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The International Comparative Legal Guide to:

Securitisation 2015

8th Edition

A practical cross-border insight into securitisation work

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Country Question and Answer Chapters:

EDITORIAL

Welcome to the eighth edition of *The International Comparative Legal Guide to: Securitisation*.

This guide provides the international practitioner and in-house counsel with a comprehensive worldwide legal analysis of the laws and regulations of securitisation.

It is divided into two main sections:

Five general chapters. These are designed to provide readers with a comprehensive overview of key securitisation issues, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in securitisation laws and regulations in 38 jurisdictions.

All chapters are written by leading securitisation lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor, Mark Nicolaides of Latham & Watkins LLP, for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

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1 Receivables Contracts

1.1 Formalities. In order to create an enforceable debt obligation of the obligor to the seller: (a) is it necessary that the sales of goods or services are evidenced by a formal receivables contract; (b) are invoices alone sufficient; and (c) can a receivable "contract" be deemed to exist as a result of the behaviour of the parties?

(a) Certain consumer contracts or sales that are subject to the sale of goods legislation (sales involving personal property other than receivables and money) must be in writing in order to be enforceable.

(b) Invoices alone are sufficient to create a receivable, subject to the need to comply with consumer protection legislation where applicable.

(c) A contract can be found to exist based on the behaviour of the parties and a written contract is not necessary to create a receivable, but would be helpful from an evidentiary perspective in case of a dispute.

1.2 Consumer Protections. Do Canada's laws: (a) limit rates of interest on consumer credit, loans or other kinds of receivables; (b) provide a statutory right to interest on late payments; (c) permit consumers to cancel receivables for a specified period of time; or (d) provide other noteworthy rights to consumers with respect to receivables owing by them?

(a) The Criminal Code (Canada) makes it a criminal offence, subject to criminal sanctions, to charge interest at a rate greater than 60% *per annum*. Interest is broadly defined to include fees and other amounts payable by the borrower to the lender and is determined on the basis of the actual annualised return realised by the lender, other than in cases of voluntary prepayments by the borrower. In commercial cases, courts have generally reduced the fees and other returns in excess of 60% *per annum* to fall within the Criminal Code limits, rather than striking down all interest and fees altogether if there is a violation, where the commercial agreement so provides.

The *Interest Act* (Canada) prohibits charging an increased rate of interest on arrears of principal or interest that is secured by a real property mortgage.

Certain provinces also have consumer protection legislation that applies to lending transactions giving courts the ability to reduce the excessive cost of borrowing charges. Québec legislation provides that, in such case, the underlying contract may be terminated or the borrowing costs voided.

There is also case law in common law provinces to the effect that a higher rate of interest after default may be an unenforceable penalty.

(b) There is generally no statutory right to interest on late payments in the common law provinces. The ability to charge interest must be supported by a contract. In Québec, there may, in certain circumstances, be a statutory right to interest for late payments.

(c) All provinces provide a cooling off period for direct sales contracts (contracts that are negotiated other than at the seller's place of business). Certain provinces provide cooling off periods for various other types of consumer contracts as well.

(d) There is a wide array of 'cost of borrowing' laws in Canada. The failure to comply with cost of borrowing disclosure may lead to an inability to enforce the resulting receivable. In addition, class action laws have been liberalised in Canada in the past decade to make it easier for representative plaintiffs to assert claims on behalf of a class of affected consumers.

1.3 Government Receivables. Where the receivables contract has been entered into with the government or a government agency, are there different requirements and laws that apply to the sale or collection of those receivables?

Generally, receivables due from either the federal or a provincial government are not assignable unless certain procedural steps are taken under the *Financial Administration Act* (Canada) or analogous applicable provincial legislation. Receivables due from government agencies may or may not be assignable, and assignability must be determined on a case-by-case basis.

2 Choice of Law – Receivables Contracts

2.1 No Law Specified. If the seller and the obligor do not specify a choice of law in their receivables contract, what are the main principles in Canada that will determine the governing law of the contract?

Canadian courts would apply principles of private international law in determining the law of the contract. Factors to be considered include the domicile, residence, nationality or jurisdiction of incorporation of the parties, the place where the contract was concluded and the place where delivery of goods or services is to be performed.

As a practical matter, foreign law must be proven by expert evidence in Canadian courts. Therefore, if an action on a contract without an express choice of law is brought in a Canadian court, and the court assumes jurisdiction over the matter due to a sufficient connection with the matter, it is likely that the court would be willing to interpret the contract under the laws of the forum unless the issue was disputed and expert evidence of the foreign law was introduced.

2.2 Base Case. If the seller and the obligor are both resident in Canada, and the transactions giving rise to the receivables and the payment of the receivables take place in Canada, and the seller and the obligor choose the law of Canada to govern the receivables contract, is there any reason why a court in Canada would not give effect to their choice of law?

It should be noted that matters of contract law fall under provincial jurisdiction. Therefore, on the basis that this question can be read as relating to a particular province of Canada, the answer is that the court would give effect to a choice of the law of that province, subject to the qualifications listed under question 2.3.

2.3 Freedom to Choose Foreign Law of Non-Resident Seller or Obligor. If the seller is resident in Canada but the obligor is not, or if the obligor is resident in Canada but the seller is not, and the seller and the obligor choose the foreign law of the obligor/seller to govern their receivables contract, will a court in Canada give effect to the choice of foreign law? Are there any limitations to the recognition of foreign law (such as public policy or mandatory principles of law) that would typically apply in commercial relationships such as that between the seller and the obligor under the receivables contract?

A court would recognise the choice of foreign law in an agreement provided that the parties' choice of foreign law was *bona fide* and there was no reason for avoiding the choice on the grounds of public policy. Notwithstanding the parties' choice of law, a court:

(a) will not take judicial notice of the provisions of the foreign law but will apply such provisions only if they are pleaded and proven by expert testimony;

(b) will apply the law of the forum that would be characterised as procedural;

(c) will apply provisions of the law of the forum that have overriding effect (for example, certain enforcement provisions of the *Personal Property Security Act* (PPSA) in the common law jurisdictions would take priority over inconsistent remedy provisions in a security agreement governed by a foreign law) or, in Québec, that are applicable by reason of their particular object;

(d) will not apply any foreign law if such application would be characterised as a direct or indirect enforcement of a foreign revenue, expropriatory or penal law or if its application would be contrary to public policy of the forum; and

(e) will not enforce the performance of any obligation that is illegal under the laws of any jurisdiction in which the obligation is to be performed.

2.4 CISG. Is the United Nations Convention on the International Sale of Goods in effect in Canada?

Yes, it is.

3 Choice of Law – Receivables Purchase Agreement

3.1 Base Case. Does Canada's law generally require the sale of receivables to be governed by the same law as the law governing the receivables themselves? If so, does that general rule apply irrespective of which law governs the receivables (i.e., Canada's laws or foreign laws)?

No. The parties to the receivables purchase agreement would be free to choose a different law than that governing the receivables themselves. See question 2.3.

3.2 Example 1: If (a) the seller and the obligor are located in Canada, (b) the receivable is governed by the law of Canada, (c) the seller sells the receivable to a purchaser located in a third country, (d) the seller and the purchaser choose the law of Canada to govern the receivables purchase agreement, and (e) the sale complies with the requirements of Canada, will a court in Canada recognise that sale as being effective against the seller, the obligor and other third parties (such as creditors or insolvency administrators of the seller and the obligor)?

On the basis that this question can be read as relating to a particular province of Canada (see question 2.2) and subject to compliance with perfection requirements discussed under questions 4.2 and 4.4, a court in a province of Canada would recognise the effectiveness of the sale.

3.3 Example 2: Assuming that the facts are the same as Example 1, but either the obligor or the purchaser or both are located outside Canada, will a court in Canada recognise that sale as being effective against the seller and other third parties (such as creditors or insolvency administrators of the seller), or must the foreign law requirements of the obligor's country or the purchaser's country (or both) be taken into account?

The answer would be the same as for question 3.2, except that the effectiveness of the assignment against the foreign obligor would be governed by the law of the jurisdiction where the obligor was located, not as described in question 4.4.

3.4 Example 3: If (a) the seller is located in Canada but the obligor is located in another country, (b) the receivable is governed by the law of the obligor's country, (c) the seller sells the receivable to a purchaser located in a third country, (d) the seller and the purchaser choose the law of the obligor's country to govern the receivables purchase agreement, and (e) the sale complies with the requirements of the obligor's country, will a court in Canada recognise that sale as being effective against the seller and other third parties (such as creditors or insolvency administrators of the seller) without the need to comply with Canada's own sale requirements?

The sale would be recognised so long as the seller remains solvent, subject to the qualifications referred to in question 2.3. Also, in a bankruptcy proceeding in a Canadian court affecting the seller, it is possible that the court might recharacterise a sale under a foreign

law as constituting a secured loan under applicable Canadian law if the receivables purchase agreement would not also constitute a sale under applicable Canadian law.

3.5 Example 4: If (a) the obligor is located in Canada but the seller is located in another country, (b) the receivable is governed by the law of the seller's country, (c) the seller and the purchaser choose the law of the seller's country to govern the receivables purchase agreement, and (d) the sale complies with the requirements of the seller's country, will a court in Canada recognise that sale as being effective against the obligor and other third parties (such as creditors or insolvency administrators of the obligor) without the need to comply with Canada's own sale requirements?

A court would recognise the sale under the law of the seller's country, but this would not obviate the need to comply with the requirements set out in question 4.4 for the sale to be effective against obligors in Canada.

3.6 Example 5: If (a) the seller is located in Canada (irrespective of the obligor's location), (b) the receivable is governed by the law of Canada, (c) the seller sells the receivable to a purchaser located in a third country, (d) the seller and the purchaser choose the law of the purchaser's country to govern the receivables purchase agreement, and (e) the sale complies with the requirements of the purchaser's country, will a court in Canada recognise that sale as being effective against the seller and other third parties (such as creditors or insolvency administrators of the seller, any obligor located in Canada and any third party creditor or insolvency administrator of any such obligor)?

The answer here is the same as for question 3.4, with the added requirement to comply with the procedures set out in question 4.4 for the sale to be effective against obligors in Canada.

4 Asset Sales

4.1 Sale Methods Generally. In Canada what are the customary methods for a seller to sell receivables to a purchaser? What is the customary terminology – is it called a sale, transfer, assignment or something else?

Typically, the sale would be effected pursuant to a receivables purchase agreement. The terms of the receivables purchase agreement would depend upon whether the commercial arrangement is a factoring (financing), a whole loan sale (where the seller retains no residual interest in the receivables sold) or a version typically used in a securitisation (where the seller is entitled to a deferred purchase price reflecting a residual interest in the receivables). There is no significance to the choice of terminology among sale, transfer or assignment.

4.2 Perfection Generally. What formalities are required generally for perfecting a sale of receivables? Are there any additional or other formalities required for the sale of receivables to be perfected against any subsequent good faith purchasers for value of the same receivables from the seller?

In each of the common law provinces (all provinces other than Québec), perfection is governed by that province's PPSA. Under the PPSA, an absolute transfer of receivables is deemed to create a security interest. In order for the transferee to take priority in those receivables as against third parties (such as subsequent purchasers), the deemed security interest must be perfected, usually by registering a financing statement in the PPSA registry in the province where the assignor is located for purposes of the PPSA.

In Québec, an assignment of receivables could be perfected by registration only if the receivables transferred constitute a "universality of claims". If the receivables do not constitute a universality of claims, the assignment may be perfected with respect to Québec obligors only by means of actual notice of the assignment to such obligors. There is considerable uncertainty about what constitutes a universality, but it is generally accepted that a sale of all receivables of a particular type generated by the seller between two specified dates would constitute a universality of claims. It should be noted that the creation of a universality in this way prevents the random selection of Québec receivables for inclusion in a segregated pool of Canadian receivables; rather, the Québec receivables would normally be selected so as to constitute a universality of claims generated between two specified dates.

4.3 Perfection for Promissory Notes, etc. What additional or different requirements for sale and perfection apply to sales of promissory notes, mortgage loans, consumer loans or marketable debt securities?

A transfer of promissory notes is governed by the *Bills of Exchange Act* (Canada) which deals with the rights of holders in due course of a bill, note or cheque. While perfection of an assignment of promissory notes is still governed by applicable provincial PPSAs (that is, in order to perfect the assignment as against third parties, either registration or possession is required), most PPSAs expressly provide that the rights of holders in due course are not affected by provincial PPSAs. As a practical matter, in order to ensure that the purchaser of a promissory note has priority over other claimants (to ensure no one else can become a holder in due course), it will be necessary for the purchaser, or a custodian acting for the purchaser, to take and maintain possession or control.

Most provinces of Canada have enacted *Securities Transfer Acts* (STAs) that deal comprehensively with the transfer and holding of securities and interests in securities. This legislation is modelled after article 8 of the US Uniform Commercial Code.

In each of the common law provinces, an assignment of interests in real property (such as mortgages) is perfected by registering the assignment in the applicable land titles or land registry office. Usually, sellers anticipating the sale of mortgages by securitisation will arrange for their mortgages to be originated in the name of a licensed trust company as nominee, bare trustee and custodian for the benefit of the beneficial owner in order to obviate the need to reassign the mortgages for securitisation. When mortgages are not registered in the name of a custodian or nominee, registration of assignments is typically not made at the closing of the securitisation transaction where the assignor has an investment grade credit rating; instead, the assignor will deliver a power of attorney in registrable form, which may be used by the transferee to register mortgage assignments at a later date. Since these powers of attorney are coupled with an interest in the related mortgages, such powers of attorney would survive the bankruptcy of the grantor of the power (the assignor).

In Québec, claims under a mortgage (a loan secured by an immovable hypothec) constitute personal (movable) property and perfection is obtained in the same manner as for other receivables: that is, by registration at the personal property security register

(and not the land registry office) in the case of the universality of claims, or else by providing evidence of the assignment to the obligor. The assignment of the mortgage (hypothec) resulting from the assignment of the claims should be registered at the land registry office, however, failure to comply with said requirement would not render the sale ineffective against a trustee in bankruptcy of seller.

There are no statutory provisions providing that an assignment of consumer loans be treated differently than other loans.

4.4 Obligor Notification or Consent. Must the seller or the purchaser notify obligors of the sale of receivables in order for the sale to be effective against the obligors and/or creditors of the seller? Must the seller or the purchaser obtain the obligors' consent to the sale of receivables in order for the sale to be an effective sale against the obligors? Whether or not notice is required to perfect a sale, are there any benefits to giving notice – such as cutting off obligor set-off rights and other obligor defences?

In order for an assignment of a receivable to be effective against the obligor, the obligor must receive notice of the assignment. Until the obligor receives notice, it may discharge its obligations by making payment to the seller and also retain the benefit of all defences and set-off rights that may be asserted against the seller. Therefore, even where there is no need to notify obligors in order for the assignment to be effective against the seller, the benefit of providing notification is to cut off the benefit of defences and the set-off rights that could arise in the future.

In order for an assignment to be effective against the seller and its creditors, it is generally not necessary to notify obligors so long as the assignment is perfected by registration. The only exception is for obligors residing in Québec, where the assignment does not constitute a universality (see question 4.2).

4.5 Notice Mechanics. If notice is to be delivered to obligors, whether at the time of sale or later, are there any requirements regarding the form the notice must take or how it must be delivered? Is there any time limit beyond which notice is ineffective – for example, can a notice of sale be delivered after the sale, and can notice be delivered after insolvency proceedings against the obligor or the seller have commenced? Does the notice apply only to specific receivables or can it apply to any and all (including future) receivables? Are there any other limitations or considerations?

There are no mandated requirements regarding the form of notice or delivery mechanism; however, the onus of proving delivery will rest upon the party asserting delivery was made. Obligors may be notified of the assignment of their receivables at any time; however, if the seller files for protection under the *Companies' Creditors Arrangement Act* (Canada) (CCAA) or the *Bankruptcy and Insolvency Act* (Canada) (BIA), a judicial stay of proceedings would likely prohibit the purchaser from notifying obligors of the assignment of their receivables without first obtaining a court order permitting such notice to be given.

4.6 Restrictions on Assignment – General Interpretation. Will a restriction in a receivables contract to the effect that "None of the [seller's] rights or obligations under this Agreement may be transferred or assigned without the consent of the [obligor]" be interpreted as prohibiting a transfer of receivables by the seller to the purchaser? Is the result the same if the restriction says "This Agreement may not be transferred or assigned by the [seller] without the consent of the [obligor]" (i.e., the restriction does not refer to rights or obligations)? Is the result the same if the restriction says "The obligations of the [seller] under this Agreement may not be transferred or assigned by the [seller] without the consent of the [obligor]" (i.e., the restriction does not refer to rights)?

Contractual restrictions on the assignment of receivables are not binding on third party assignees, hence an assignment of "non-assignable" receivables may be perfected; however, an assignment of an undivided interest in a receivable (rather than the entire receivable) would remain subject to contractual restrictions.

In addition, the obligor thereunder will be entitled to fully discharge its obligations by making a payment to the seller, and therefore such an assignment would still be subject to the seller's insolvency risk. Restriction on the assignment (or right to delegate) obligations without consent would generally be binding on the seller.

4.7 Restrictions on Assignment; Liability to Obligor. If any of the restrictions in question 4.6 are binding, or if the receivables contract explicitly prohibits an assignment of receivables or "seller's rights" under the receivables contract, are such restrictions generally enforceable in Canada? Are there exceptions to this rule (e.g., for contracts between commercial entities)? If Canada recognises restrictions on sale or assignment of receivables and the seller nevertheless sells receivables to the purchaser, will either the seller or the purchaser be liable to the obligor for breach of contract or tort, or on any other basis?

As noted in question 4.6, the assignment would be effective as between the seller and purchaser. The seller could be liable for damages due to breach of contract and unless there was a waiver of set-off or defences by the obligor, the obligor may set off these damages against the receivable.

The purchaser could be liable to the obligor for the tort of inducing breach of contract.

4.8 Identification. Must the sale document specifically identify each of the receivables to be sold? If so, what specific information is required (e.g., obligor name, invoice number, invoice date, payment date, etc.)? Do the receivables being sold have to share objective characteristics? Alternatively, if the seller sells all of its receivables to the purchaser, is this sufficient identification of receivables? Finally, if the seller sells all of its receivables other than receivables owing by one or more specifically identified obligors, is this sufficient identification of receivables?

It is not necessary for the sale document to identify each specific receivable; however, it must contain a description of the receivables being sold which is sufficient to allow them to be identified as belonging to the class of receivables sold. This may be satisfied by a sale of all of a seller's receivables, or all receivables sharing objective characteristics, or all receivables of the seller other than those owing from specifically identified obligors.

If a sale is of less than all of the receivables of a particular type, then the existence of shared objective characteristics that would permit identification of receivables as either being sold or not sold would affect the characterisation of such receivables as a universality in Québec. See question 4.2.

4.9 Respect for Intent of Parties; Economic Effects on Sale. If the parties describe their transaction in the relevant documents as an outright sale and explicitly state their intention that it be treated as an outright sale, will this description and statement of intent automatically be respected or will a court enquire into the economic characteristics of the transaction? If the latter, what economic characteristics of a sale, if any, might prevent the sale from being perfected? Among other things, to what extent may the seller retain: (a) credit risk; (b) interest rate risk; (c) control of collections of receivables; or (d) a right of repurchase/ redemption without jeopardising perfection?

There is a risk of a court recharacterising a sale of receivables as a secured loan. True sale legal opinions are typically delivered in Canadian securitisation transactions. The most important factor in determining whether there has been a true sale is the intention of the parties, as evidenced by the documents, communications and conduct of the parties. The most important indication of the intention that an arrangement is a secured loan is the existence of a right of the seller to require that the receivables sold be reassigned to it.

According to the only reported judicial decision in Canada that considered the issue of the recharacterisation of a sale in a securitisation context, the court listed the following factors, in addition to the intention of the parties, to be considered in determining whether a transaction constitutes a true sale:

(a) the transfer of ownership risk and the level of recourse;
(b) the ability to identify the assets sold;
(c) the ability to calculate the purchase price;
(d) whether the return to the purchaser will be more than its initial investment and a calculated yield on such investment;
(e) the right of the seller to retain surplus collections;
(f) a right of redemption by the seller;
(g) the responsibilities for collection of the receivables; and
(h) the ability of the seller to extinguish the purchaser's rights from sources other than the collection of the receivables.

Of these factors, it is likely that the only one that is determinative of the issue by itself is the presence of a right of redemption. In determining whether there is a right of redemption, the court merely looked to whether there was a contractual right of the seller to repurchase or redeem the purchased receivables and did not infer that there was one on the basis of an economic analysis of the transaction.

4.10 Continuous Sales of Receivables. Can the seller agree in an enforceable manner to continuous sales of receivables (i.e., sales of receivables as and when they arise)? Would such an agreement survive and continue to transfer receivables to the purchaser following the seller's insolvency?

Yes, it can. If the seller files for protection under the CCAA or the BIA, a judicial stay of proceedings would likely prohibit the future transfer of receivables to the purchaser unless the seller indicated in its filing that it wished to continue to transfer such receivables in order to continue to receive funding from the purchaser.

4.11 Future Receivables. Can the seller commit in an enforceable manner to sell receivables to the purchaser that come into existence after the date of the receivables purchase agreement (e.g., "future flow" securitisation)? If so, how must the sale of future receivables be structured to be valid and enforceable? Is there a distinction between future receivables that arise prior to or after the seller's insolvency?

Yes. However, the sale only occurs when the receivables come into existence.

With respect to receivables arising after the seller's insolvency, see question 4.10.

4.12 Related Security. Must any additional formalities be fulfilled in order for the related security to be transferred concurrently with the sale of receivables? If not all related security can be enforceably transferred, what methods are customarily adopted to provide the purchaser the benefits of such related security?

Security interests securing the receivables transferred to the purchaser are assigned together with the receivables. Under the PPSA, the registration of an assignment of a security interest by the secured party is optional; such registration is not necessary in order to maintain perfection of the original security interest. Since the originator is also normally appointed as the servicer of the receivables, it is rare to effect these registrations at the time of a securitisation. However, if a replacement servicer is appointed, such registrations would be effected by or on behalf of the purchaser at such time. Under the Québec Civil Code, the need to register an assignment of a security interest or other rights depends on the type of security interest or other rights involved.

4.13 Set-Off; Liability to Obligor. Assuming that a receivables contract does not contain a provision whereby the obligor waives its right to set-off against amounts it owes to the seller, do the obligor's set-off rights terminate upon its receipt of notice of a sale? At any other time? If a receivables contract does not waive set-off but the obligor's set-off rights are terminated due to notice or some other action, will either the seller or the purchaser be liable to the obligor for damages caused by such termination?

Notice of assignment will not terminate a right of set-off that accrued prior to receipt of the notice. Notice of assignment will also not terminate a right of set-off that accrues after receipt of the notice if the set-off right arises out of the same, or closely interrelated, contracts. As for liability of the seller or purchaser, refer to question 4.7.

5 Security Issues

5.1 Back-up Security. Is it customary in Canada to take a "back-up" security interest over the seller's ownership interest in the receivables and the related security, in the event that an outright sale is deemed by a court (for whatever reason) not to have occurred and have been perfected?

No. That may be interpreted as contrary to the intent of the parties to treat the transaction as a sale. In any event, so long as the assignment

is perfected as an assignment, if it is recharacterised by a court as a secured financing, the perfected assignment will also constitute perfection of the security interest in common law provinces.

Under Québec law, the likelihood of recharacterisation is low, as the assignment of claims as security is no longer recognised. If the transaction is recharacterised, the sale would likely not constitute a movable hypothec without delivery.

5.2 Seller Security. If it is customary to take back-up security, what are the formalities for the seller granting a security interest in receivables and related security under the laws of Canada, and for such security interest to be perfected?

This is not applicable in common law provinces.

To the extent that Québec laws apply to the validity and perfection of such security, appropriate charging language and a charging amount in Canadian dollars would need to be included in the documentation so as to constitute a hypothec. A registration of the hypothec would also be necessary. Additional formalities for the granting of the hypothec might have to be followed if the secured obligations constitute titles of indebtedness such as notes.

5.3 Purchaser Security. If the purchaser grants security over all of its assets (including purchased receivables) in favour of the providers of its funding, what formalities must the purchaser comply with in Canada to grant and perfect a security interest in purchased receivables governed by the laws of Canada and the related security?

The purchaser would have to grant security by means of a written agreement, which (subject to question 2.3) need not be governed by the laws of a Canadian province. A security interest in receivables would attach when:

(a) value is given by the lender;

(b) the debtor has rights in the receivables or the power to transfer rights in the receivables to the lender; and

(c) the debtor has signed a security agreement that contains a description of the receivables sufficient to enable them to be identified.

Where the purchaser funds the purchase of receivables by issuing notes, it would ordinarily enter into a trust indenture with an indenture trustee acting for the noteholders and other secured creditors. The trust indenture would include the granting of a security interest over the receivables.

In each of the above two cases, perfection would be achieved by registration under the applicable PPSA in common law provinces.

To the extent that Québec law applies, it would also be necessary for the purchaser to enter into a hypothec.

5.4 Recognition. If the purchaser grants a security interest in receivables governed by the laws of Canada, and that security interest is valid and perfected under the laws of the purchaser's country, will it be treated as valid and perfected in Canada or must additional steps be taken in Canada?

It will be recognised. Where the purchaser is located (or domiciled under Québec law) outside Canada, no additional steps are required. If the purchaser is located in a Canadian province, it would be necessary to perfect the security interest by registration. If the purchaser is domiciled in Québec, a hypothec will be required.

5.5 Additional Formalities. What additional or different requirements apply to security interests in or connected to insurance policies, promissory notes, mortgage loans, consumer loans or marketable debt securities?

Please refer to question 4.3.

5.6 Trusts. Does Canada recognise trusts? If not, is there a mechanism whereby collections received by the seller in respect of sold receivables can be held or be deemed to be held separate and apart from the seller's own assets until turned over to the purchaser?

These types of trusts are recognised in common law provinces, not Québec. However, a trust cannot "deem" collections to be held separate and apart from the seller's own assets if, in fact, they are commingled with the seller's assets such that they may not be separately identified.

In Québec, a similar result would be achieved by appointing the seller as agent (mandatory) of the purchaser.

5.7 Bank Accounts. Does Canada recognise escrow accounts? Can security be taken over a bank account located in Canada? If so, what is the typical method? Would courts in Canada recognise a foreign law grant of security (for example, an English law debenture) taken over a bank account located in Canada?

Security can be granted over escrow accounts. The means for taking security depends upon the type of account. For simple bank accounts, perfection can be achieved by registration under the applicable PPSA or by obtaining a hypothec over the claim resulting from such bank account if the holder is domiciled in Québec. For securities accounts, it is necessary to take control over these accounts under the applicable STA in those provinces that have enacted STAs.

Courts in Canada would recognise a foreign law grant of security subject to provincial private international law rules governing the validity of security interests; however, procedural aspects of enforcing security would be governed by the law of the province where the account was located.

5.8 Enforcement over Bank Accounts. If security over a bank account is possible and the secured party enforces that security, does the secured party control all cash flowing into the bank account from enforcement forward until the secured party is repaid in full, or are there limitations? If there are limitations, what are they?

Where security over a bank account is properly enforced and is not subject to a stay of proceedings in connection with an insolvency filing by the grantor of security and is not subject to prior ranking liens or claims and the bank has agreed to do so, the bank will recognise the secured party as the person in control of the account and all proceeds flowing into it.

5.9 Use of Cash Bank Accounts. If security over a bank account is possible, can the owner of the account have access to the funds in the account prior to enforcement without affecting the security?

Yes, they can.

6 Insolvency Laws

6.1 Stay of Action. If, after a sale of receivables that is otherwise perfected, the seller becomes subject to an insolvency proceeding, will Canada's insolvency laws automatically prohibit the purchaser from collecting, transferring or otherwise exercising ownership rights over the purchased receivables (a "stay of action")? If so, what generally is the length of that stay of action? Does the insolvency official have the ability to stay collection and enforcement actions until he determines that the sale is perfected? Would the answer be different if the purchaser is deemed to only be a secured party rather than the owner of the receivables?

Under the restructuring provisions of the BIA, a stay of proceedings is automatic for a period of 30 days and may be renewed by court order for further 30-day periods (up to a maximum period of six months). Under the CCAA, an application to restructure normally includes an application for a stay order of unlimited duration which is normally granted by the court.

If there has been a true sale of receivables and the seller has been replaced as servicer by a replacement servicer and all obligors have been notified of the assignment prior to the filing under an insolvency proceeding, the stay would not affect the collection of such receivables. However, the stay could prevent a replacement servicer from being appointed, or obligors from being notified, until a court determines that the transaction constituted a sale of receivables rather than a secured financing.

If the sale was not a true sale and the purchaser is deemed to only be a secured creditor, the stay of proceedings would prohibit the purchaser from enforcing its rights as a secured creditor unless leave is obtained from the court.

6.2 Insolvency Official's Powers. If there is no stay of action under what circumstances, if any, does the insolvency official have the power to prohibit the purchaser's exercise of rights (by means of injunction, stay order or other action)?

Although a stay order under the CCAA is not automatic, it is almost always included as part of the application by the debtor company to initiate restructuring proceedings under that Act.

6.3 Suspect Period (Clawback). Under what facts or circumstances could the insolvency official rescind or reverse transactions that took place during a "suspect" or "preference" period before the commencement of the insolvency proceeding? What are the lengths of the "suspect" or "preference" periods in Canada for (a) transactions between unrelated parties, and (b) transactions between related parties?

Numerous statutes may be relevant in connection with the insolvency of the seller (collectively, Insolvency Statutes), including the BIA, the CCAA, the *Winding-up and Restructuring Act* (Canada) and various provincial fraudulent preference and fraudulent conveyance statutes. Under the Insolvency Statutes, certain transactions by an originator may be overridden or set aside in certain circumstances, including the following:

- a transfer of property made with the intention of defeating or defrauding creditors or others of their claims against the seller;
- a transaction that is entered into by an insolvent seller (or a seller that knows that it is on the verge of insolvency):
  - with the intent to defeat or prejudice its creditors;
  - with a creditor with the intent to give that creditor preference over the other creditors of the seller; or
  - with a creditor and that has the effect of giving that creditor a preference over other creditors of the seller;
- a gratuitous conveyance made within three months immediately preceding the commencement of a winding-up proceeding;
- a contract, whereby creditors are injured or delayed, made by a seller who is unable to meet its engagements with a person who knows of that inability or who has probable cause for believing that such inability exists;
- a conveyance for consideration, whereby creditors are injured or obstructed, made by a seller who is unable to meet its engagements with a person ignorant of that inability and before that inability has become public, but within 30 days before the commencement of a winding-up proceeding; and
- a sale, deposit, pledge or transfer of any property by a seller in contemplation of insolvency by way of security for payment to any creditor whereby that creditor obtains or will obtain an unjust preference over other creditors.

The time periods noted above relate to third party dealings; such review periods are extended if the seller and purchaser are related parties. In addition, under the transfers at undervalue provisions of the BIA and CCAA, a court may review a disposition of property for which the consideration received by the seller is conspicuously less than the fair market value of the receivables sold by the seller who becomes an insolvent person or bankrupt.

Bulk sales legislation applies in Ontario if there is a sale of tangible assets (such as leased autos or equipment) out of the ordinary course of business. Failure to comply with applicable bulk sales legislation could make the purchaser responsible for losses suffered by the creditors of the originator (up to the value of the transferred assets).

6.4 Substantive Consolidation. Under what facts or circumstances, if any, could the insolvency official consolidate the assets and liabilities of the purchaser with those of the seller or its affiliates in the insolvency proceeding?

There are no express provisions for substantive consolidation under the Insolvency Statutes. Instead, the jurisdiction to order substantive consolidation rests under the general equitable jurisdiction of the court in insolvency proceedings. There are only a small number of Canadian court decisions with reasons for judgment dealing with substantive consolidation. Canadian courts have generally adopted the "balancing of prejudice" test from U.S. court decisions, whereby the court asks whether the creditors of the insolvent person will suffer greater prejudice in the absence of consolidation than the debtor (and any objecting creditors) will suffer from its imposition. Factors commonly referred to in determining the balancing of interests include the following:

- difficulty in segregating assets;
- presence of consolidated financial statements;
- profitability of consolidation at a single location;
- commingling of assets and business functions;
- unity of interests in ownerships;
- existence of inter-corporate loan guarantees; and
- transfer of assets without observance of corporate formalities.

Since substantive consolidation is an equitable remedy, the risk that it could be applied cannot be eliminated; however, to reduce the risk of substantive consolidation, a number of steps can be taken, including the following:

(a) the special purpose purchaser can be established as an "orphan" trust legally under the control of an arm's-length trustee, with no beneficiary having a right to terminate the trust;

(b) if an intermediate special purpose entity that is wholly owned by the seller (to which the receivables would be sold before being sold again to the purchaser) is used, it can be required to have an independent director who would be required to approve any fundamental change (such as amalgamation, winding-up or sale of substantial assets of the intermediate special purpose entity); and

(c) the intermediate special purpose entity or the special purpose purchaser should be operationally separate from the seller through the following means:

- it can have its own bank accounts to pay its liabilities;
- it can have its own financial statements prepared;
- its liabilities should not be guaranteed by the seller; and
- it should hold itself out to third parties as a separate entity distinct from the seller.

6.5 Effect of Insolvency on Receivables Sales. If insolvency proceedings are commenced against the seller in Canada, what effect do those proceedings have on (a) sales of receivables that would otherwise occur after the commencement of such proceedings, or (b) on sales of receivables that only come into existence after the commencement of such proceedings?

See question 4.10 which would apply to both situations.

6.6 Effect of Limited Recourse Provisions. If a debtor's contract contains a limited recourse provision (see question 7.3 below), can the debtor nevertheless be declared insolvent on the grounds that it cannot pay its debts as they become due?

Even if a debtor has an enforceable limited recourse provision in its contracts, it is still possible for a debtor to be declared insolvent if it cannot meet its obligations as they generally become due (for example, to taxing authorities). However, if there are only contractual creditors under limited recourse contracts then the debtor should not be declared insolvent on this ground.

7 Special Rules

7.1 Securitisation Law. Is there a special securitisation law (and/or special provisions in other laws) in Canada establishing a legal framework for securitisation transactions? If so, what are the basics?

There is no such law in Canada. There is, however, special covered bond legislation.

7.2 Securitisation Entities. Does Canada have laws specifically providing for establishment of special purpose entities for securitisation? If so, what does the law provide as to: (a) requirements for establishment and management of such an entity; (b) legal attributes and benefits of the entity; and (c) any specific requirements as to the status of directors or shareholders?

Canada has no law specifically providing for securitisation special purpose entities. In Canada, the special purpose entity used to issue notes is typically a common law trust.

7.3 Limited-Recourse Clause. Will a court in Canada give effect to a contractual provision in an agreement (even if that agreement's governing law is the law of another country) limiting the recourse of parties to that agreement to the available assets of the relevant debtor, and providing that to the extent of any shortfall the debt of the relevant debtor is extinguished?

A properly drafted unambiguous non-recourse clause will be enforceable, even if it is governed by a foreign law. See question 2.3.

7.4 Non-Petition Clause. Will a court in Canada give effect to a contractual provision in an agreement (even if that agreement's governing law is the law of another country) prohibiting the parties from: (a) taking legal action against the purchaser or another person; or (b) commencing an insolvency proceeding against the purchaser or another person?

Such a clause is not likely to be enforceable as it is likely contrary to public policy.

7.5 Priority of Payments "Waterfall". Will a court in Canada give effect to a contractual provision in an agreement (even if that agreement's governing law is the law of another country) distributing payments to parties in a certain order specified in the contract?

Generally, a court would give effect to such a contractual provision; however, where such a provision reduces a party's rights under that provision as a result of that party's insolvency, such reduction in rights may not be enforceable.

7.6 Independent Director. Will a court in Canada give effect to a contractual provision in an agreement (even if that agreement's governing law is the law of another country) or a provision in a party's organisational documents prohibiting the directors from taking specified actions (including commencing an insolvency proceeding) without the affirmative vote of an independent director?

An action taken by a corporation without the approval of an independent director in contravention of a contractual restriction not to do so would nevertheless be a valid corporate act so long as it was done within the constraints of the corporation's constating documents. The remedy of the contract counterparty would be an action for breach of contract.

A requirement in a corporation's constating documents, including in a unanimous shareholders' agreement, to the effect that the corporation could not institute certain actions without an independent director's approval should be effective to preclude such action from being validly taken without such approval.

8 Regulatory Issues

8.1 Required Authorisations, etc. Assuming that the purchaser does no other business in Canada, will its purchase and ownership or its collection and enforcement of receivables result in its being required to qualify to do business or to obtain any licence or its being subject to regulation as a financial institution in Canada? Does the answer to the preceding question change if the purchaser does business with other sellers in Canada?

Assuming that the purchaser is not a foreign bank, merely owing receivables does not in and of itself require registration. Servicing receivables through an agent similarly does not require registration. However, if the activities amount to carrying on a business, registration under extra-provincial registration statutes would be required in order to maintain an action on any of the receivables. The greater the number of sellers that a purchaser deals with from a particular province, the higher the probability that the purchaser's activities would constitute carrying on a business.

In order to avoid becoming subject to regulation in Canada, it would be advisable for the purchaser to limit its connections to Canada by ensuring, as much as possible, that the following occur:

(i) the decision to purchase the receivables is made outside Canada;

(ii) all negotiations relating to the purchase of the receivables are either conducted outside Canada or conducted by telephone communications during which all of the officers and employers of the purchaser participating in the communications are outside Canada;

(iii) the funding for the purchase of receivables occurs outside Canada; and

(iv) the purchaser executes and delivers its documentation relating to the purchase outside Canada.

Provided that the purchaser is not carrying on business in Canada, no licensing would be required nor would the purchaser become subject to regulation as a financial institution.

8.2 Servicing. Does the seller require any licences, etc., in order to continue to enforce and collect receivables following their sale to the purchaser, including to appear before a court? Does a third party replacement servicer require any licences, etc., in order to enforce and collect sold receivables?

The need for the seller to be licensed would depend upon the nature of the sale and the nature of the receivables.

Collection by a seller of receivables on behalf of a purchaser would not require additional licensing so long as the obligors are not notified of the assignment. If obligors are notified of the assignment and the seller continues to collect receivables on behalf of the purchaser, certain provinces have collection agency statutes that could apply to require the seller to become licensed as a collection agent. A third party replacement servicer could require a licence under applicable collection agency statutes unless it was exempt from the application of such statutes (as are most financial institutions).

The collection of certain types of receivables, such as mortgages, may require special licensing under mortgage broker legislation of certain provinces.

8.3 Data Protection. Does Canada have laws restricting the use or dissemination of data about or provided by obligors? If so, do these laws apply only to consumer obligors or also to enterprises?

Yes. The *Personal Information Protection and Electronic Documents Act* (PIPEDA) is federal legislation that governs the collection, use and disclosure of personal information of individuals. Certain provinces have also implemented privacy legislation. PIPEDA and provincial privacy legislation apply only to individuals, not to commercial enterprises.

8.4 Consumer Protection. If the obligors are consumers, will the purchaser (including a bank acting as purchaser) be required to comply with any consumer protection law of Canada? Briefly, what is required?

Most consumer protection laws would apply at or near the time that the receivable is originated. These include cost of borrowing disclosure laws, false advertising laws and certain laws regulating motor vehicle dealers. To the extent these laws were not observed by the seller, this could provide the obligors with defences against the purchasers. To the extent that there are consumer protection laws that apply following origination, such as privacy laws, the purchaser, including a bank, would be required to comply. In Québec, the assignee of a consumer receivable will be jointly and severally liable with the assignor for the assignor's obligations toward the consumer (subject to certain statutory monetary limitations).

8.5 Currency Restrictions. Does Canada have laws restricting the exchange of Canada's currency for other currencies or the making of payments in Canada's currency to persons outside the country?

No, it does not.

9 Taxation

9.1 Withholding Taxes. Will any part of payments on receivables by the obligors to the seller or the purchaser be subject to withholding taxes in Canada? Does the answer depend on the nature of the receivables, whether they bear interest, their term to maturity, or where the seller or the purchaser is located? In the case of a sale of trade receivables at a discount, is there a risk that the discount will be recharacterised in whole or in part as interest? In the case of a sale of trade receivables where a portion of the purchase price is payable upon collection of the receivable, is there a risk that the deferred purchase price will be recharacterised in whole or in part as interest?

Canada has now fully eliminated withholding tax on interest paid to arm's-length lenders, other than participating debt interest. Therefore, Canadian receivables, other than those that produce lease or royalty payments and dividends, sold to a non-Canadian purchaser that deals at arm's-length with the obligor, will generally not be subject to Canadian withholding tax regardless of the jurisdiction of the non-Canadian purchaser. However, due to concerns about

a non-Canadian purchaser becoming subject to Canadian tax by virtue of carrying on business in Canada through the servicing of the Canadian receivables, it is more common for an intermediate Canadian special purpose entity to be established to purchase the Canadian receivables and for that special purpose entity to then issue an interest-bearing note to a non-Canadian investor. Discount is generally considered as interest to the holder.

Deferred purchase price (up to the original principal of the obligation) will not generally be considered to be interest.

Withholding tax of 25% is generally exigible on most cross-border lease, royalty and dividend payments, subject to reduction through bilateral tax treaties.

9.2 Seller Tax Accounting. Does Canada require that a specific accounting policy is adopted for tax purposes by the seller or purchaser in the context of a securitisation?

Canadian taxpayers must generally calculate their income for Canadian tax purposes in accordance with Canadian generally accepted accounting principles (although there are a number of specific policies that permit tax treatment to be different than accounting treatment). All Canadian public companies now adopt International Financial Reporting Standards for fiscal years commencing on or after 1 January 2011. Specified rules exist in the *Income Tax Act* (Canada) for financial institutions (as defined) holding and disposing of "specified debt obligations" (as defined).

9.3 Stamp Duty, etc. Does Canada impose stamp duty or other documentary taxes on sales of receivables?

No, it does not.

9.4 Value Added Taxes. Does Canada impose value added tax, sales tax or other similar taxes on sales of goods or services, on sales of receivables or on fees for collection agent services?

The federal government imposes a goods and services tax (GST) and some provinces impose a provincial sales tax (PST) that is combined with GST into a blended harmonised sales tax (HST); certain provinces maintain their own PST. These taxes apply to the transfer of certain tangible assets, such as leased automobiles and equipment. Servicing fees are also subject to GST or HST. Generally, no GST or HST is applicable to receivables that are sold on a fully serviced basis, whereby the servicing component is an ancillary part of the receivables purchase price and no separate servicing fee is charged. Therefore, it is most common in Canada not to specify a separate servicing fee but instead to sell receivables on a fully serviced basis. However, if a replacement servicer is appointed, the replacement servicing fees would be subject to GST or HST. The GST rate is 5%. The HST rate depends upon the applicable province. In Ontario it is 13%.

9.5 Purchaser Liability. If the seller is required to pay value added tax, stamp duty or other taxes upon the sale of receivables (or on the sale of goods or services that give rise to the receivables) and the seller does not pay, then will the taxing authority be able to make claims for the unpaid tax against the purchaser or against the sold receivables or collections?

If a seller has failed to remit GST, HST or PST, failed to remit certain employee source deductions and employee and employer portions of Unemployment Insurance and Canada Pension Plan payments or failed to remit withholding taxes on payments to non-residents, the applicable tax authority may recover such taxes from the assets (or any realisation thereon) from a person who merely has a security interest in the assets on a super-priority basis. Where a true sale has occurred, assets are purchased from a seller selling in the ordinary course of business; tax liability of the seller does not attach to the purchased assets.

9.6 Doing Business. Assuming that the purchaser conducts no other business in Canada, would the purchaser's purchase of the receivables, its appointment of the seller as its servicer and collection agent, or its enforcement of the receivables against the obligors, make it liable to tax in Canada?

The answer would depend upon the specific facts of each particular situation. It is possible that the appointment of the seller as servicer and collection agent, or the enforcement of the receivables against the obligors, could cause a non-Canadian purchaser to be considered to carry on business in Canada and to be liable to tax in Canada on that basis. As discussed above, due to the concern with a non-Canadian purchaser being considered to carry on business in Canada through the servicing of Canadian receivables, it is more common for an intermediate Canadian special purpose entity to be established to purchase the Canadian receivables and for that special purpose entity to then issue an interest bearing note to a non-Canadian investor.

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