered in Canada or to acquire a target with such a plan should determine whether a deemed trust could apply to a wind-up deficiency under the applicable pension legislation and consider the impact on their security position in the event of an insolvency.

Equitable subordination

Under the US Bankruptcy Code, the doctrine of equitable subordination allows courts to subordinate creditor claims to those of lower-ranking creditors. This extraordinary remedy is typically reserved for situations of egregious conduct on the part of creditors, because it supplants negotiated contractual arrangements between parties. In order for a claimant to succeed in subordinating a creditor claim, it must demonstrate that the creditor engaged in inequitable conduct, that the conduct harmed other creditors of the bankrupt company or conferred upon the creditor an unfair advantage, and that the subordination is consistent with the remainder of the US Bankruptcy Code.[18]

Although there is no equivalent legislative provision in Canada, recent decisions by Canadian courts have suggested that the doctrine of equitable subordination could be adopted in the right circumstances. In *Indalex*, the Supreme Court of Canada affirmed the 'wait and see' approach it espoused in *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*,[19] whereby rather than ruling one way on the doctrine's applicability, it declared that the facts at hand did not give rise to a claim for equitable subordination and

17 2013 SCC 6 [*Indalex*].

18 In *re Mobile Steel Co.* 563 F.2d 692 (5th Cir. 1977), paragraphs 24–26.

19 [1992] 3 SCR 558, paragraph 44.

left its determination for a later date.[20] The Ontario Court of Appeal has, for the most part, followed the same approach.[21] Accordingly, litigants may argue that the doctrine is applicable at the lower court level. However only in a select few cases has a court applied the US doctrine.[22] Other courts have taken the 'wait and see approach,'[23] and still others have held the doctrine to be inapplicable in Canada.[24] The issue of whether the doctrine of equitable subordination is applicable in Canada will remain unresolved until Canadian courts are faced with egregious creditor conduct of the type that warrants an authoritative decision on the issue.

Second lien financings

As noted above, a Canadian borrower may incorporate several different types of indebtedness (including second lien loans) in its capital structure. Second lien loans (also known as term B loans) are an increasingly popular source of financing in Canada for acquisitions, recapitalisations and restructurings. Non-bank entities such as hedge funds, private equity funds and distressed debt funds, particularly those based in the United States, are typically the providers of second lien loans to Canadian borrowers. As second lien loans are secured by a lien on all or a portion of the borrower's assets, these loans are generally considered to be a lower risk alternative to mezzanine loans and, accordingly, are less costly than mezzanine or other junior unsecured debt. In addition, as a result of investor demand for the enhanced yields available through leveraged products, second lien loan terms have become more debtor-friendly and a number of borrowers have been able to obtain covenant-lite loans. Often these loans are provided in US dollars so are particularly attractive to Canadian borrowers with significant US dollar cash flows that provide a natural hedge to currency exchange fluctuations that could otherwise affect their ability to make loan payments in US dollars.

The respective rights of the first lien lenders and the second lien lenders will be set forth in an intercreditor agreement. A first lien-second lien intercreditor agreement will certainly include a contractual subordination of the second lien lender's claim to the rights of the first lien lender and restrictions on the ability of the second lien lender to enforce its lien against the common collateral for the loans. The intercreditor agreement may also include provisions addressing the issues set out directly below.

Intercreditor agreements

Lenders have made a broad variety of debt products available to borrowers to finance their operations, acquisitions and other activities. As a result, many borrowers have complex capital structures with several layers of debt secured by liens on the same

20 *Indalex*, footnote 17, *supra*, paragraph 77.

21 See, for example, *Re I Waxman & Sons Ltd*, [2010] 67 CBR (5th) 1 (OntCA). For an example of the Ontario Court of Appeal subordinating a creditor's claim based on equitable principles, see *Bulut v. Brampton (City)* [2000] OJ No. 1062, paragraph 77.

22 See, for example, *Lloyd's Non-Marine Underwriters v. JJ Lacey Insurance Ltd*, 2009 NLTD 148.

23 See, for example, *Christian Brothers of Ireland (Re)*, [2004] OJ No. 359, paragraph 104.

24 See, for example, *AEVO Co. v. D & A Macleod*, 4 OR (3d) 368 (Ont SC).

collateral. For example, a borrower may have a senior term and operating credit facility, hedging obligations, cash management obligations and a second lien term loan secured by liens on the borrower's assets. Lenders in these circumstances will typically enter into an intercreditor agreement that delineates their respective rights, remedies and priorities particularly in a default situation. Canadian courts will generally treat an intercreditor agreement as an enforceable contract between the lenders and uphold its provisions. However, if the borrower in question is subject to an insolvency proceeding, it is possible that the court supervising the proceeding may make an order that is not consistent with the provisions of the applicable intercreditor agreement in exercising its jurisdiction over the matter.

The terms of any particular intercreditor agreement will be influenced by the borrower's creditworthiness and capital structure, the type and terms of the relevant debt, the lender's preferred exit strategies and the general economic environment. The primary purpose of an intercreditor agreement from a senior lender's perspective is to ensure that it is in a position to control the enforcement proceedings with respect to a defaulting borrower until the senior lender is repaid in full or is no longer prepared to continue. Intercreditor agreements also typically include provisions that deal with:

a the relative priority of liens on the collateral;

b the application and turnover of proceeds derived from the collateral, payment restrictions or blockage periods with respect to junior debt payments;

c restrictions on the type and amount of senior debt that ranks prior to more junior debt;

d standstill periods and other restrictions on enforcement proceedings by holders of junior debt;

e access rights to certain collateral;

f restrictions on certain modifications to the terms of each lender's credit documentation;

g refinancing rights; and

h the right of junior debtholders to purchase the senior debt.

Triggers for junior debt payment blockages, the frequency and length of payment blockage periods as well as the right to make catch-up payments once a payment blockage has ceased are often heavily negotiated. The elements and amount of senior debt (including interest rate and fee increases, over-advances, prepayment premiums and hedging obligations) that ranks in priority to the junior secured debt are also frequently the subject of much discussion.

V LEGAL RESERVATIONS AND OPINIONS PRACTICE

In syndicated lending transactions in Canada, legal opinions are generally delivered by counsel to the borrower and, where necessary, local counsel in each relevant province or territory. Such opinions typically include corporate opinions; non-contravention and no breach opinions; regulatory approval opinions; share capital opinions; enforceability opinions; and creation and registration of security opinions.

It is not uncommon for lending transactions in Canada to be financed by foreign lenders based in financial centres such as New York or London. This occurs most often when the borrower is foreign or part of a larger cross-border or international corporate structure or where the transaction being financed is a cross-border transaction. Foreign lenders often expressly choose to have their principal financing agreement governed by the law of their home jurisdiction, and to stipulate that any resulting disputes will be governed by that law. In these circumstances, foreign lenders need to understand how choice of law and foreign judgments are treated in Canada and whether consent to jurisdiction clause are enforceable.

i Choice of law

Generally speaking, in a proceeding in Canada to enforce a foreign law-governed document, Canadian courts will, with limited exceptions, apply the law expressly chosen by the parties, so long as the choice of the foreign law in the agreement is *bona fide*, legal and not contrary to public policy. Canadian courts will apply local law to procedural matters and apply local laws that have overriding effect. In addition, Canadian courts will not apply foreign law if to do so would have the effect of enforcing a foreign revenue, expropriation or penal law.

In the unlikely event that the parties do not expressly choose a system of law to govern the primary financing agreement, Canadian courts will apply the law which has the closest and most real and substantial connection to the agreement.

ii Enforcement of foreign judgments

Without reconsidering the merits, and subject to certain defences, Canadian courts generally will issue judgments in Canadian dollars based on final and conclusive foreign judgments rendered against the person for a specified amount if the action in Canada is brought within any applicable limitation period. Under certain circumstances, our courts have the discretion to stay or decline to hear an action based on a foreign judgment. Such actions may also be impacted in our courts by bankruptcy, insolvency or other similar laws affecting creditors' rights.

Certain defences are available to debtors in Canada to prevent recognition and enforcement of a foreign judgment against them. The foreign judgment cannot have been obtained by fraud or in a manner contrary to natural justice. In addition, the foreign judgment cannot be for a claim which under Canadian law would be characterised as being based on a revenue, expropriation or penal law nor can the foreign judgment be contrary to public policy. Finally, our courts will not enforce the foreign judgment if it has already been satisfied or is void or voidable under the foreign law.

iii Submission to jurisdiction clauses

Agreements to submit all disputes related to the financing transaction to a specified jurisdiction are common in commercial financing agreements, and can be exclusive or non-exclusive. Under Canadian law, non-exclusive jurisdiction clauses have historically been held to be enforceable. Recent Canadian case law, including decisions from the Supreme Court of Canada, has strongly supported enforcement of exclusive jurisdiction clauses in order to increase predictability and certainty in the Canadian market.

VI LOAN TRADING

In Canada, the market for syndicated loans continues to be the primary means for borrowers to access financing. Syndication continues to be the avenue used by lenders to allocate and distribute exposure to certain borrowers or industry sectors. However, unlike the US loan market, the use of secondary trading in loans is limited and there is no significant market for loan participations. Syndication or assignments of loans and lending commitment are the most common methods of transferring loan exposure in Canada. Assignment by a lender of its loan position is usually permitted, subject in some cases to the borrower's consent or only to a permitted list of assignees and to the general requirement that the assignment must not result in increased costs to the borrower. Due to the lack of a significant secondary market for trading loans that limits term B loan availability in Canada as stated above, many large Canadian companies have instead chosen to access the term B loan market or the second lien loan market available in the United States.

Loan participants in Canada, as in most other markets, do not have a direct contractual relationship with the borrower. While a participant assumes the risks associated with the loan transaction in which it is participating, it has no direct interest or rights under any credit documents, including the security, if any, related to the loan. In addition to the credit risk associated with a borrower, a participant also faces the risk related to the solvency of the grantor of a participation in a loan. In the event the grantor of a participation files for bankruptcy, for example, a participant's right to receive payment on its underlying loan will continue to depend upon and flow through the grantor and not the borrower. The terms of the particular participation agreement will determine the rights available to the participant in a grantor's bankruptcy as a secured or unsecured creditor.

VII OUTLOOK AND CONCLUSIONS

The outlook for leveraged financing in Canada continues to be positive, although lending activity is somewhat volatile. We expect that Canadian borrowers will take advantage of low interest rates, market liquidity and favourable financing terms in the coming year by securing debt financing to fund acquisitions, the refinancing of existing debt with more onerous terms, dividend recapitalisations and other balance sheet restructurings. In addition, we expect that the trend of Canadian borrowers amending (including repricing) and extending their credit facilities prior to maturity will continue given the favourable conditions in the Canadian debt market, particularly in light of the fact that interest rates generally are expected to increase later in 2015 or early in 2016.

The high-yield market in Canada continues to evolve. Although only one Canadian dollar denominated high-yield note issuance has been completed in the first six months of 2015 as compared to 15 deals with a value of C$2.9 billion in 2014, we expect new issuances to increase given strong demand for new issuances across various sectors and rating categories resulting from the lack of supply.

As US sponsors become more active in Canada and seek financing from Canadian lenders for their Canadian acquisitions, covenant-lite loans are becoming more common in Canada. Covenant-lite loans generally do not include financial maintenance covenants

or include them only on a springing basis based on certain leverage levels. Equity cures of financial covenant breaches are generally permitted. As financial covenant breach is often an early indicator of financial difficulty, the downside for lenders is that they may not be able to trigger a default based on a financial covenant breach and initiate restructuring discussions at an early stage when more options are available to address the borrower's financial issues.

Unitranche lending has also gained some popularity with Canadian borrowers, particularly those exposed to US lenders through their US affiliates. Unitranche facilities combine senior and junior debt into one credit facility, with the lenders addressing their respective priorities with a first in, last out mechanism under an agreement among lenders.

Another trend is the increased activity level of foreign lenders in Canada, particularly those based in the United States. Many foreign lenders are seeking to expand their relationship with clients in their home jurisdictions to affiliates of those clients located in Canada. In this connection, a number of foreign lenders have established a local presence in Canada such as a foreign bank branch, and are offering a wide variety of financial products to Canadian clients. The increased competition in the Canadian financial market resulting from entry of foreign lenders should be beneficial to Canadian borrowers.

Appendix 1

ABOUT THE AUTHORS

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Jean E Anderson is a partner in the banking and finance law group at Goodmans. Her practice focuses on financing, corporate transactions and regulatory matters. With more than 30 years of extensive expertise in the areas of project finance, structured finance, asset-based lending, debt restructuring, complex domestic and cross-border financings and regulatory matters relating to financial institutions, she is recognised as a leading practitioner of banking and finance law by *Chambers Global*, Euromoney's *Guide to the World's Leading Banking Lawyers* and *Guide to the World's Leading Women in Business Law*, *IFLR1000*, *The Best Lawyers in Canada* and Law Business Research's *International Who's Who of Banking Lawyers*. She is recognised for asset-based lending and banking by *The Canadian Legal Lexpert Directory*, *The Lexpert/American Lawyer Guide to the Leading 500 Lawyers in Canada* and *The Lexpert Guide to Leading US/Canada Cross-border Corporate Lawyers in Canada*. In addition, she was recently named *Best Lawyers 2015* Toronto Asset-Based Lending Practice 'Lawyer of the Year' and recognised as a leading infrastructure lawyer in Canada by Lexpert. She also received the 2009 Lexpert Zenith Award, recognising her as one of Canada's leading female lawyers. She formerly served as a law clerk to the Chief Justice of the Ontario Court of Appeal, and was admitted to the Ontario Bar in 1981.

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David Nadler is a partner in the banking and finance law group at Goodmans. His practice focuses on financing and corporate transactions. He represents leading Canadian and foreign banks and non-bank lenders and debtors in complex domestic and cross-border syndicated lending transactions, and has been involved in several debt restructurings representing creditors and debtors. He also practises with Goodmans' hospitality law group, representing owners and operators of hotels. He is recognised as

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