

THE ACQUISITION  
AND LEVERAGED  
FINANCE  
REVIEW

SIXTH EDITION

Editor  
Marc Hanrahan

THE LAWREVIEWS

THE ACQUISITION  
AND LEVERAGED  
FINANCE  
REVIEW

SIXTH EDITION

Reproduced with permission from Law Business Research Ltd  
This article was first published in December 2019  
For further information please contact [Nick.Barette@thelawreviews.co.uk](mailto:Nick.Barette@thelawreviews.co.uk)

**Editor**  
Marc Hanrahan

PUBLISHER

Tom Barnes

SENIOR BUSINESS DEVELOPMENT MANAGER

Nick Barette

BUSINESS DEVELOPMENT MANAGER

Joel Woods

SENIOR ACCOUNT MANAGERS

Pere Aspinall, Jack Bagnall

ACCOUNT MANAGERS

Olivia Budd, Katie Hodgetts, Reece Whelan

PRODUCT MARKETING EXECUTIVE

Rebecca Mogridge

RESEARCH LEAD

Kieran Hansen

EDITORIAL COORDINATOR

Tommy Lawson

HEAD OF PRODUCTION

Adam Myers

PRODUCTION EDITOR

Martin Roach

SUBEDITOR

Keely Shannon

CHIEF EXECUTIVE OFFICER

Nick Brailey

Published in the United Kingdom  
by Law Business Research Ltd, London  
Meridian House, 34-35 Farringdon Street, London, EC4A 4HL, UK  
© 2019 Law Business Research Ltd  
[www.TheLawReviews.co.uk](http://www.TheLawReviews.co.uk)

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided was accurate as at November 2019, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above.

Enquiries concerning editorial content should be directed  
to the Publisher – [tom.barnes@lbresearch.com](mailto:tom.barnes@lbresearch.com)

ISBN 978-1-83862-077-6

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:

ADVOKATFIRMAET BAHR AS

A&L GOODBODY

ANDERSON MÖRI & TOMOTSUNE

BECCAR VARELA

FELLNER WRATZFELD & PARTNERS

GILBERT + TOBIN

GOODMANS LLP

HANNES SNELLMAN ATTORNEYS LTD

HEUSSEN

KOLCUOĞLU DEMİRKAN KOÇAKLI ATTORNEYS AT LAW

MAGNUSSON DENMARK

MILBANK LLP

NASSIRY LAW

PINHEIRO NETO ADVOGADOS

TIAN YUAN LAW FIRM

URÍA MENÉNDEZ ABOGADOS, SLP

WALDER WYSS LTD

WOLF THEISS FALUDI ERŐS ATTORNEYS AT LAW

# CONTENTS

PREFACE.....	v
<i>Marc Hanrahan</i>	
Chapter 1 INTRODUCTION .....	1
<i>Marc Hanrahan</i>	
Chapter 2 ARGENTINA.....	9
<i>Tomás Allende</i>	
Chapter 3 AUSTRALIA.....	20
<i>John Schembri and David Kirkland</i>	
Chapter 4 AUSTRIA.....	35
<i>Markus Fellner and Florian Kranebitter</i>	
Chapter 5 BRAZIL.....	44
<i>Fernando R de Almeida Prado and Fernando M Del Nero Gomes</i>	
Chapter 6 CANADA.....	62
<i>Jean E Anderson, David Nadler, Carrie B E Smit, David Wiseman, Caroline Descours, Chris Payne and Keyvan Nassiry</i>	
Chapter 7 CHINA.....	80
<i>Jie Chai, Qin Ma and Xiong Yin</i>	
Chapter 8 DENMARK.....	87
<i>Nikolaj Jubl Hansen, Søren Theilgaard and Caspar Rose</i>	
Chapter 9 GERMANY.....	101
<i>Thomas Ingenhoven and Odilo Wallner</i>	
Chapter 10 HUNGARY.....	116
<i>Melinda Pelikán, János Pásztor, László Lovas and Bence Kálmán</i>	

## Contents

---

Chapter 11	IRELAND .....	127
	<i>Catherine Duffy and Robbie O'Driscoll</i>	
Chapter 12	JAPAN .....	138
	<i>Satoshi Inoue, Yuki Kohmaru and Risa Fukuda</i>	
Chapter 13	NETHERLANDS .....	147
	<i>Sandy van der Schaaf and Martijn B Koot</i>	
Chapter 14	NORWAY .....	156
	<i>Markus Nilssen, Magnus Tønseth and Audun Nedrelid</i>	
Chapter 15	SPAIN .....	165
	<i>Borja Contreras and José Félix Zaldivar</i>	
Chapter 16	SWEDEN .....	175
	<i>Paula Röttorp and Carolina Wahlby</i>	
Chapter 17	SWITZERLAND .....	185
	<i>Lukas Wyss and Maurus Winzap</i>	
Chapter 18	TURKEY .....	199
	<i>Umut Kolcuoğlu, Bihter Bozbay and İpek Yüksel</i>	
Chapter 19	UNITED KINGDOM .....	210
	<i>Suhrud Mehta, Russell Jacobs, Mark Stamp, Mitali Ganguly and Francesca Mosely</i>	
Chapter 20	UNITED STATES .....	219
	<i>Lauren Hanrahan, Eschi Rahimi-Laridjani, Douglas Landy, Morgan Lingar, James Kong and Archan Hazra</i>	
Appendix 1	ABOUT THE AUTHORS .....	229
Appendix 2	CONTRIBUTORS' CONTACT DETAILS .....	249

# PREFACE

Leveraged finance, particularly with respect to acquisition financing, has been an expanding asset class for many years. As of the fourth to quarter of 2018, leveraged loans outstanding totalled US\$1,147 billion and high-yield bonds outstanding totalled US\$1,256 billion. The average annual growth rate for leveraged loans outstanding (2000–2018) equalled 15.8 per cent and for high-yield bonds (1997–2018) equalled 6.5 per cent.<sup>1</sup> In 2018, leveraged finance loan totals for acquisition finance surpassed the previous records set in 2007.<sup>2</sup>

The leveraged finance markets and these markets' participants grow deeper and more sophisticated year over year. The playing field for acquisition finance, particularly for private equity deals, remains in large part an issuer-controlled game with an increasing number of new financing sources clamouring to become involved. As has been noted by many, credit controls (covenants and collateral coverage) remain soft and continue to weaken in some cases. That said, default rates are at the low end of the historical range and new piles of capital continue to be accumulated to support acquisition financing. As discussed in the Introduction that follows, regulators are indicating concern about the leveraged loan market in the case of an economic downturn but, to date, that does not seem to have stifled the appetite for new deals and associated financings.

For lawyers, this is a great area of practice. There is lots of activity given the size of the asset class; everything from new issuance, to refinancings, to work outs and insolvency proceedings. But to be an effective practitioner in the area, more is required than occasionally dabbling in leveraged finance transactions. Most lawyers who successfully practice in leveraged finance do it full time. Knowing 'market terms' is considered to be very helpful, if not critical, to success in this area.

This volume is intended to introduce the newcomer to the legal basics involved in leveraged finance, particularly acquisition finance, so that he or she is grounded in the underpinnings of the practice area. It is also intended to be a helpful update for the more seasoned practitioner with respect to what is new and what is being talked about in leveraged finance deals.

---

1 Source: Financial Stability Report of the Board of Governors of the Federal Reserve System, May 2019.

2 2018: U.S. Primary Loan Market Review, LSTA 3 January 2018.

Thanks to my partners Casey Fleck and Doug Landy, and my associates Chris Hahm, James Kong and George Miller, for their help in editing the volume and preparing the Introduction that follows.

**Marc Hanrahan**

Milbank LLP

New York, NY

September 2019



# CANADA

*Jean E Anderson, David Nadler, Carrie B E Smit, David Wiseman, Caroline Descours, Chris Payne and Keyvan Nassiry*<sup>1</sup>

## I OVERVIEW

Leveraged lending is frequently used by Canadian borrowers to fund a number of activities, including acquisitions, capital expenditures, dividend recapitalisations, refinancings of existing debt and ongoing operations. Recent acquisition activity in Canada has been relatively 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 and the easing of credit terms have contributed to the attractiveness of leveraged loans for Canadian borrowers.

### i Recent Canadian acquisition activity

The pace of mergers and acquisitions in Canada flourished in the fourth quarter of 2018, pushing M&A activity in Canada to a record annual high.<sup>2</sup> There were 874 announcements in the fourth quarter, bringing the 2018 total number of announcements to 3,415, a 14 per cent increase from the 2,991 announcements made in 2017.<sup>3</sup> There were 874 announcements valued at C\$58 billion in the fourth quarter of 2018, a slight decrease compared to the 881 deals worth C\$68 billion in the third quarter.<sup>4</sup> The strength in activity in the fourth quarter was bolstered by a robust domestic merger and acquisition market, with 402 transactions involving Canadian buyers of domestic companies.<sup>5</sup> There was also a sizeable increase in foreign acquisitions, with a record quarterly high of 281 announced in the fourth quarter, a 19 per cent increase from the third quarter.<sup>6</sup> Real estate was the most active sector by deal volume, ending the year with a strong quarter of 114 announced transactions, a 27 per cent increase compared to the same period in 2017.<sup>7</sup> The industrials sector notably experienced a 60 per cent increase in activity over the same quarter last year. Industrials

---

1 Jean E Anderson, David Nadler, Carrie B E Smit, David Wiseman and Caroline Descours are partners and Chris Payne is a senior associate at Goodmans LLP. Keyvan Nassiry is the founding partner of Nassiry Law, a Quebec firm based in Montreal.

2 Crosbie & Company, M&A Quarterly Canadian M&A Online: [www.crosbieco.com/who-we-are/m-a-publications](http://www.crosbieco.com/who-we-are/m-a-publications). Figures provided are a compilation from 2018 quarterly reports.

3 *ibid.*

4 *ibid.*

5 *ibid.*

6 *ibid.*

7 *ibid.*

represented 36 per cent of aggregate deal volume in the fourth quarter, primarily driven by the C\$17.5 billion purchase of Johnson Controls' Power Solution business by Caisse de dépôt et placement du Québec and Brookfield Business Partners.<sup>8</sup>

The surge in merger and acquisition activity continued into the first and second quarters of 2019, with 801 and 886 announced transactions respectively, the latter being the highest level ever.<sup>9</sup> In the first quarter, the total deal value of C\$74 billion was much higher than the first quarter of 2018 and at the high end of the range over the past seven years as a large number of mega deals (transactions with aggregate value in excess of C\$1 billion) were announced.<sup>10</sup> Total deal value decreased slightly to C\$70 billion in the second quarter.<sup>11</sup> This strong quarter is partly attributed to 13 mega deals. These mega deals had a total value of C\$42.6 billion, down from 13 mega deals valued at C\$59 billion in the first quarter and compared to the 18 mega deals valued at C\$51 billion during the second quarter of 2018.<sup>12</sup> The largest announced transaction was the C\$7.7 billion acquisition of Merlin Entertainments, a UK based company, by a consortium of investors that included the Canadian Pension Plan Investment Board.<sup>13</sup> The industrials sector was the most active sector, with 113 transactions valued at C\$17.3 billion. The real estate sector was the second most active sector, with 110 transactions valued at C\$12.5 billion in the quarter.<sup>14</sup> Ontario currently remains the most active province for the quarter, with 236 deals valued at C\$11.1 billion,<sup>15</sup> and keeping in line with historical trends, outbound merger and acquisitions (transactions with Canadian buyers and foreign targets) outpaces inbound merger and acquisitions (foreign buyers and Canadian targets) by a ratio of 2:1.<sup>16</sup> Overall, 2019 is on track to be a strong year for Canadian merger and acquisition activity.

## 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 acquisition was funded through various types of debt obtained from a variety of sources. Sources include senior secured credit facilities provided by domestic and foreign financial institutions, second-lien credit facilities, unsecured credit facilities, streaming arrangements, senior secured bonds, high-yield notes and mezzanine debt.

For example, Innergex Renewable Energy Inc financed its acquisition of 62 per cent of TransCanada Corporation's co-ownership participation in five wind farms in Quebec, as well as TransCanada's 50 per cent interest in Cartier Wind Farms' operating entities, using two credit facilities.<sup>17</sup> Stingray Digital Group Inc, a leading music, media, and technology company, financed its acquisition of Newfoundland Capital Corporation Limited through

---

8 *ibid.*

9 Crosbie & Company, M&A Quarterly Canadian M&A, online: [www.crosbieco.com/who-we-are/m-a-publications](http://www.crosbieco.com/who-we-are/m-a-publications). Figures provided are a compilation from 2019 quarterly reports.

10 *ibid.*

11 Crosbie & Company, note 9 at second quarterly report.

12 *ibid.*

13 *ibid.*

14 *ibid.*

15 *ibid.*

16 *ibid.*

17 'Innergex Acquires 62% Interest in Five Wind Farms From TransCanada for \$620M', *Expert* (January 2019) at 10, online: <http://digital.carswellmedia.com/i/1077525-january-2019/9?m4=>.

a private placement of subscription receipts, a bought-deal public offering of subscription receipts, and an issuance of subscription receipts through the exercise of subscription rights financed by Investment Québec and Le Fonds de solidarité FTQ. Stingray also entered into new credit facilities for C\$450 million with a syndicate of Canadian banks.<sup>18</sup> AltaGas Ltd acquired WGL Holdings, Inc for approximately C\$9 billion. This transaction was financed through a US\$3 billion bridge facility, a C\$2.6 billion bought deal offering of subscription receipts, and a C\$400 million private placement of subscription receipts.<sup>19</sup> 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 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 in order to establish a presence in Canada and must comply with the operational requirements of the Bank Act on an ongoing basis.

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

Absent connection with a bank, foreign and other lenders that are not otherwise regulated as financial institutions in Canada (e.g., insurance companies, trust companies and credit unions) do not require any special licences or regulatory approvals to make a loan to a Canadian borrower. 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

---

18 'Stingray Digital Group Inc. Acquires Newfoundland Capital Corp. Ltd. and Completes Subscription Receipts Offerings', *Lexpert* (March 2019) at 8, online: <http://digital.carswellmedia.com/i/1097797-march-2019/7?m4=>.

19 'AltaGas Ltd. Acquires WGL Holdings, Inc.', *Lexpert* (January 2019) at 10, online: <http://digital.carswellmedia.com/i/1077525-january-2019/9?m4=>.

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.

### ***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).

### ***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.

### ***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.<sup>20</sup>

#### i Security

##### *Personal property and tangible movable property*

###### *Common law provinces*

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

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

A security interest in tangible property must be perfected if a creditor is to have priority over the interests of other creditors and third parties. Registration of a financing statement in each province or territory where tangible assets are physically located is necessary to perfect a security interest in those assets. The PPSAs are publicly accessible, searchable databases, and a registered financing statement serves as notice that a debtor's assets have been encumbered in favour of a secured creditor. Certain types of tangible personal property such as chattel paper, instruments, money, documents of title and large goods can also be perfected 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. 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.

---

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.

## ***Personal property and intangible property***

### *General – common law provinces*

Intangible personal property includes claims and receivables, intellectual property (IP) rights and investment property.<sup>21</sup> Generally, creditors secure intangibles similarly to tangibles, by way of a security agreement and perfection by registration under the PPSAs.<sup>22</sup> The law of the jurisdiction where the debtor is located<sup>23</sup> at the time the security interest attaches governs the validity, perfection and priority of a security interest in intangible personal property.

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 STAs.

---

21 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).

22 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.

23 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. In Ontario, however, deeming rules for determining a debtor's location under the Personal Property Security Act (Ontario) became effective on 31 December 2015. The rules determine a debtor's location based on what type of entity the debtor is. For example, provincial corporations are deemed to be located in the province or territory of incorporation or organisation.

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

In addition to execution of a security agreement and filing under the PPSAs to perfect an interest in investment property as an intangible, secured creditors can also establish 'control' or possession over such property. Control is the 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<sup>24</sup> 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. 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.

---

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



## **ii Guarantees**

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

## **iii Guarantee limitations**

### ***Financial assistance***

Corporate legislation in Canada has eliminated outright restrictions on financial assistance. It is permitted without restrictions of any kind in several provinces, including Ontario and Nova Scotia. In other provinces and territories, financial assistance is also permitted generally but is subject to a solvency test or disclosure requirements. This more relaxed regime has provided increased flexibility to lenders in Canada when structuring security packages that include guarantees.

### ***Corporate benefit***

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

## **iv Agency concept**

Except for Quebec, the concept of agency has long been 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.

Until recently, the concept of holding security for others was not clear under Quebec law. Most lending lawyers in Quebec had taken the view that an agent had to be formally appointed as a person holding the lenders' power of attorney to hold a hypothec without delivery on behalf of future, unknown members of a syndicate of lenders. Revised Article 2692 of the CCQ clarifies this uncertainty. Under revised Article 2692, a hypothec may be granted to a 'hypothecary representative' for all present and future creditors of the obligations secured by that hypothec. This clarification has been well received in the Canadian market.

## **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<sup>25</sup> 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).<sup>26</sup>

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.<sup>27</sup> 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.

---

25 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.

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

27 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.

## 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 charges will continue to have priority over a secured lender's claim in a bankruptcy, including, among others, 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 BIA proposal, generally speaking, 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 and charges that can prime a lender's security outside a bankruptcy for unpaid amounts, such as vacation pay and sales tax, would be reversed in a bankruptcy of the insolvent borrower.<sup>28</sup> This might not be the case, however, where a statutory trust satisfies the general principles of trust law for creating a true trust, in which case the assets impressed with the trust would be excluded from any distribution to the insolvent borrower's secured creditors.<sup>29</sup>

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)*,<sup>30</sup> 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. Prior to this decision, it was generally thought that the deemed trust provisions of the applicable pension legislation would not apply to a wind-up deficiency. Although the Supreme Court made it clear that a deemed trust could apply to a wind-up deficiency, and that the claim for such amount would be subordinate to a court-ordered charge securing 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

28 In *Callidus Capital Corp v. Canada*, 2018 SCC 47, the Supreme Court of Canada denied a taxing authority's efforts 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.

29 In a recent case, *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.

30 2013 SCC 6 (*Indalex*).

indebtedness existing at the time a CCAA order is made.<sup>31</sup> 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. (a.k.a. Redwater)*,<sup>32</sup> which considered Alberta's provincial regulatory regime regarding abandonment and reclamation obligations (or end-of-life obligations with respect to abandoned oil wells).<sup>33</sup> 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 question before the Supreme Court in Redwater was whether the Alberta Energy Regulator's use of powers under Alberta's provincial legislation to enforce compliance with end-of-life obligations could be enforced in insolvency and whether those powers conflict with the trustee in bankruptcy's powers under the BIA or with the order of creditor priorities prescribed by the BIA. If so, the provincial regulatory regime would be inoperative to the extent of the conflict by virtue of the doctrine of federal paramountcy.<sup>34</sup>

The majority of the Supreme Court held that, for a number of reasons, the Regulator's use of its provincial statutory powers does not create a conflict with the BIA and, therefore, does not trigger the doctrine of federal paramountcy. 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.

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

31 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).

32 2019 SCC 5.

33 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.

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

suppliants negotiated contractual arrangements between parties. For a claimant to succeed in subordinating a creditor claim, it must demonstrate that the creditor engaged in inequitable conduct, that the conduct harmed other creditors of the bankrupt company or conferred upon the creditor an unfair advantage, and that the subordination is consistent with the remainder of the US Bankruptcy Code.

Although there is no equivalent legislative provision in Canada, recent decisions by 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*,<sup>35</sup> 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.<sup>36</sup> Subsequently, in its recent decision in *US Steel Canada Inc (Re)*,<sup>37</sup> 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.

---

35 20 [1992] 3 SCR 558, paragraph 44.

36 *Indalex*, note 29 at paragraph 77.

37 2016 ONCA 662 (*US Steel*).

#### **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 foreign or the Canadian target is part of a larger cross-border or international corporate structure. Foreign lenders often expressly choose to have their principal financing agreement governed by the law of their home jurisdiction and to stipulate that any resulting disputes will be governed by that law. In these circumstances, foreign lenders need to understand how choice of law and foreign judgments are treated in Canada and whether consent to jurisdiction clauses 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 in order to increase predictability and certainty in the Canadian market.

**VI ACQUISITIONS OF PUBLIC COMPANIES**

In Canada, acquisitions of public companies are generally implemented through (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. While, in recent years, the availability of financing has been restricted, there is now 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.<sup>38</sup>

### **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'.<sup>39</sup> 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'.<sup>40</sup>

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.

---

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

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

40    National Instrument 62-104 - (Take-Over Bids and Issuer Bids) (2016), 39 OSCB (Supp-1) 63, Section 2.27(2).



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 66⅔ per cent (75 per cent for some jurisdictions) of the outstanding securities are acquired, the offeror can complete the acquisition of 100 per cent of the securities of the target company by means of a subsequent going private transaction. In this circumstance, the offeror can vote the shares that were tendered to it under the bid. Since the voting threshold under applicable law for approval of a going-private transaction is 66⅔ 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.<sup>41</sup> 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.<sup>42</sup>

## VII OUTLOOK

Secured debt continues to be a popular source of funds for Canadian borrowers although lending activity is somewhat volatile. Canadian borrowers are continuing to take advantage of relatively low interest rates, market liquidity and favourable financing terms by securing debt financing to fund acquisitions, the refinancing of existing debt with more onerous terms, dividend and other balance sheet restructurings. In addition, we expect that the trend of Canadian borrowers amending (including repricing) and extending their credit facilities prior to maturity will continue given the favourable conditions in the Canadian debt market including falling interest rates.

---

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

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

The high-yield market in Canada has been a difficult one for borrowers for the past couple of years, with a limited number of Canadian dollar-denominated high-yield note issuances being completed. As a result, Canadian borrowers are increasingly turning to the US high-yield market to raise funds and are generally finding that they must pay a premium compared with US borrowers in that market for their offerings to be successful.

As US sponsors become more active in Canada and seek financing from Canadian lenders for their Canadian acquisitions, covenant-lite loans are becoming more common in Canada. Covenant-lite loans generally do not include financial maintenance covenants or include them only on a springing basis based on certain leverage levels. Equity cures of financial covenant breaches are generally permitted. As financial covenant breach is often an early indicator of financial difficulty, the downside for lenders is that they may not be able to trigger a default based on a financial covenant breach and initiate restructuring discussions at an early stage when more options are available to address the borrower's financial issues.

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

## 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. Clients represented include Wells Fargo, Bank of America, Monroe Capital, Hitachi Capital, OMERS, Citizens Bank, US Bank, UBS, AB Private Credit, Carlyle Global Credit and Clearwater Seafoods.

Jean is recognised in *The Canadian Legal Expert Directory*, *The Expert/American Lawyer Media Guide to the Leading 500 Lawyers in Canada*, *The Expert Guide to Leading US/Canada Cross-border Corporate Lawyers in Canada (banking and asset-based lending)*, *Chambers Global (banking and finance)*, *IFLR 1000*, *Euromoney's Guide to The World's Leading Banking Finance & Transactional Lawyers* and *The World's Leading Women in Business Law (banking)*, Law Business Research's *International Who's Who Legal of Banking Lawyers and Best Lawyers in Canada (banking and structured finance)*. Jean was named the '2015 Toronto Asset-Based Lending Lawyer of the Year' by Best Lawyers of Canada and she also received the 2009 Expert Zenith Award recognising her as one of Canada's leading women lawyers.

She served as a law clerk to the Chief Justice of the Ontario Court of Appeal. Prior to joining Goodmans in 2000, she was a partner at another major Toronto law firm.

## **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's experience includes representation of: Organigram Holdings Inc, a leading licensed producer of cannabis, in connection with a credit facility provided by a syndicate of lenders led by Bank of Montreal; a syndicate of lenders in connection with a credit facility provided to CM Solutions Inc, an OMERS affiliate, in connection with its acquisition of D+H Collateral Management Corp; a syndicate of lenders in connection with a C\$1 billion credit facility agreement to one of Canada's largest pension funds; an owner and developer of a group of branded full-service hotels; a syndicate of lenders in connection with a US\$1 billion senior revolving credit facility to one of Canada's largest real estate companies; Nuvo Pharmaceuticals Inc in connection with acquisition financing with respect to its acquisition of certain assets of Aralez Pharmaceuticals Inc; Stephenson's Rental Services Inc in connection with term and acquisition credit facilities of C\$210 million; APLP Holdings Limited Partnership, a subsidiary of Atlantic Power Corporation in its establishment of C\$900 million in new senior secured credit facilities; Toronto-Dominion Bank in connection with the provision of a C\$625 million acquisition and operating credit facility to Canadian Apartment Properties REIT; Royal Bank of Canada in connection with the provision of a C\$255 million credit facility to Cologix Inc; Canadian Pacific Railway Ltd in connection with its formation of a joint venture with Dream Unlimited Corp to develop its portfolio of surplus real estate.

David is recognised as a leading banking lawyer by *The Canadian Legal Expert Directory*, *Euromoney's Guide to the World's Leading Banking Lawyers*, *The Legal 500 Canada*, *Best Lawyers in Canada* and *IFLR 1000*. He has also been recognised for banking by Chambers Global. David has been described as someone who is 'practical and takes real world scenarios into consideration' (*The Legal 500 Canada* 2019).

David has co-authored a number of articles in the area of banking and finance, including, most recently, the Canada chapter of the fifth edition of Law Business Research Ltd's *The Acquisition and Leveraged Finance Review* published in January 2019.

David has served as a board and committee member of several non-profit organisations. 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's representative work includes acting for: Onex Corporation in its agreement to acquire all outstanding shares of WestJet Airlines Ltd for C\$5 billion; Searchlight Capital Partners, LP in its acquisition of Mitel Networks Corporation, a publicly listed global market leader in business communications, in an all-cash transaction of US\$2 billion; Ceridian HCM Holding Inc, a global human capital management software company, in its US\$631.3 million initial public offering of dual-listed common shares in Canada and the United States; Toys 'R' Us Canada in its acquisition by Fairfax Financial Holdings Limited and its emergence from creditor protection; and Spectra Energy Corp in its merger with Enbridge Inc for C\$37 billion in stock (enterprise value of C\$165 billion)

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*, *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*, Law Business Research's *Who's Who Legal: Canada*, *The Legal 500 Canada and International Tax Review's Women in Tax Leaders*.

Law Business Research's *Who's Who Legal: Canada 2018* recognised Carrie as one of the seven 'Most Highly Regarded Individuals' in Canada in the practice of corporate tax. Carrie was named the Toronto Tax 'Lawyer of the Year' by *Best Lawyers in Canada* in 2016 and 2018 and she also received the Best in Tax Award at the 2012 Euromoney Americas' Women in Business Law Awards.

Carrie has spoken at numerous tax conferences and has written papers on a variety of income tax matters. She is a regular speaker at the annual CBA 'Tax Law for Lawyers' conference. 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 long-standing member of the Opinions Committee and the Technology Committee at Goodmans.

David is recognised as a leading lawyer in the areas of bank lending, project finance, asset-based lending and global mining by *IFLR 1000*, *Best Lawyers in Canada*, *Who's Who Legal* and *Lexpert*. David also has the highest possible rating (AV Preeminent) 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 of *The Acquisition and Leveraged Finance Review* and *The Lending and Secured Financing 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.

His 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's representative work includes acting for: Fiera Private Debt (formerly IAM Private Debt), as lead counsel, in connection with various infrastructure and corporate financings across Canada; CE Mining in connection with a financing of Rambler Metals & Mining; SkyPower Global in connection with a holdco financing in relation to its seven Ontario RESOP solar park projects and its completion of 5 concurrent refinancings totalling US\$230 million by Nomura Securities International for these projects; Hub International in connection with its US\$5.06 billion cross-border refinancing from Morgan Stanley; Conuma Resources in connection with its US\$250 million cross-border refinancing, comprising a US\$200 million 10 per cent senior secured notes offering and a US\$25 million credit facility; CJF Capital Partners and SUSI partners in connection with cross-border, non-recourse third party project financings of two energy storage projects in Ontario totalling 12MW; CEDA/OMERS in connection with its C\$125 million credit facilities with Bank of Nova Scotia; Hudson Resources in connection with a multi-lender project financing in Greenland; Mandalay Resources in connection with US\$40 million HSBC credit facilities; Ganfeng Lithium Co, Ltd in connection with the US\$355 million financing of Cauchari-Olaroz lithium project in Jujuy, Argentina; Canaccede Financial Group in connection with its US\$75 million financing and several distressed debt portfolio acquisitions from Canadian banks; Ridgeback Resources in connection with its C\$400 million senior credit facilities and US\$40 million second lien notes; OMERS/Golf Town/Golfsmith in connection with DIP credit facilities from Antares Capital; Eurasian Resources Group in connection with US\$3.1 billion in credit facilities from VTB Bank; KKR and Jefferies Finance in connection with the US\$700 million refinancing of Preferred Sands; Wells Fargo, PNC Bank, MidCap Business Credit, Sienna Lending, People's Bank, Provident Bank and Citizen's Bank on various ABL/commercial finance transactions; various leading international and US law firms on cross-border financings.

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, and 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's representative work includes: company counsel on numerous corporate recapitalisation transactions, including Concordia International Corp, Bellatrix Exploration Ltd, Sherritt International Corporation, Postmedia Network Canada Corp and Millar Western Forest Products Ltd; debtor counsel on numerous commercial insolvency restructurings, including Cinram International Inc, Graceway Canada Company, SkyLink Aviation Inc, Plasco Energy Group, Nelson Education and Rubicon Minerals; debtholder counsel on numerous commercial insolvency restructurings, including Sino-Forest, Jaguar Mining, Mobilicity and Cash Store; monitor, trustee and/or information officer counsel on numerous commercial insolvency restructurings, including Extreme Fitness, Tamerlane Ventures, Target Canada, Horsehead and FirstOnSite.

Caroline is recognised as a Rising Star in restructuring and insolvency by *IFLR 1000*. She was admitted to the Ontario Bar in 2010.

## **CHRIS PAYNE**

### *Goodmans LLP*

Chris Payne is a senior associate in a business law group at Goodmans. His practice is transaction-based with a particular emphasis on banking and finance law. Chris has experience representing a variety of private and public companies as well as financial institutions on a range of domestic and cross-border commercial lending transactions, including acquisition finance, project finance and asset-based loans.

Chris also assists companies with corporate restructurings and regulatory matters and maintains a general corporate law practice.

Chris' representative work includes acting for: Searchlight Capital Partners, LP in connection with its C\$2 billion acquisition financing of Mitel Networks Corporation, a global market leader in business communications; Coca-Cola Canada Bottling Limited, a Canadian-based joint venture between prominent businessman and philanthropist Larry Tanenbaum OC, and Junior Bridgeman, a former National Basketball Association player, renowned entrepreneur and owner of Kansas City-based Heartland Coca-Cola Bottling Company, in financing its acquisition of Coca-Cola Refreshments Canada Company from Coca-Cola Refreshments USA, Inc, a subsidiary of The Coca-Cola Company; Morneau Shepell Inc in connection with its acquisition of LifeWorks Corporation Ltd for a total purchase price of approximately C\$426 million; Wells Fargo in connection with a financing deal to provide American Tire Distributors (ATD) with C\$1.05 billion in exit financing to support operations and future growth initiatives at ATD and ensure they emerge from bankruptcy; Brookfield Principal Credit in connection with the US\$650 million term loan provided to Bumble Bee Seafoods; SkyPower Corp in connection with its completion of five concurrent refinancings totalling US\$230 million by Nomura Securities International for its seven Ontario RESOP solar park projects; CEDA/OMERS in connection with its C\$125 million credit facilities with Bank of Nova Scotia; Carlyle Group in its C\$225 million credit facility to Empire Communities; CE Mining in connection with a financing of Rambler Metals & Mining; and Hudson Resources in connection with a multi-lender project financing in Greenland.

He was admitted to the Ontario Bar in 2014.



## **KEYVAN NASSIRY**

### *Nassiry Law*

After practicing 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 Expert/American Lawyer Guide to the Leading 500 Lawyers in Canada*, *Expert Leading Canadian Lawyers in Global Mining*, *Expert Leading Canadian Lawyers in Energy* and *The Canadian Legal Expert Directory*. He is past president of the Montreal chapter of the Turnaround Management Association (TMA) and member of the American Bar Association, Business Law Section.

Keyvan was admitted to the *Barreau du Québec* in 1991.

## **GOODMANS LLP**

Bay Adelaide Centre – West Tower  
333 Bay Street, Suite 3400  
Toronto  
Ontario M5H 2S7  
Canada  
Tél: +1 416 979 2211  
Fax: +1 416 979 1234  
janderson@goodmans.ca  
dnadler@goodmans.ca  
csmit@goodmans.ca  
dwiseman@goodmans.ca  
cdescours@goodmans.ca  
cpayne@goodmans.ca  
www.goodmans.ca

## **NASSIRY LAW**

Tel: +1 514 994 6760  
knassiry@nassiry.com  
www.nassiry.com

an LBR business

ISBN 978-1-83862-077-6