The Acquisition and Leveraged Finance Review

Eighth Edition

Editor
Fernando Colomina Nebreda

The Law Reviews

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PREFACE

It is fair to say that the acquisition and leveraged finance industry has shown resilience in relation to the difficult global situation arising from the covid-19 pandemic, particularly in comparison to the previous global crisis in 2008. Generally speaking, while in the first semester of 2020 the deal flow slowed as a result of covid-19 as private equity (PE) houses were forced to shift their focus onto already existing portfolios, there was a noteworthy increase in the acquisition and leveraged market activity in the second semester, predominantly in the last quarter. The following defensive industries have demonstrated their ability to withstand the covid-19 crisis: pharmceuticals; bio sanitary; food; technology, media and telecommunications; and logistics, among others.

Covid-19 vaccines are providing confidence to market players, therefore facilitating the ability to agree on valuations, and also reducing gaps between the expectations of both seller and buyer. The result is more mergers and acquisitions (M&A) activity. Besides, it is reasonable to expect that the emergency measures taken by governments worldwide to address the hardships caused by covid-19 (such as state aid measures or public restrictions regarding foreign direct investment) will gradually be removed. This should, in principle, also lead to more deal flow in the M&A sector.

We are currently witnessing fierce competition in the acquisition and leveraged finance market due to the following factors: (1) an abundance of liquidity (perhaps even more than the previous year since some PE houses now hold additional 'dry powder' that was allocated to 2020 but which they could not use because of covid-19); (2) a low-interest-rate environment, which is likely to persist for several years; and (3) the fact that US investors are increasingly entering EU markets seeking a higher yield and vice versa.

The above is, in turn, resulting in more flexible terms for sponsors. It is also helping to consolidate the trend on convergence between both high-yield structures and loan structures and US and European markets in the world's most sophisticated financial hubs. Once again, this means that careful and thoughtful monitoring of domestic circumstances is imperative.

Finally, as indicated by the European Leveraged Finance Association, it is worth remarking that 'the leveraged finance market is undergoing a seismic shift in approach to ESG [environmental, social and governance] and sustainability'. Indeed, ESG has emerged dramatically in the acquisition and leveraged finance industry as evidenced by the blossoming of loans and bonds linked to sustainability in 2021. Terms will continue to unfold as market players intend to develop broadly ESG terms that go beyond pricing considerations. To this end, transparency will be a key factor in the success of the cross-border expansion tied to this nascent trend.

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Many thanks to everybody who has participated in this publication, and a special thank you to Law Business Research.

We sincerely hope that this edition of *The Acquisition and Leveraged Finance Review* will be of assistance to you in this challenging era.

Fernando Colomina Nebreda
Latham & Watkins
Madrid
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Chapter 5

CANADA

Jean E Anderson, David Nadler, Carrie B E Smit, David Wiseman, Caroline Descours, Steven Marmer and Keyvan Nassiry[1]

I OVERVIEW

Leveraged lending is frequently used by Canadian borrowers to fund a number of activities, including acquisitions, capital expenditures, dividend recapitalisations, refinancing of existing debt and ongoing operations. The covid-19 pandemic was expected to, and initially did, severely impact the Canadian mergers and acquisitions market, and as a result the number of leveraged lending transactions in Canada for 2020. However, notwithstanding the continued impact of the pandemic, including border restrictions, which were expected to adversely affect the number of M&A transactions both domestically and globally, the opposite has occurred. Acquisition activity in Canada has been exceptionally strong, and leveraged loans continue to be an important source of capital for many Canadian acquisitions. Continuing low interest rates, substantial liquidity in the North American market, favourable credit terms and an increasing number of sources of leveraged financing have contributed to the attractiveness of leveraged loans for Canadian borrowers.

i Recent Canadian acquisition activity

Following the slowdown in mergers and acquisitions activity in Canada as a result of the covid-19 pandemic in the first half of 2020, the third and fourth quarters of 2020 saw a fairly surprising rebound in mergers and acquisitions, with 804 announced transactions and an aggregate deal value of C$18 billion in the third quarter and 935 announced transactions and an aggregate deal value of C$84.5 billion in the fourth quarter.[2] In 2020 there were a total of 3,136 transactions announced, a slight decrease from 2019 but stronger than many analysts projected.[3] Overall, these numbers reflect a strong bounce back for the Canadian mergers and acquisitions market after many transactions that were put on hold in Q1 and Q2 were revived and completed.[4] In the fourth quarter alone, the aggregate deal value was 7 per cent higher than the prior three quarters combined. The strength of activity in the fourth quarter was bolstered by a robust domestic mergers and acquisitions market, with 2,169 transactions involving Canadian targeted companies, 638 of which occurred in the

1 Jean E Anderson, David Nadler, Carrie B E Smit, David Wiseman and Caroline Descours are partners and Steven Marmer is an associate at Goodmans LLP. Keyvan Nassiry is the founding partner of Nassiry Law Inc.
2 Crosbie & Company, M&A Quarterly Canadian M&A Online: www.crosbieco.com/who-we-are/m-a-publications. Figures provided are a compilation from 2020 quarterly reports.
3 ibid.
4 ibid.

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fourth quarter representing a 20 per cent increase compared to Q3 2020.[5] In 2020, there was a 7 per cent drop in foreign acquisitions compared to 2019, with international buyers acquiring 495 Canadian companies.[6] Conversely, Canadian buyers continued to be highly acquisitive internationally, acquiring 830 foreign companies in 2020.[7] Real estate, typically one of the most active sectors in Canada, recovered from a slow Q2 and Q3 to end the year with a total of 309 announced transactions, but was still down 47 per cent compared to the 455 announced transactions in 2019.[8] The industrials sector remained strong in the fourth quarter with 106 transactions valued at C$7.3 billion.[9]

The resurgence in activity continued into the first quarter of 2021 as the markets continued to play catch up from transactions put on hold due to the pandemic. In the first quarter of 2021, there were 1,007 announced transactions, which were valued at C$81 billion, surpassing the previous all-time high for announced transactions from Q4 2020 by 8 per cent.[10] Ten mega deals (transactions with an aggregate value in excess of C$1 billion) in Q1 2021 were announced with an aggregate value of C$53.3 billion, down from the 16 announced in the fourth quarter of 2020.[11] The sector was buoyed by the announcement of Rogers Communications' acquisition of Shaw Communications for C$26.5 billion, one of the largest domestic transactions of the decade. The second quarter of 2021 continued to showcase the strong recovery with 990 announced acquisitions worth C$93 billion.[12] By deal value, it was the highest in six quarters and well above the lows that hit the markets in the first and second quarters of 2020.[13] Information technology, metals and mining and real estate were the three most active sectors during the second quarter of 2021 with 141, 126 and 108 announced transactions, respectively.[14] Information technology continued to see strong activity from the 'tech boom' and was the most active sector for the third straight quarter. The financial services and precious metals sectors both experienced slight retreats in transactions relative to the previous quarter.[15] Ontario continued to be the most active province for the quarter, with 233 deals valued at C$8.2 billion, while Alberta had the largest announced transaction total of C$20.4 billion across 77 transactions.[16] Overall, the challenges the Canadian mergers and acquisitions market experienced in the first half of 2020 have largely faded as another record-setting quarter leads Canada into a strong 2021.

ii Canadian financing sources

Canadian companies financed their acquisitions in recent months in a variety of ways. In many cases, a significant portion of the consideration for the acquisitions was funded through different types of debt obtained from a variety of sources. Sources include senior

5 ibid.
6 ibid.
7 ibid.
8 ibid.
9 ibid.
10 Crosbie & Company, M&A Quarterly Canadian M&A Online: www.crosbieco.com/who-we-are/m-a-publications. Figures provided are a compilation from 2021 quarterly reports.
11 ibid.
12 ibid.
13 ibid.
14 ibid.
15 ibid.
16 ibid.

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secured credit facilities provided by domestic and foreign financial institutions and hedge funds, second-lien credit facilities, unsecured credit facilities, streaming arrangements, senior secured bonds, high-yield notes and mezzanine debt.

For example, Berkshire Partners were able to close its 70 per cent majority investment in VetStrategy for C$1.4 billion having received new financing commitments from existing and new lenders to sufficiently fund the business after closing.[17] Canopy Growth Corp obtained a C$750 secured credit facility with funds advanced by King Street Capital Management, LP to assist with debt repurchasing and acquisitions.[18] Cirque du Soleil entered into a stalking-horse credit bid transaction with certain of its existing lenders in which it obtained US$300 million in new first lien debt and US$300 million in second lien debt while exchanging its existing second-lien debt for warrants.[19] 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.

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 foreign 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) (the Bank Act). Lenders that are banks or affiliated with foreign banks must obtain the necessary approvals under the Bank Act 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. These lenders will, however, be subject to laws of general application that

17 'Lexpert's 2021 Awards of Excellence for Top Deals', Lexpert (April 2021) at 24: https://digital.lexpert.ca/i/1358980-april-2021/24?

18 Canopy Growth Corp., Press Release, "Canopy Growth Announces US$750 Million Term Loan Financing" (18 March 2021), online: Cision <https://www.newswire.ca/news-releases/canopy-growth-announces-us-750-million-term-loan-financing-807606985.html>.

19 'Lexpert's 2021 Awards of Excellence for Top Deals', Lexpert (April 2021) at 26: https://digital.lexpert.ca/i/1358980-april-2021/26?.

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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 and that their borrowers covenant to provide this information on an ongoing basis.

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.

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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 (1) borrowed money used for the purpose of earning income from a business or property; or (2) 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).

The 2021 Canadian federal budget proposed a new 'earnings stripping' rule to generally limit interest deductibility based on a fixed ratio of tax EBITDA. Tax EBITDA is generally taxable income before taking into account interest expense, interest income, income tax and deductions for depreciation and amortisation. The new rule will limit the deductibility of interest to 40 per cent of tax EBITDA for taxation years beginning on or after 2023 but before 2024, and 30 per cent thereafter. A higher ratio may be acceptable in certain situations. Denied interest can be carried forward up to 20 years, or back up to three years.

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 (1) the creditor owns (or has a 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 (2) the debt-to-equity ratio of the debtor with respect to such non-resident creditors 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.

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.

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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.

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 (CCQ) and the common law applicable in the other provinces and territories, are discussed below.[20]

i Security

Personal property and tangible 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. In secured financings in the Canadian market, tangible 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 goods 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 each province or territory where such 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 notice that a debtor's assets have been encumbered in favour of a secured creditor.

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

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Chattel paper,[21] instruments, money, documents of title and large goods can also be perfected by a secured party by possession.

Quebec

Security over tangible movable property in Quebec is created by a hypothec. Registration at the Register of Personal and Movable Real Rights (RPMRR) perfects the hypothec[22]. 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.

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 the 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 commonly dealt with in the Canadian market includes claims and receivables, contractual rights, and intellectual property (IP) rights.[23] Generally, creditors secure intangibles similarly to tangibles, by way of a security agreement and perfection by registration under the PPSAs.[24] The law of the jurisdiction where the debtor is located[25] at the time the security interest attaches governs the validity, perfection and priority of a security interest in intangible personal property. Accordingly, the secured party must file under the

21 In Ontario, as of 15 May 2020, the PPSA was modernised to recognise both tangible, 'wet ink' chattel paper and electronic chattel paper. Similar amendments were made to the PPSA in Saskatchewan in 2019. In Ontario, under the new regime, electronic chattel paper can be perfected by control. Related changes have been made to the conflict of laws and the priority rules. Given the recognition of electronic chattel paper in the United States under the Uniform Commercial Code and the Ontario and Saskatchewan PPSAs, we expect that in time the PPSAs in the other Canadian provinces and territories will be updated with similar changes.

22 At the time of writing, the Quebec's National Assembly was considering adopting Bill 96 (An Act respecting French, the official and common language of Québec). If enacted, Bill 96 would require that all applications for registration of hypothecs be drawn up exclusively in French.

23 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 the assets. In Quebec, insurance policies can be charged by a hypothec (with a special perfection regime for hypothecs over life insurance policies).

24 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.

25 Generally, under the PPSAs, a debtor is located at its place of business or if a debtor has more than one place of business, where it has its chief executive office. However, in Ontario, British Columbia and Saskatchewan, deeming rules for determining a debtor's location more easily and with more certainty have recently been enacted. We expect the balance of provinces and territories to implement similar rules over the next several years. The updated rules determine a debtor's location based on what type of entity the debtor is. For example, in Ontario provincial corporations are deemed to be located in the province or territory of incorporation or organisation.

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PPSA in the province or territory where the debtor is located to perfect against intangible personal property. Secured parties must also file in the jurisdiction the debtor is located to perfect non-possessory interests in certain collateral such as instruments, negotiable documents of title, money and chattel paper.

While IP ownership rights are governed by federal legislation in Canada, security in these intangibles is governed by the PPSAs. 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 intellectual property such as trademarks, copyright or patents to file a copy or notice of the security agreement with the Canadian Intellectual Property Office.

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 movable 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. A hypothec on monetary claims is perfected by obtaining control over such claim (e.g., in the case of a deposit account, by the secured party entering into a control agreement with the financial institution holding the account).

Investment property

Financial assets such as shares and other securities are considered investment property under the PPSAs. All of the common law provinces and territories in Canada 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 that are generally similar to the STAs.

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, secured creditors can also establish 'control' or possession over such property. Control is the preferred 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.

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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[26] 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.

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 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 immovable and that ensures its utility and real rights in immovable property, as well as actions to assert these rights or to obtain possession of immovables.

Each province and territory in Canada has a real property title registration system. Secured creditors perfect interests in real property by filing their mortgage, debenture, hypothec or trust deed against the title to the debtor's real property. Generally, registration fees for real property mortgages 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, 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 these types of 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

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

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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.[27]

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.

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[28] 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 that has the effect of preferring one creditor over another and that was entered into within prescribed time periods before insolvency proceedings in respect of the debtor were commenced. 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

27 Certain provisions of the Corporations Act (Newfoundland and Labrador) restrict the ability of a corporation to provide financial assistance to related persons where the assistance would jeopardise the solvency of the corporation. In addition, Section 78 of the Corporations Act (Newfoundland and Labrador) prohibits a corporation from giving financial assistance, which may be a loan, guarantee or some other structure, to certain blacklisted persons when 'circumstances prejudicial to the corporation exist'. The blacklist includes shareholders, directors, officers or employees of the corporation, and associates of these persons. It is a wide net that catches most entities in the same corporate organisation. Expectedly, the provisions are usually encountered in financing transactions where corporate guarantees are required or in intercompany loan situations. Although there are exceptions set out in the statute (the most commonly relied upon exceptions are the giving of assistance by a wholly owned subsidiary to its parent corporation or by a corporation to a subsidiary), when these exceptions are unavailable, a full analysis is required to determine whether the provisions are applicable and what course of action is the most appropriate to ensure that the assistance can be provided.

28 Where a trustee refuses or neglects to take proceedings after being requested to do so by a creditor, 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, on notice being given the other creditors of the contemplated proceeding, and on such other terms and conditions as the court may direct.

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debtor and persons who gave inadequate consideration for assets, goods or services provided by the debtor within prescribed time periods before insolvency proceedings in respect of the debtor were commenced. 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 necessary modifications) to proceedings under Canada's other major insolvency and restructuring statute, the Companies' Creditors Arrangement Act (CCAA).[29]

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.[30] 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 its debts or knew it was on the brink 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 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 a 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 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 may be afforded priority over a secured lender pursuant to a court order and the priority of these claims will be determined by the court based on the facts of each case. The court may, for example, grant a charge in priority to the security of existing lenders in the debtor's assets to secure, among other things, claims of, or in respect of, critical suppliers, debtor-in-possession lenders, directors' corporate indemnities, key employee retention payments and professional administration fees.

29 In which case, a CCAA court-appointed monitor could challenge preferences and other transactions at undervalue. See Section 36.1(1) of the CCAA.

30 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 BIA or CCAA and outside the proceedings.

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In addition, certain statutory claims will continue to have priority over a secured lender's claim in an insolvency proceeding. In a bankruptcy scenario, these include 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. In a CCAA restructuring or a BIA proposal, generally, the restructuring plan or proposal for the insolvent borrower must provide for the payment of certain employee and other claims unless otherwise agreed by the relevant parties. Notably, a number of the Canadian federal and provincial statutory deemed trusts that can prime a lender's security outside a bankruptcy for unpaid amounts, such as vacation pay and sales taxes, will be reversed in a bankruptcy of the insolvent borrower.[31] However, where a statutory trust satisfies the general principles of trust law for creating a true trust, the assets impressed with the trust would be excluded from any distribution to the insolvent borrower's secured creditors in the bankruptcy proceedings.[32]

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)*,[33] however, 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. Before 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 that amount would be subordinate to a court-ordered charge securing 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 existing at the time a CCAA order is made.[34] Lenders providing financing to a Canadian borrower that has a defined benefit plan registered in Canada or to acquire a

31 In *Callidus Capital Corp v. Canada*, 2018 SCC 47, the Supreme Court of Canada denied a taxing authority's efforts in the bankruptcy proceedings of the debtor to have its deemed trust for unremitted taxes upheld as against a secured creditor who, before the insolvent debtor's bankruptcy, received proceeds from the insolvent debtor that were deemed to be held in trust for the taxing authority.

32 In *The Guarantee Company of North America v. Royal Bank of Canada*, 2019 ONCA 9, the Ontario Court of Appeal held that Ontario's Construction Lien Act impresses a true trust on the funds owing to or received by a bankrupt contractor, preserving those assets from distribution to the bankrupt contractor's creditors. In *Urbancorp Cumberland 2 GP Inc (Re)*, 2020 ONCA 197, in the context of a CCAA proceeding, the Ontario Court of Appeal found that Ontario's Construction Lien Act (now the Construction Act) creates a valid trust pursuant to general trust law, and this statutory provincial trust can be effective in an insolvency to the extent it does not conflict with a specific priority under federal law.

33 2013 SCC 6 (*Indalex*).

34 See also *Grant Forest Products Inc v. The Toronto-Dominion Bank*, 2015 ONCA 570 (*Grant Forest*). In *Grant Forest*, the Ontario Court of Appeal confirmed that a judge presiding over CCAA proceedings has the discretion to permit a creditor to petition the debtor company into bankruptcy, even when the transition to bankruptcy results in a loss of the pension deemed trust and an altering of priorities in favour of a secured creditor. In addition, the Ontario Court of Appeal, although not explicitly upholding the ruling of the lower court that a wind-up deemed trust does not prevail when a wind-up is ordered after the commencement of CCAA proceedings, did distinguish the facts from the *Indalex* case (the wind-up deemed trust under consideration in *Indalex* arose before the CCAA proceedings commenced, whereas in *Grant Forest*, neither of the pension plans were wound up until after the CCAA proceedings commenced).

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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.

Lenders should also be aware of a notable decision of the Supreme Court of Canada, *Orphan Well Association et al v. Grant Thornton Limited et al (Redwater)*,[35] which considered Alberta's provincial regulatory regime regarding abandonment and reclamation obligations (or end-of-life obligations) with respect to abandoned oil wells.[36] The Alberta Energy Regulator issued orders under the provincial regulatory regime requiring Redwater Energy Corporation, an insolvent oil and gas company, to fulfil its end-of-life obligations.

The majority of the Supreme Court held that, for a number of reasons, the Regulator's use of its provincial statutory powers to enforce compliance with end-of-life obligations under Alberta's provincial legislation, does not create a conflict with the BIA and therefore does not trigger the doctrine of federal paramountcy.[37] This meant that the Alberta regime, which was binding on receivers and trustees, could be enforced against Redwater's trustee in bankruptcy such that Redwater's end-of-life obligations for its inactive oil and gas wells were to be satisfied from the insolvent estate, notwithstanding the impact on secured lender recovery. The Court of Queen's Bench has since held that the findings of *Redwater* do not extend to a situation where property that is unrelated to property that is affected by an environmental condition is sold before any abandonment or reclamation orders are made by the provincial regulator, and where the purchaser assumes the end-of-life obligations for that property.[38]

The treatment of environmental obligations in insolvency is an evolving issue, and the applicable provincial regulatory regime will factor significantly into a court's determination.[39] Lenders will want to ensure they understand the applicable provincial regulatory regime, and its application in a potential insolvency, as well as ensure that lending values account for such risks where a Canadian borrower has potential environmental liabilities.

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

35 2019 SCC 5.

36 These obligations refer generally to responsibilities for plugging and capping oil wells to prevent leaks, dismantling surface structures and restoring the surface to its previous condition.

37 The doctrine of federal paramountcy establishes that where there is a conflict between valid provincial and federal laws, the federal laws will prevail and the provincial laws will be inoperative to the extent they conflict with the federal laws.

38 *Manitok Energy Inc (Re)*, 2021 ABQB 227.

39 See, for example, *British Columbia (Attorney General) v. Quinsam Coal Corporation*, 2020 BCSC 640, where the British Columbia Supreme Court distinguished *Redwater* on the basis that the Alberta regime regulating the abandonment, closure and reclamation of oil and gas wells is different from British Columbia's Mines Act and allowed certain sale proceeds to be paid to the secured creditor while there remained unfulfilled regulatory obligations, including reclamation obligations imposed under the Mines Act.

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conduct, that the conduct harmed other creditors of the bankrupt company or that an unfair advantage was conferred on the creditor, and that the subordination is consistent with the remainder of the US Bankruptcy Code.

Although there is no equivalent legislative provision in Canada, Canadian courts have suggested that the doctrine of equitable subordination could potentially be adopted in certain 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*,[40] 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.[41] In its subsequent decision in *US Steel Canada Inc (Re)*[42] the Ontario Court of Appeal ruled that the CCAA court does not have the jurisdiction under the CCAA to grant the remedy of equitable subordination. The Ontario Court of Appeal, however, left the door open for equitable subordination to apply in a BIA context on the basis that the BIA provides the court with express jurisdiction in equity. Leave to appeal to the Supreme Court of Canada was granted in respect of the Ontario Court of Appeal's decision in *US Steel*; however, the appeal was discontinued and the Ontario Court of Appeal decision remains the authority in Canada.

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 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 below.

40 20 [1992] 3 SCR 558, paragraph 44.

41 *Indalex*, note 29 at paragraph 77.

42 2016 ONCA 662 (US Steel).

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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 or notes 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 lenders' 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 debt holders 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 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 a foreign entity or the Canadian target is part of a larger cross-border or international corporate structure, but also more recently in largely Canadian-based transactions. 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 are enforceable.

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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 affected in the 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 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 to increase predictability and certainty in the Canadian market.[43]

VI ACQUISITIONS OF PUBLIC COMPANIES

In Canada, acquisitions of public companies are generally implemented through (1) 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); (2) 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 (3) 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.

43 *ZI Pompey Industries v. Ecu-Line NV* [2003] 1 S.C.R. 450.

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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. In recent years, there has been 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.[44]

i Conditionality and certainty of funds

Canadian securities laws establish a 'certainty of funds' requirement for takeover bids of Canadian public companies. In this regard, Section 2.27 of National Instrument 62-104 (Take-Over Bids and Issuer Bids) 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 must 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'.[45] 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'.[46]

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 generally set at 66⅔ 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

44 We have focused on the laws of the province of Ontario in our analysis of these issues below.
45 National Instrument 62-104 – (Take-Over Bids and Issuer Bids) (2016), 39 OSCB (Supp-1) 63, Section 2.27(1).
46 id., Section 2.27(2).

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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 66.6 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. Because the voting threshold under applicable law for approval of a going-private transaction is 66.6 per cent (75 per cent for some jurisdictions) of the shares voting at the shareholders' meeting called to approve the 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. This 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 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 conditions precedent to the financing, the circumstances under which the loan must be repaid and the proposed method of repayment.[47] These disclosure requirements are easily satisfied by including a summary of the terms and conditions of the financing in the circular, which must be in the form prescribed.[48]

VII OUTLOOK

Secured debt continues to be a popular source of funds for Canadian borrowers although lending activity is somewhat volatile and subject to market conditions. The initial impact of the covid-19 pandemic on the financial condition of certain industries and their inability to obtain financing has faded from the Canadian market as it has experienced record growth since early 2020. Canadian borrowers are once again taking advantage of historically low interest rates, market liquidity and favourable financing terms by securing debt financing to fund acquisitions, the refinancing of existing debt, other balance sheet restructurings and to develop growth plans. In addition, we expect that the trend of Canadian borrowers in good financial condition amending (including repricing) and extending their credit facilities prior to maturity will continue given the favourable conditions in the Canadian debt market, including falling interest rates.

47 National Instrument 62-104 – (Take-Over Bids and Issuer Bids), Form 62-104F1 – Take-Over Bid Circular at item 12.

48 See prescribed form in National Instrument 62-104 – (Take-Over Bids and Issuer Bids), Form 62-104F2 – Issuer Bid Circular.

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The high-yield market in Canada has rebounded for borrowers in 2021 after a brief pause in the first two quarters of 2020 because of the pandemic and a number of Canadian dollar-denominated high-yield note issuances have been completed this year. As a result, Canadian borrowers are also turning to the US high-yield market to raise funds.

US sponsors continue to remain active in Canada as market liquidity and demand for covenant-lite loans to finance Canadian acquisitions and growth have remained strong. 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 a 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.

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Appendix 1

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Jean Anderson is a partner and a member of the banking and finance law group of Goodmans. Her practice focuses on financing, corporate transactions and regulatory matters. With more than 35 years of legal experience, she has developed extensive expertise in the areas of project finance, structured finance, asset-based lending, P3 finance, debt restructuring and complex domestic and cross-border financings and regulatory matters relating to foreign and domestic financial institutions. Jean is recognised in *The Canadian Legal Lexpert Directory*, *The Lexpert/American Lawyer Media Guide to the Leading 500 Lawyers in Canada*, *The Lexpert Guide to Leading US/Canada Cross-border Corporate Lawyers in Canada*, *Lexpert Special Edition: Canada's Leading Finance and M&A Lawyers*, *Lexpert Special Edition: Canada's Leading Infrastructure Lawyers*, *Chambers Global*, *Chambers Canada*, *IFLR1000*, Euromoney's *Guide to The World's Leading Banking Finance & Transactional Lawyers* and *The World's Leading Women in Business Law*, *Who's Who Legal of Banking Lawyers* and *Best Lawyers in Canada*. Jean was named the '2015 Toronto Asset-Based Lending Lawyer of the Year' by *Best Lawyers of Canada* and she also received the 2009 Lexpert Zenith Award recognising her as one of Canada's leading women lawyers. She was admitted to the Ontario Bar in 1981.

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Keyvan's practice focuses primarily on sophisticated domestic and cross-border financings as well as on turnarounds, private equity, second liens, mezzanine, bridge and hospitality M&A and finance. He holds significant experience in asset-based lending, syndicated loans, real estate loans, securitisation, mine and consumer financings, equipment financing and leasing, factoring, intercreditor relations, consumer finance and other aspects of banking and financing law. Keyvan regularly acts for Canadian, American and offshore banks, PE funds and commercial lenders, as well as borrowers, regarding complex secured and unsecured credit facilities.

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