The Acquisition and Leveraged Finance Review

Ninth Edition

Editor
Fernando Colomina

The LawReviews

THE ACQUISITION AND LEVERAGED FINANCE REVIEW

NINTH EDITION

Editor
Fernando Colomina

THE LAWREVIEWS

PUBLISHER
Clare Bolton

HEAD OF BUSINESS DEVELOPMENT
Nick Barette

TEAM LEADER
Katie Hodgetts

SENIOR BUSINESS DEVELOPMENT MANAGER
Rebecca Mogridge

BUSINESS DEVELOPMENT MANAGER
Joey Kwok

BUSINESS DEVELOPMENT ASSOCIATE
Archie McEwan

RESEARCH LEAD
Kieran Hansen

EDITORIAL COORDINATOR
Georgia Goldberg

PRODUCTION AND OPERATIONS DIRECTOR
Adam Myers

PRODUCTION EDITOR
John Harris

SUBEDITOR
Hilary Scott

CHIEF EXECUTIVE OFFICER
Nick Brailey

Published in the United Kingdom
by Law Business Research Ltd
Holborn Gate, 330 High Holborn, London, WC1V 7QT, UK

www.TheLawReviews.co.uk

ISBN 978-1-80449-138-6

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

ACKNOWLEDGEMENTS

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

AKSU ÇALIŞKAN BEYGO ATTORNEY PARTNERSHIP (ASC LAW)

ANDERSON MŌRI & TOMOTSUNE

GILBERT + TOBIN

GOODMANS LLP

LATHAM & WATKINS

LEE AND LI, ATTORNEYS-AT-LAW

MERITS & TREE LAW OFFICES

NASSIRY LAW INC

PINHEIRO NETO ADVOGADOS

SCHOENHERR (IN COOPERATION WITH LAW FIRM STOYANOV AND TSEKOVA)

SHARDUL AMARCHAND MANGALDAS & CO

WALDER WYSS LTD

CONTENTS

PREFACE

Market conditions have remained challenging through the past year. The post-pandemic recovery globally saw a significant setback as a result of the war in Ukraine, which exacerbated the pre-existing market issues and led to historic policy actions and moves across global markets. US inflation saw a cool-down from a second-quarter peak as the Fed turned to aggressive tightening on the market, risking triggering a recession in the US economy. Eurozone inflation accelerated through the year, reaching record double digits in the third quarter as power suppliers looked for alternative sources amidst soaring energy prices. Governments have been forced to intervene, with energy price caps announced to protect households through the winter. Further rate rises will be expected at European Central Bank policy meetings to tame inflation and restore price stability as recession risks grow.

In tandem with these challenges, the acquisition and leveraged finance industry saw primary issuance slow down significantly, with declines of almost 50 per cent in the first half of the year from record highs in the same period in 2021. Market conditions particularly deteriorated throughout the second quarter as we saw the credit markets take an early summer break. One bright spot, accounting for the largest portion of European buyout activity, was the volume of add-ons in popular defensive sectors such as B2B and IT, as financial sponsors looked to build up portfolio companies through the uncertainty.

Traditional lenders have been cautious about underwriting buyouts in this environment as spreads have widened. Financial sponsors across Europe have consequently considered private debt funds as a viable alternative to the syndicated markets. This year, they have played a more prominent role in larger buyout financings across sectors, with several funds sharing the risk. There are, however, signs that private debt funds are becoming more selective and looking to safer sectors that are less cyclical and protected from supply-chain issues. We would expect to see an increase in pricing on financing packages with less leverage and a demand in stronger protection and more-conservative terms.

As we enter 2023, macroeconomic conditions in Europe in a tighter policy environment are likely to remain challenging in the first half of the year. There will be an increase in liability management transactions, restructurings and distress-related M&A across more cyclical, capital-intensive sectors and highly indebted buyouts. But down markets and recessions provide good buying opportunities. With European equity prices likely to remain at relatively low and attractive levels, take-private transactions will continue to be an attractive source of deal flow. The strengthening US dollar also creates an opportunity for financial sponsors to take advantage of an attractive FX rate, particularly if the businesses are resistant to inflation or provide counter-cyclical business hedges.

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
Latham & Watkins
Madrid
November 2022

Chapter 4

CANADA

Jean E Anderson, David Nadler, Carrie B E Smit, David Wiseman, Caroline Descours, Cathy Costa-Faria, 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. While acquisition activity in Canada was exceptionally strong throughout 2021, rising interest rates and the prospects of a recession have resulted in a slower pace of merger and acquisition activity. Nevertheless, leveraged loans continue to be an important source of capital for Canadian acquisitions. Rising interest rates and other factors have had an effect on the level of acquisition activity in the latter half of 2022 and it remains to be seen whether that trend continues into 2023.

i Recent Canadian acquisition activity

The strong recovery in mergers and acquisitions activity seen in the first half of 2021 continued into the third and fourth quarters of the year, with 917 announced transactions having an aggregate deal value of C$98 billion in the third quarter, and 943 announced transactions having an aggregate deal value of C$87 billion in the fourth quarter.[2] In 2021, there were a record total of 3,857 transactions announced, surpassing the 2016 record by more than 400 transactions and representing a roughly 23 per cent increase from 2020.[3] Overall, these numbers reflect a robust Canadian mergers and acquisitions market, with 2021 having three of the four most active quarters on record.[4] Following a slight decrease of activity in Q3 2021, deal activity picked up again in Q4 2021. The strength of activity in the fourth quarter was bolstered by a steady domestic mergers and acquisitions market, with 2,487 transactions involving Canadian targeted companies in 2021, 577 of which occurred in the fourth quarter.[5] In 2021, there was also a sizeable increase in foreign acquisitions, with international buyers acquiring 681 Canadian companies, a nearly 38 per cent increase from 2020.[6] Canadian buyers continued to be highly acquisitive internationally, acquiring 1,142

1 Jean E Anderson, David Nadler, Carrie B E Smit, David Wiseman and Caroline Descours are partners and Cathy Costa-Faria and Steven Marmer are associates 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 2021 quarterly reports.
3 ibid.
4 ibid.
5 ibid.
6 ibid.

foreign companies during the year.[7] The information technology, industrial and real estate sectors were the most active in Q4 2021, ending the year with 140, 132, and 109 announced transactions, respectively.[8] There was a decrease of activity in the healthcare, financial services and precious metals sectors, each falling more than 14 per cent.[9]

Following record levels of mergers and acquisition activity in 2021, the market began to cool in the first quarter of 2022, with 851 announced transactions valued at C$67 billion, below the 2021 quarterly averages of 964 and C$90 billion, respectively.[10] Thirteen mega deals (transactions with an aggregate value in excess of C$1 billion) in Q1 2022 were announced with an aggregate value of C$48 billion, down from the 14 announced in the fourth quarter of 2021 valued at C$56 billion.[11] With the rise in interest rates and the withdrawal of government support relating to the covid-19 pandemic, Q1 2022 saw an increase in deal activity in sectors viewed as inflation hedges, including precious metals, financial services, metals and mining, consumer staples, real estate and utilities.[12] The second quarter of 2022 saw a sharp decline in mergers and acquisitions activity with 747 announced transactions worth C$54 billion, down 12 per cent and 19 per cent from Q1 2022, respectively.[13] The total of 1,598 transactions in the first half of 2022 represents a 20 per cent decline from the same period in 2021.[14] This deceleration in activity can be attributed to unforeseen factors, including rising inflation and the heightened possibility of a recession, both of which have had a greater impact on larger transactions, those in cyclical sectors such as metals and mining, and those in interest rate sensitive sectors such as real estate.[15] Eleven mega deals were announced in Q2 2022 with an aggregate value of C$35 billion, with six deals involving Canadian targets, including Rogers and Shaw's conditional divestiture of Freedom Mobile to Quebecor Inc.[16] Ontario continued to be the most active province for the quarter with 203 deals valued at C$22.3 billion, representing 74 per cent of all transaction value in Q2 2022.[17] Overall, Canadian mergers and acquisitions activity is softening as the market shifts towards pre-pandemic activity levels, though many fundamentals such as access to capital and demand from key actors remain intact.

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

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 2022 quarterly reports.
11 ibid.
12 ibid.
13 ibid.
14 ibid.
15 ibid.
16 Quebecor, Press Release, 'Rogers, Shaw and Quebecor Announce Agreement for Sale of Freedom Mobile', (17 June 2022), online: Cision, www.newswire.ca/news-releases/rogers-shaw-and-quebecor-announce-agreement-for-sale-of-freedom-mobile-811448865.html.
17 ibid.

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, Algoma Steel Group Inc. merged with a special purpose acquisition company and entered into financing arrangements with Canada Infrastructure Bank and the Strategic Innovation Fund.[18] Restaurant Brands International Inc. amended its existing credit facility to extend the maturity date and increase the size of the loan from C$717 million to C$1.25 billion in connection with its acquisition of Firehouse Restaurant Group Inc.[19] In connection with its acquisition of Great Bear Resources Ltd., Kinross Gold Corporation drew down US$1.1 billion to assist with financing a portion of the plan of arrangement.[20] Canadian Pacific Railway Limited acquired Kansas City Southern for US$31 billion, partially funded by debt, and which was the largest dollar value deal in Canada over the past year, and one of the largest over the past five years.[21]

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

18 Algoma Steel Inc., Press Release, 'Algoma Steel and Legato Merger Corp. Close Business Combination', (19 October 2021), online: Globe Newswire, www.globenewswire.com/en/news-release/2021/10/19/2316953/0/en/Algoma-Steel-and-Legato-Merger-Corp-Close-Business-Combination.html.

19 Restaurant Brands International Inc., Press Release, 'Restaurant Brands International Inc. Completes Acquisition of Firehouse Subs and Announces Increase in Borrowings Under Existing Term Loan A Facility' (15 December 2021), online: Cision, www.newswire.ca/news-releases/restaurant-brands-international-inc-completes-acquisition-of-firehouse-subs-and-announces-increase-in-borrowings-under-existing-term-loan-a-facility-847986647.html.

20 Kinross Gold Corporation, Press Release, 'Kinross completes acquisition of Great Bear Resources' (24 February 2022), online: Globe Newswire, www.globenewswire.com/en/news-release/2022/02/24/2391463/0/en/Kinross-completes-acquisition-of-Great-Bear-Resources.htmll.

21 Canadian Pacific, Press Release, 'Canadian Pacific and Kansas City Southern Execute Agreement to Combine, Creating First Single-Line Rail Network Linking U.S.-Mexico-Canada' (15 September 2021), online: Cision, www.prnewswire.com/news-releases/canadian-pacific-and-kansas-city-southern-execute-agreement-to-combine-creating-first-single-line-rail-network-linking-us-mexico-canada-301377665.html.

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.

In the absence of 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 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.

ii Withholding tax

Under the Income Tax Act (Canada) (the Tax Act), interest paid by a Canadian-resident debtor to an arm's-length non-resident creditor will not generally be subject to the Canadian withholding tax, provided that the interest is not participating (e.g., contingent or dependent on the use of or production from property in Canada: computed with reference to revenue, profit, cash flow, commodity price or similar criteria, 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.

Under Canada's 'back-to-back' rules, additional withholding tax may apply where an intermediary is interposed between a foreign lender and a Canadian borrower, and a higher rate of Canadian withholding tax would otherwise apply in respect of payments to the foreign lender.

iii 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).

iv 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 apply. These rules generally apply where: (1) a non-resident creditor owns (or has a right to acquire or is non-arm's-length with a person who owns or has the right to acquire) shares of the debtor representing 25 per cent or more of the votes or value of the debtor's capital stock; and (2) the debt-to-equity ratio of the debtor in respect of such creditors exceeds 1.5:1. The thin capitalisation rules may apply in a situation where acquisition financing is undertaken by a non-resident parent corporation, that then lends funds to its Canadian subsidiary, which acquires the target assets or shares.

Under Canada's 'back to back' rules, the thin capitalisation rules may apply where an intermediary is interposed between a non-resident creditor and a Canadian borrower, and the thin capitalisation rules would otherwise apply in respect of payments to the non-resident creditor.

v Recent amendments

In 2022, new interest deductibility and anti-hybrid structure rules were released, which may affect the deductibility of interest.

In November 2022, revised draft legislation was released respecting (among other measures) the previously proposed interest deductibility rules, referred to as the 'excessive interest and financing expenses limitation' (or EIFEL) rules. The EIFEL rules are broadly in line with OECD BEPS Action 4, and seek to introduce a limit on the amount of interest and financing expenses that resident and non-resident corporations and trusts can deduct in computing income. More specifically, the basic regime under the EIFEL rules generally limits the deduction of interest and financing expenses to 30 per cent of the taxpayer's 'adjusted taxable income' (i.e., tax EBITDA), with a transitional rate of 40 per cent for taxation years beginning on or after 1 October 2023 but before 1 January 2024. Interest and financing expenses that exceed the applicable limit in a particular year will not be deductible in that year, but generally may be carried forward and deducted in those future years (subject to the application of the EIFEL rules in those years). Certain Canadian corporations and trusts that do not exceed their applicable limit in a particular year generally will be permitted to transfer all or a portion of their 'excess capacity' to other Canadian corporations and trusts within their group. Further, taxpayers generally may carry forward for up to three years their 'excess capacity' to be utilised in those future years (subject to the application of the EIFEL rules in those years).

Members of certain groups of corporations and trusts may be permitted to effectively opt out of the basic regime in a particular year and elect into an alternative (and potentially more favourable) regime under the EIFEL rules for that year. Where applicable, this alternative regime may permit members of the group to deduct interest and financing expenses beyond the 30 (or 40) per cent limit where the overall group has a higher 'group ratio' of net third-party interest expense to earnings.

As drafted, the EIFEL rules, once effective, will not apply to: (1) groups of corporations and trusts whose aggregate net interest expense among their Canadian members does not exceed C$1 million; (2) certain Canadian-resident corporations and trusts (and groups consisting of Canadian-resident corporations and trusts) that carry on substantially all of their business in Canada (provided that certain other requirements are met); or (3) Canadian-controlled private corporations that have (together with any associated corporations) taxable capital employed in Canada of less than C$50 million. Individuals will also be exempt from the EIFEL rules.

Draft legislation respecting the anti-hybrid rules was also released in 2022, applicable to payments made on or after 1 July 2022. These rules are in line with OECD BEPS Action 2 and generally restrict the deduction of certain payments made by Canadian taxpayers under hybrid mismatch arrangements to the extent that the payments give rise to a further deduction in another country or are not included in the income of a non-resident recipient. Similarly, where a payment by a non-resident is deductible for foreign income tax purposes, no deduction in respect of this payment may be permitted to a Canadian taxpayer.

vi Consolidation issues

Canadian-resident corporations do not file consolidated tax returns (unlike in certain other jurisdictions, such as the United States). As a result, interest payable by a Canadian-resident corporation is only deductible by that particular corporation and can only offset income earned by that particular corporation. Where the taxable income of the debtor corporation is insufficient 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.

vii 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.

viii 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 because 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.[22]

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 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 notice that a debtor's assets have been encumbered in favour of a secured creditor.

Chattel paper,[23] 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. Since 1 September 2022, applications for registration at the RPMRR must be drawn up exclusively in French.[24] The foregoing implies that deeds of hypothec in English would include collateral set out in French. 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.

22 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.

23 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.

24 An Act respecting French, the official and common language of Québec, SQ 2022, c 14.

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.[25] Generally, creditors secure intangibles similarly to tangibles, by way of a security agreement and perfection by registration under the PPSAs.[26] The law of the jurisdiction where the debtor is located[27] 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 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 under the PPSAs. 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

25 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).

26 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.

27 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.

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.

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[28] 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

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

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. The filing of hypothecs at the Quebec Land Registry Office must be made exclusively in French. 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 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.[29]

29 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.

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[30] 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 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).[31]

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

30 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.

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

allow a creditor to attack fraudulent conveyances and unjust preferences.[32] 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.

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 in a bankruptcy or receivership scenario, 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. In liquidating restructuring proceedings under the CCAA or BIA where the company is expected to become subject to a bankruptcy or receivership, a court may order employee claims under the Wage Earner Protection Act to be paid before the company's bankruptcy or receivership proceedings are commenced, and provided the court is satisfied that all employees have been dismissed. Notably, a number of the Canadian federal and provincial statutory deemed trusts that can prime a lender's security outside a bankruptcy or CCAA proceeding for unpaid amounts, such as sales taxes, will be reversed in a bankruptcy or CCAA proceeding of the insolvent

32 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.

borrower.[33] 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.[34]

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)*,[35] 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.[36] 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.

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*),[37] which considered Alberta's provincial regulatory regime regarding abandonment and reclamation obligations (or end-of-life obligations) with respect to abandoned oil wells.[38] 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.

33 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.

34 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.

35 2013 SCC 6 (*Indalex*).

36 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).

37 2019 SCC 5.

38 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.

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.[39] 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.[40]

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.[41] 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 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*,[42] 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.[43] In its subsequent decision in *US Steel Canada Inc (Re)*[44] 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

39 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.

40 See also *Manitok Energy Inc (Re)*, 2022 ABCA 117.

41 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.

42 [1992] 3 SCR 558, paragraph 44.

43 *Indalex*, note 29 at paragraph 77.

44 2016 ONCA 662 (*US Steel*).

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.

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.

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.[45]

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.

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.[46]

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

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

46 We have focused on the laws of the province of Ontario in our analysis of these issues below.

are available to make full payment for the securities that the offeror has offered to acquire'.[47] 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'.[48]

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 662/3 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 66.6 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.

47 National Instrument 62-104 – (Take-Over Bids and Issuer Bids) (2016), 39 OSCB (Supp-1) 63, Section 2.27(1).

48 ibid., Section 2.27(2).

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.[49] 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.[50]

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. As noted above, the volume of leveraged loans to fund M&A transactions is declining given the rapid increase in interest rates since March 2022 and ongoing economic uncertainty. However, we expect demand for secured leveraged loans to continue as a source of funding for acquisition financing, the refinancing of maturing indebtedness and for corporate restructurings given the lack of other activities and the expectation that interest rates will start to come down again in late 2023 and early 2024.

Starting on 1 June 2023, Quebec's new French language law requires as a condition of validity that an adhesion contract (i.e., non-negotiable agreement) involving counterparties in Quebec be drawn up in French before the parties may agree to signing its English version.[51] Lenders (domestic or foreign) as well as foreign entities such as financial institutions, private equity and hedge funds will be exempt from such requirement.

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

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

51 See footnote 24.

Appendix 1

ABOUT THE AUTHORS

JEAN E ANDERSON

Goodmans LLP

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.

DAVID NADLER

Goodmans LLP

David Nadler is a partner and co-heads the banking and finance law group at Goodmans. He is also a leading member of the firm's hospitality law group. David consistently represents Canadian and international financial institutions, non-bank lenders and public and private companies in connection with complex domestic and cross-border lending transactions. David has worked on several financings in the seniors housing sector, both for lenders and operators. He has also been involved in several debt restructurings representing both creditors and debtors. David represents various clients in the hospitality industry, including hotel owners, brand management companies and franchisors. David has been involved in hospitality transactions in Canada and throughout the world, including in India, China, the Czech Republic, Hong Kong, Japan, Morocco, Israel and Egypt. David is recognised as a leading banking lawyer by *Chambers Canada*, Euromoney's *Guide to the World's Leading Banking Lawyers*, *The Legal 500 Canada*, *Best Lawyers in Canada* and *IFLR1000*. He has also been recognised by *Chambers Global* and *The Canadian Legal Lexpert Directory*. He was admitted to the Ontario Bar in 1993.

CARRIE B E SMIT

Goodmans LLP

Carrie Smit is a partner and heads the tax group at Goodmans. Her practice is transaction based and encompasses all aspects of income taxation that arise in corporate and commercial transactions, including cross-border mergers, corporate reorganisations, domestic and international debt financings, debt restructurings and private equity investments. Carrie is recognised as a leading tax lawyer by *The Canadian Legal Lexpert Directory*, *The Lexpert Guide to the Leading US/Canada Cross-border Corporate Lawyers in Canada*, *The Lexpert/American Lawyer Guide to the Leading 500 Lawyers in Canada*, *Lexpert Special Edition: Canada's Leading Finance and M&A Lawyers*, *Chambers*, *Best Lawyers in Canada*, Euromoney's *Guide to the World's Leading Tax Advisors* and *Guide to the World's Leading Women in Business Law*, *Who's Who Legal: Canada*, *The Legal 500 Canada* and *International Tax Review's Women in Tax Leaders*. *Who's Who Legal: Canada 2018* recognised Carrie as one of the seven 'Most Highly Regarded Individuals' in Canada in corporate tax. Carrie has been named the Toronto 'tax lawyer of the year' by *Best Lawyers in Canada* and received the 'best in tax' award at the 2012 Euromoney Americas' Women in Business Law Awards. She was admitted to the Ontario Bar in 1992.

DAVID WISEMAN

Goodmans LLP

David Wiseman is a partner in a business law group and a longstanding member of the opinions committee and the technology committee at Goodmans. *IFLR1000*, *Best Lawyers in Canada*, *Who's Who Legal* and *Lexpert* recognise David as a leading lawyer in the areas of bank lending, project finance, asset-based lending and global mining. David also has the highest possible rating (AV pre-eminent) from LexisNexis Martindale-Hubbell for ethical standards and legal ability. David has written and spoken on debt finance topics in a variety of forums, including co-authoring and editing the Canada chapter in this publication as well as *The Lending and Secured Finance Review*. David previously was a member of the board of directors of the Boulevard Club and a member of the capital projects committee that provided input and guidance on the design and construction of the club's West Wing rebuild. David supports a number of charities, including Juvenile Diabetes Research Foundation and Women's Shelters Canada. David's practice is transaction-based with a particular emphasis on project financing, bank and asset-based lending, high-yield debt and restructurings with banking and finance components. David advises lenders, borrowers and sponsors on complex domestic, cross-border and international financings. David has deep knowledge of financing issues relevant to renewable energy, infrastructure and mining. David was admitted to the Ontario Bar in 1997.

CAROLINE DESCOURS

Goodmans LLP

Caroline Descours is a partner in the corporate restructuring group at Goodmans, which is consistently and widely recognised as Canada's best and leading corporate restructuring practice. Caroline's practice focuses on corporate restructuring and commercial insolvency matters, including Canadian, transnational and cross-border matters. She has significant experience in corporate and insolvency restructurings, recapitalisation transactions, acquisitions, commercial financing transactions, and private equity and corporate matters. Her roles include acting as counsel for companies, secured and unsecured debtholders, and monitors and trustees, as well as advising boards of directors in respect of corporate and restructuring transactions and strategic alternatives. She also acts for private equity funds and investors in a broad range of transactions. Caroline has been honoured as a 'rising star' by *IFLR1000* and by *Lexpert Rising Stars: Leading Lawyers Under 40*. She is recognised in the *Canadian Legal Lexpert Directory*, *Best Lawyers in Canada*, *Chambers Canada* and Euromoney's *Guide to the Worlds Leading Women in Business Law*. Caroline was admitted to the Ontario Bar in 2010.

CATHY COSTA-FARIA

Goodmans LLP

Cathy Costa-Faria is a research lawyer at Goodmans. She advises on complex legal issues in corporate, commercial and insolvency matters. She has several years' experience practising as a corporate restructuring lawyer, representing debtors, creditors and court-appointed officers through restructuring and receivership proceedings. Cathy heads the firm's writing programme, designed to ensure effective communication and maintain the highest standards of legal writing. She facilitates the firm's research and writing training for law students and junior lawyers. She was admitted to the Ontario Bar in 2002.

STEVEN MARMER

Goodmans LLP

Steven Marmer is an associate in the banking and finance law group at Goodmans. His practice is transaction-based with a particular emphasis on banking and finance law. Steven has experience representing a variety of private and public companies, Canadian and US banks and private financial institutions on a range of domestic and cross-border commercial lending transactions.

Steven regularly acts in a number of financing transactions including acquisition finance, project finance, securitisation, restructuring, asset-based loans, technology and start-up finance. Steven was admitted to the Ontario Bar in 2019.

KEYVAN NASSIRY

Nassiry Law Inc

After practising banking and finance for almost 25 years in three large firms, Keyvan Nassiry launched Nassiry Law, a lending law and debt finance boutique firm based in Montreal.

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.

Keyvan is a frequent panellist and moderator for CLE programs and private clients. He has ranked consistently among the top practitioners in his field by *The Best Lawyers in Canada*, *Chambers and Partners*, *The Lexpert/American Lawyer Guide to the Leading 500 Lawyers in Canada*, *Lexpert Leading Canadian Lawyers in Global Mining*, *Lexpert Leading Canadian Lawyers in Energy* and *The Canadian Legal Lexpert Directory*. He is a former president of the Montreal chapter of the Turnaround Management Association and a member of the American Bar Association, business law section.

Keyvan was admitted to the Quebec Bar in 1991.

NASSIRY LAW INC

1250 René-Lévesque Boulevard West
Suite 2200
Montreal H3B 4W8
Canada
Tel: +1 514 944 6760
knassiry@nassirylaw.com
www.nassirylaw.com

ISBN 978-1-80449-138-6