The Acquisition and Leveraged Finance Review

Editor
Christopher Kandel

Law Business Research

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Editor
Christopher Kandel

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EDITOR'S PREFACE

Acquisition and leveraged finance is a fascinating area for lawyers, both inherently and because of its potential for complexity arising out of the requirements of the acquisition process, cross-border issues, regulation and the like. It can also cut across legal disciplines, at times requiring the specialised expertise of merger and acquisition lawyers, bank finance lawyers, securities lawyers, tax lawyers, property lawyers, pension lawyers, intellectual property lawyers and environmental lawyers, among others.

The Acquisition and Leveraged Finance Review is intended to serve as a starting point in considering structuring and other issues in acquisition and leveraged finance, both generally but also particularly in cases where more than just an understanding of the reader's own jurisdiction is necessary. The philosophy behind the sub-topics it covers has been to try to answer those questions that come up most commonly at the start of a finance transaction and, having read the contributions, I can say that I wish that I had had this book available to me at many times during my practice in the past, and that I will turn to it regularly in the future.

Many thanks go to the expert contributors who have given so much of their time and expertise to make this book a success; to Nick Barette, Gideon Roberton and Shani Bans at Law Business Research for their efficiency and good humour, and for making this book a reality; and to the partners, associates and staff at Latham & Watkins, with whom it is a privilege to work. I should also single out Sindhoo Vinod and Aymen Mahmoud for particular thanks – their reviews of my own draft chapters were both merciless and useful.

Christopher Kandel
Latham & Watkins
September 2014

Chapter 5

CANADA

Jean E Anderson, David Nadler, Carrie B E Smit and David Wiseman[1]

I OVERVIEW

Leveraged lending is frequently used by Canadian borrowers to fund a number of activities, including acquisitions, capital expenditures, dividend recapitalisations, refinancings of existing debt and ongoing operations. As noted below, acquisition activity in Canada has been relatively steady, and leveraged loans are an important source of capital for many Canadian acquisitions. 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.

i Recent Canadian acquisition activity

The pace of acquisitions in Canada was steady but unremarkable during the period from the start of 2013 until the end of the first quarter in 2014. In 2013, the number of announced deals progressed from 223, 256, 246 to 262 during Q1 to Q4,[2] with total deal value averaging C$41.6 billion for each of the first three quarters, but falling to C$33.5 billion in Q4.[3] The real estate sector accounted for the largest percentage of transactions each quarter. The first quarter of 2014 saw Canadian merger and acquisition (M&A) activity levels hit their second lowest quarterly level by volume mark

1 Jean E Anderson, David Nadler, Carrie B E Smit and David Wiseman are partners at Goodmans LLP. The authors would like to acknowledge the contributions of articling students, Jeremy Burgess and Richard Ha, as well as Keyvan Nassiry of BCF with respect to Quebec matters.

2 Crosbie & Company, M&A Quarterly Report – Q1/14 (19 June 2014) at p. 1: www.crosbieco.com/ma/index.html. Crosbie and Company sets a minimum deal value of C$5 million for inclusion in its data.

3 Crosbie & Company, Canadian M&A Activity – Fourth Quarter 2013 report (21 March 2014) at p. 1: www.crosbieco.com/ma/index.html.

since 2003, with only 189 announced deals valued at C$31.1 billion, primarily due to pronounced decreases in the real estate and energy sectors.[4] Although the overall number of transactions was down, the eight announced mega deals (deals valued at over C$1 billion) drove the average deal dollar value above Q1 levels in 2013.[5] The second quarter of 2014 represented a turnaround for Canadian M&A activity, with reports indicating a 10 per cent increase in both volume and value from Q1, amounting to an almost 20 per cent year-over-year increase.[6] This increase in activity has been driven by a strong equity market, the availability of inexpensive financing and healthy corporate cash reserves.[7]

ii Canadian financing sources

Canadian companies financed their acquisitions over the past 18 months in a variety of ways. In many cases, a significant portion of the consideration for the acquisition 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, high yield notes and mezzanine debt. For example, Loblaw Companies Limited used a C$3.5 billion unsecured term loan facility as well as C$1.6 billion raised from unsecured notes to help finance its C$6.6 billion acquisition of Shoppers Drug Mart. Hudson's Bay Company financed its US$2.9 billion acquisition of Saks Incorporated with a US$2 billion senior secured term loan facility and a US$300 million junior secured term loan facility from a syndicate of banks led by Bank of America, NA, General Electric Capital Corporation and the Royal Bank of Canada. Hudson's Bay also obtained a US$950 million revolving credit facility. Pacific Rubiales raised US$1.3 billion though an offering of senior unsecured notes in addition to utilising US$400 million from its existing credit facility with a US financial institution to finance its purchase of Petrominerales. Crombie REIT used C$547.8 million in bank credit facilities and C$75 million convertible unsecured subordinated debentures to purchase a portfolio of retail properties from a subsidiary of Sobeys Inc. Agnico Eagle Mines Ltd funded the C$502 million owing in connection with acquiring 50 per cent of Osisko Mining Corporation from its existing US$1.2 billion unsecured credit facility provided by a syndicate of major Canadian financial institutions. Although these mentioned transactions represent only a fraction of the acquisitions recently done by Canadian companies, they provide good examples of highly leveraged financings for major acquisitions in Canada.

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4 Crosbie & Company, Canadian M&A Activity – First Quarter 2014 report (19 June 2014) at p. 1: www.crosbieco.com/ma/index.html.

5 Ibid.

6 PwC, Capital Markets Flash – Canadian M&A deals Quarterly – Q2 2014 at p. 5: www.pwc.com/ca/en/deals/canadian-quarterly.jhtml. Crosbie & Company had not released its Q2 2014 M&A data at the time of writing this chapter.

7 Ibid.

II REGULATORY AND TAX MATTERS

i Regulatory matters

Lender-related regulatory requirements

Canadian borrowers regularly obtain acquisition 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 (Canada) (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 the 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.

Absent connection with 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 they are not a financial institution exempted from compliance.

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.

Canadian anti-money laundering legislation

The Proceeds of Crime (Money Laundering) and Terrorist Financing Act (Canada) makes it mandatory for certain entities (including lenders) to undertake measures to ascertain

the identity of Canadian borrowers and related parties before accepting them as clients, 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.

ii Tax matters

Canadian tax issues must also be considered when structuring acquisition financing.

Withholding tax

Under the Income Tax Act (Canada) (Tax Act), interest paid by a Canadian resident debtor to an arm's-length non-resident creditor will not generally be subject to 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.

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 borrowed money used for the purpose of earning income from a business or property; or an amount payable for property that 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).

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 the creditor owns (or has a right to acquire) shares of the debtor representing 25 per cent

or more of the value of the debtor's capital stock, and the debt-to-equity ratio of the debtor is in excess of 1.5:1. The thin capitalisation rules may apply in a situation where acquisition financing is undertaken by a non-resident parent corporation which then on-loans the funds to its Canadian subsidiary which acquires the target assets or shares.

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 to 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.

III SECURITY AND GUARANTEES

Secured loans are often used in Canada to finance acquisitions. The forms of security and 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 (QCC) and the common law applicable in the other provinces and territories, are discussed below.[8]

i Security

Personal property and tangible moveable property – common law provinces

Each of the common law provinces and territories in Canada has a personal property security statute (collectively, 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

8 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.

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. 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. 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 and tangible moveable property – Quebec

Security over tangible moveable property in Quebec is created by a hypothec. Registration at the Register of Moveable Real Rights (RMRR) perfects the hypothec. 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 and 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 QCC, secured parties are well advised to consider any applicable federal legislation and to take any additional steps prescribed therein to establish a first-ranking claim on such assets.

Personal property and intangible property (general) – common law provinces

Intangible personal property includes claims and receivables, intellectual property (IP) rights and investment property.[9] Generally, creditors secure intangibles similarly to tangibles, by way of a security agreement and perfection by registration under the PPSAs.[10] The law of the jurisdiction where the debtor is located[11] 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

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9 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.

10 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.

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

security interest in Canadian trademarks, copyright or patents to file a copy or notice of the security agreement with the Canadian Intellectual Property Office.

Personal property and intangible property (general) – Quebec
Under the QCC, 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 QCC by way of a hypothec that is perfected by filing in the RMRR.

Personal property and 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 QCC 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 arranging for the securities intermediary[12] to record the secured party as the entitlement holder; obtaining a control agreement from the securities intermediary; or having a third party obtain control on its behalf.

12 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, sub-surface land rights, rental income, and other profits derived from land and leasehold interests. Real estate under the QCC 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. There are some 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.

ii Guarantees

Guarantees are a common feature of secured lending structures for acquisition and other types of 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.

iii Guarantee limitations

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.

iv 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, however, most lending lawyers take the view that an agent must be formally appointed as a person holding the lenders' *fonde de pouvoir* (power of attorney) to hold a hypothec without delivery on behalf of future, unknown members of a syndicate of lenders. The deed of hypothec must be executed before a Quebec notary and granted as security for the payment of a bond. The bond is simultaneously pledged to the agent as custodian bondholder as security for all obligations to the lenders under the syndicated facility. As the party holding the hypothec, the agent, in its capacity as *fonde de pouvoir*, can enforce all of the rights under the hypothec.

v 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[13] can challenge preferences and other transactions at undervalue under the federal Bankruptcy and Insolvency Act (Canada) (BIA). Under Section 95 of the BIA, a trustee in bankruptcy can challenge a preference (i.e., a transaction with a debtor or payment made by a debtor that 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 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).[14]

Provincial legislation is also available to creditors or trustees to attack preferential transactions. While there are differences among the various provincial statutes, most

13 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.

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

provinces allow a creditor to attack fraudulent conveyances and unjust preferences.[15] 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 his or her debts or knew that he or she was 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.

IV PRIORITY OF CLAIMS

i Priority claims

In Canada, the priority of 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 CCAA or BIA proceeding. 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 (Canada), 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 amounts such as holiday 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

15 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.

Indalex Limited (Re),[16] 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.

ii 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. 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.[17]

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*,[18] 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 left its determination for a later date.[19] The Ontario Court of Appeal has, for the most part, followed the same approach.[20] 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.[21] Other courts have taken the 'wait and see approach,'[22] and still

16 2013 SCC 6 [*Indalex*].

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

18 [1992] 3 SCR 558 at paragraph 44.

19 *Indalex*, footnote 16 at paragraph 77.

20 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 at paragraph 77.

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

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

others have held the doctrine to be inapplicable in Canada.[23] 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.

iii 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 loan 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, and 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 or second lien intercreditor agreement will certainly include a contractual subordination of the second lien lender's lien to the lien 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 below.

iv 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 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.

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

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 the relative priority of liens on the collateral, the application and turnover of proceeds derived from the collateral, payment restrictions or blockage periods with respect to junior debt payments, restrictions on the type and amount of senior debt that ranks prior to more junior debt, standstill periods and other restrictions on enforcement proceedings by holders of junior debt, access rights to certain collateral, restrictions on certain modifications to the terms of each lender's credit documentation, refinancing rights and 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 rank in priority to the junior secured debt are also frequently the subject of much discussion.

V JURISDICTION

It is not uncommon for acquisitions in Canada to be financed by foreign lenders based in financial centres such as New York or London. This occurs most often when the buyer is foreign or the Canadian target is part of a larger cross-border or international corporate structure. 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 clauses is 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, as 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 that 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 judgement cannot be for a claim that under Canadian law would be characterised as being based on a revenue, expropriatory 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 ACQUISITIONS OF PUBLIC COMPANIES

In Canada, acquisitions of public companies are generally implemented through takeover bids pursuant to which the acquirer bids for the shares of the target (and which may or may not be followed by a compulsory acquisition of those shares that are not tendered into the bid or a second stage going private transaction); a plan of arrangement (whereby a solvent company can pursue a broad range of fundamental changes under a single transaction that is court approved); or an amalgamation of the target company with the acquirer. In Canada, acquisitions of public companies are generally effected by way of a takeover bid or plan of arrangement.

In each of the foregoing cases, where the consideration to be paid for the shares of the target will be satisfied in whole or in part in cash, an acquirer will generally incur as much debt as possible (often using the assets and credit rating of the target company as collateral) to finance the going private transaction. While, in recent years, the availability of financing has been restricted, we are now seeing a resurgence in acquisitions being financed by more significant amounts of debt and a rejuvenation of the highly leveraged buyout market.

There are several issues that are unique to the financing of acquisitions of public companies in Canada. While many of these issues vary based on the specific provincial corporate and securities laws that are applicable in any given transaction, the general

approach and issues raised are common in all Canadian jurisdictions. We have focused on the laws of the Province of Ontario in our analysis of these issues below.

i Conditionality and certainty of funds

Canadian securities laws establish a 'certainty of funds' requirement for takeover bids of Canadian public companies. By way of example, Section 97.3 of the Ontario Securities Act states that where a bid provides that the consideration for the securities deposited under such bid is to be paid, in whole or in part, in cash, '[...] the offeror shall make adequate arrangements before the bid to ensure that the required funds are available to make full payment for the securities that the offeror has offered to acquire'.[24] In addition, the financing arrangements can be subject to conditions only if, at the time the bid is commenced, '[...]the offeror reasonably believes the possibility to be remote that, if the conditions of the bid are satisfied or waived, the offeror will be unable to pay for the securities deposited under the bid due to a financing condition not being satisfied.'[25]

In practice, the 'adequate arrangement' test will generally be satisfied by the offeror obtaining a binding commitment letter from its financing source that contains only limited customary conditions. Conditions that are viewed as generally being acceptable include those that mirror the conditions in favour of the offeror contained in the bid documents or that are otherwise reasonably easy for the offeror to satisfy (such as the completion of a definitive credit agreement and related loan documents). Conditions that would be unacceptable in this context would include conditions that are in the discretion of the lenders, such as satisfactory due diligence or satisfaction with the capitalisation or ownership of the target following completion of the bid.

ii Two-stage transaction

Generally, acquisition financings are secured by, *inter alia*, the collateral of the target company. In fact, the credit rating and the value of the assets owned by the target company are significant components in the lenders' analysis of the amount of credit they are willing to provide to finance an acquisition. In connection with an acquisition where the offeror aims to acquire all of the outstanding shares of the target company, the minimum tender condition is set at either 90 per cent or 66 2/3 per cent (75 per cent for some jurisdictions). This allows the offeror to achieve a certain level of security regarding the outcome of the bid.

If an offeror acquires more than 90 per cent of the securities subject to the bid (excluding those previously held by it), both Canadian federal and provincial legislation provides for a procedure for the compulsory acquisition of the balance of the shares within a certain period of time. In the event less than 90 per cent but more than 66 2/3 per cent (75 per cent for some jurisdictions) of the outstanding securities are acquired, the offeror can complete the acquisition of 100 per cent of the securities of the target company by means of a subsequent going private transaction. In this circumstance, the offeror can vote the shares that were tendered to it under the bid. Since the voting threshold under

24 Securities Act, RSO 1990, Chapter S.5, Section 97.3(1).

25 Securities Act, RSO 1990, Chapter S.5, Section 97.3(2).

applicable law for approval of a going private transaction is 66 2/3 per cent (75 per cent for some jurisdictions) of the shares voting at the shareholders' meeting called to approve such transaction, the offeror can be assured that the transaction will be approved.

The foregoing has a direct impact on a lender's ability to take security over the assets of the target company. Such security cannot be granted until the offeror acquires 100 per cent of the shares of the target. The lenders will have to advance funds under the credit agreement at such time as the minimum bid condition is satisfied to enable the offeror to acquire the number of securities tendered but before it is able to obtain a security interest in the assets of the target. However, it is essentially a certainty that once such minimum number of shares is tendered to the bid, the offeror will be able to acquire 100 per cent of the target in due course.

iii Disclosure requirements

There are disclosure requirements under Canadian securities laws with respect to the terms of a financing related to the acquisition of a public company. In Ontario, for example, in the context of a takeover bid where a financing is involved, the takeover bid circular must state the name of the lender, the terms and financing conditions of the loan and the circumstances under which the loan must repaid.[26] These disclosure requirements are easily satisfied by including a summary of the terms and conditions of the financing in the circular.

VII OUTLOOK

The outlook for leveraged financing in Canada is positive. We expect that Canadian borrowers will continue to 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 re-pricing) and extending their credit facilities prior to maturity will continue given the favourable conditions in the Canadian debt market. The Canadian high yield market should also be active in the coming year as Canadian borrowers, particularly those in the energy area, seek to raise capital to fund acquisitions through bond issuances.

Another trend worth noting 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.

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26 Ontario Securities Commission Rule 62-504 Take-Over Bids and Issuer Bids, OSC Rule 62-504F1 at item 12.

Appendix 1

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