THE LENDING AND SECURED FINANCE REVIEW

NINTH EDITION

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PREFACE

This ninth edition of *The Lending and Secured Finance Review* contains contributions from leading practitioners in 15 different countries, and I would like to thank each of the contributors for taking the time to share their expertise on the developments in the corporate lending and secured finance markets in their respective jurisdictions, and on the challenges and opportunities facing market participants. I would also like to thank our publishers without whom this review would not have been possible.

I hope that the commentary that follows will serve as a useful source for practitioners and other readers.

Azadeh Nassiri
Slaughter and May
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Chapter 1

CANADA

Christopher Alam, Kelby Carter and Katie Ross[1]

I OVERVIEW

On a global scale, 2022 was a challenging year for economies and inflation. As challenges from the covid-19 pandemic eased, inflation rose and remains high, and in response, central banks around the world, including the Bank of Canada, continue to implement raised interest rates.[2] Canada's financial system is well-equipped to cope with this challenging global economic situation, as evidenced by its performance throughout the 2008 financial crisis, and its economic growth over the past year.[3] Private sector economists predict an ongoing decline in the consumer price index, expecting it to fall below 3 per cent in the third quarter of 2023, and reach approximately 2 per cent in the second quarter of 2024.[4] Recent inflation data has been encouraging, and while a mild recession remains possible, the hope among Canadians is that the market will maintain positive economic momentum.

i Recent deal activity

In 2022, the Canadian merger and acquisitions (M&A) market experienced its lowest deal count since 2017.[5] However, deal activity picked up in the year's fourth quarter with an 11 per cent increase in announced transactions compared to Q3.[6] Mid-market transactions accounted for the majority of deals and mega-deal transactions contributed most of the deal value.[7] Cross-border transactions continued to be a key driver of overall M&A activity, with a shift to acquisitions by Canadian companies abroad outpacing foreign acquisitions of Canadian targets.

ii Standardised terms

Similar to the replacement of the London Interbank Offered Rate, Canada is reforming its interest rate benchmark in accordance with the Canadian Alternative Reference Rate (CARR) working group's recommendation to permanently cease publication and calculation

1 Christopher Alam and Kelby Carter are partners and Katie Ross is an associate at Gowling WLG.

2 Canada, Department of Finance, Budget 2023 a Made in Canada Plan (Ottawa: Department of Finance, 2023) https://www.budget.canada.ca/2023/pdf/budget-2023-en.pdf accessed 27 March 2023 at 9 (Budget 2023).

3 Canada experienced the strongest economic growth in the G7 in the past year.

4 Budget 2023 see footnote 2 at 13.

5 Crosbie & Company, Canadian M&A Publications: https://www.crosbieco.com/who-we-are/m-a-publications. Figures provided from the 2022 quarterly reports.

6 ibid.

7 ibid.

of all tenors of the Canadian Dollar Offered Rate (CDOR) after 28 June 2024, to be replaced with the Canadian Overnight Repo Rate (CORRA). In August 2022, CARR published recommended fallback language for use in new and existing loan agreements to ease the transition of credit facility documentation to CORRA.

iii Canadian financing sources

Canadian corporate borrowers have a variety of financing options available from an assortment of providers including non-domestic lenders. The purpose of the borrowing will strongly impact the type of facility entered into. Companies continue to finance their operations with operating loans or lines of credit provided by the company's primary financial institution. Finally, government funding and credit programmes were a significant source of funding for Canadian businesses adversely affected by the covid-19 pandemic, a financing source that is expected to become less prevalent.[8]

II LEGAL AND REGULATORY DEVELOPMENTS

i Lender-related regulatory requirements

At the federal level, no regulatory approvals or licensing requirements are imposed on non-banks extending commercial loans to borrowers in Canada. Therefore, the concern among lenders is whether they will be classified as a bank and thus subject to regulation under the federal Bank Act. This classification depends on whether the lender, in making the loan, is found to be engaging in or carrying on business in Canada.[9] Not only must domestic and foreign banks carrying on business in Canada comply with regulatory approval and licensing requirements, they will also face certain capital and investment restrictions.

Non-banks should be cognisant of provincial requirements, including certain licensing requirements, and general laws concerning the taking and enforcement of security interests.

Lenders must also comply with Canada's Interest Act and Criminal Code, which limit the amount of interest a lender can charge on financing transactions.[10] In its 2023 budget (Budget 2023), the government announced its intention to amend the criminal rate of interest. If implemented, the criminal rate of interest would be lowered from the equivalent of 47 per cent annual percentage rate (APR) to the equivalent of 35 per cent APR.

ii Borrower-related regulatory requirements

There are no legal restrictions on the borrowing powers of a corporation incorporated in Canada. Applicable restrictions would be set out in the corporation's articles, by-laws or unanimous shareholders' agreements. However, lenders to Canadian borrowers subject to government regulation must ensure that borrowers have obtained all necessary governmental consent required to grant security on its assets prior to financing being secured.

8 In its 2022 Budget, the federal government announced its commitment, after two years of emergency pandemic spending, to reducing covid-19 related spending by up to C$3 billion over four years.

9 Bank Act, S.C., 1991, c.46, s. 510(a).

10 Generally, under Canada's Interest Act, R.S.C., 1985, c. l-15, parties may allow and exact any rate of agreed-upon interest or discount on any contract or agreement. Where no rate is fixed by the parties, this Act sets a default interest rate of 5 per cent per annum.

iii Anti-money laundering legislation

Lenders are required, under the Proceeds of Crime (Money Laundering) and Terrorist Financing Act, to ascertain the identity of Canadian borrowers and related parties before accepting them as clients; to report certain transactions to the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC); and to maintain certain client and transaction records. On 5 April 2022, changes to this Act came into effect resulting in significant implications for services offering crowdfunding, payment processing and existing money services businesses (MSBs). Crowdfunding platforms must now register as MSBs or foreign money services businesses with FINTRAC. Further amendments to this Act, introduced in Budget 2023, to implement a publicly accessible beneficial ownership registry, represent a major blow to money laundering operations.[11]

iv Basel III

In 2022, the Office of the Superintendent of Financial Institutions announced revised capital, leverage, liquidity and disclosure rules incorporating the final Basel III.[12] Most of these revised rules will take effect in the second fiscal quarter of 2023, with those related to market risk and credit valuation adjustment risk taking effect in early 2024.

III TAX CONSIDERATIONS

i Withholding tax

Generally, Canadian tax legislation facilitates the receipt of loans to Canadian borrowers from foreign lenders without imposing Canadian withholding tax on these loans. Withholding tax on interest to arm's-length lenders in Canada is zero (other than for participating debt interest). However, Canadian borrowers paying interest to non-arm's length foreign lenders attract Canadian federal withholding tax under the federal Income Tax Act at a rate of up to 25 per cent of gross interest paid (excluding fully exempt interest). This domestic rate may be reduced for treaty countries. The withholding rate for the United States is zero per cent, and for most other countries the rate is 10 to 15 per cent with some outliers where an increased rate will be applied.

ii Interest deductibility

The Income Tax Act establishes the technical requirements that must be met for interest to be deductible to a Canadian-resident debtor. Generally, interest in a reasonable amount is deductible on borrowed money used to earn income from a business or property; or an amount payable for property that is acquired to gain or produce income from a business or property.

On 3 November 2022, the Department of Finance (Finance) released revised legislation for the new excessive interest and financing expense limitation (EIFEL) rules. Upon implementation, the EIFEL rules, applying in conjunction with the thin capitalisation rules, will limit the deduction of interest and financing expenses to a fixed ratio, which would

11 Budget 2023 see footnote 2 at 174.

12 Canada, Office of the Superintendent of Financial Institutions, OSFI completes Basel III reforms, releases final liquidity rules to protect Canadians,(Ottawa: Office of the Superintendent of Financial Institutions, 2022) https://www.osfi-bsif.gc.ca/Eng/osfi-bsif/med/Pages/basel23_nr.aspx accessed 1 April 2023.

come into force for taxation years commencing after 1 October 2023. This new regime is in line with the Organisation for Economic Co-operation and Development base erosion and profit sharing initiatives Action 4, focusing on limiting interest and financing expenses that resident and non-resident corporations can deduct in computing income.

The EIFEL rules apply to Canadian resident corporations and trusts with more than C$1 million of interest and financing expenses, net of interest and financing revenue. They also apply to non-residents conducting business in Canada with deductible interest and financing revenue (excluding interest and financing revenue relating to certain Canadian public–private partnership infrastructure projects). The EIFEL rules do not contain any avoidance or purpose test and narrowly exclude certain entities.[13] Under the EIFEL rules net interest expense and financing deductions are limited to a fixed ratio of 30 per cent (with a 40 per cent transitional rate applicable for taxation years after 30 September 2023 and before 1 January 2024) of adjusted taxable income, generally being earnings before interest, taxes, depreciation and amortisation. Taxpayers will be able to carry forward excess capacity to deduct interest for three years and the restricted interest and financing expense for 20 years.

The EIFEL rules offer an alternative group ratio, which applies to corporate groups with audited consolidated financial statements or that would be required to have such statements if the entities were subject to the International Financial Reporting Standards. Upon meeting the requirements under this group ratio, the Canadian members of a group of corporations or trusts can jointly elect into the group ratio rules for a taxation year (with the election made on an annual basis). If the formula used to calculate the group ratio results in a greater ratio than the fixed ratio, the taxpayer can deduct interest and financing expenses in excess of the fixed ratio.

iii Thin capitalisation rules

The Income Tax Act's thin capitalisation rules restrict Canadian corporations and trusts, including Canadian branches of foreign corporations, from deducting interest expense on debt owing to certain non-residents, typically those that do not deal at arm's length with significant shareholders. Generally, the thin capitalisation rules apply if the non-resident owns 25 per cent or more of the shares of the debtor corporation (by vote or value) or 25 per cent or more of the interests in the debtor trust (by value); and the debt-to-equity ratio of the debtor exceeds 1.5:1.

iv Stamp and documentary taxes

There are no stamp duties or documentary taxes payable upon the enforcement of a security. Registration or filing fees are payable to the applicable registries in each province and territory, and notarial fees are payable in Quebec.

13 Entities excluded under the EIFEL rules include Canadian controlled private corporations with less than C$50 million of taxable income employed in Canada; eligible groups of corporations and trusts resident in Canada with C$1 million or less of aggregate financing expenses in a taxation year; and corporations or trusts resident in Canada that have limited operations outside of Canada, subject to certain conditions.

v Foreign Account Tax Compliance Act

The United States passed the Foreign Account Tax Compliance Act (FATCA) in March 2010 to discourage US persons from evading US tax by using financial accounts held outside of the country. Since 2014, the Income Tax Act requires Canadian financial institutions to comply with FACTA. Canadian financial institutions must identify and report information to the Canada Revenue Agency (CRA) on reportable financial accounts held in Canada by US persons and the CRA shares this information with the US Internal Revenue Service. Under this Act, payments made to US creditors under Canadian financing arrangements may be subject to a 30 per cent US withholding tax.

vi Hybrid mismatch arrangements

The hybrid mismatch rules aim to address arrangements where a deduction is allowed in one country in respect of a cross-border payment and its receipt is not fully included in the other country. The first package of legislation with respect to hybrid mismatch arrangements was released on 29 April 2022, and the rules are intended to apply to payments arising on or after 1 July 2022. The second package of legislation has not yet been released.

IV CREDIT SUPPORT AND SUBORDINATION

i Security

A security interest is an interest in certain assets (collateral) securing payment or performance of an obligation. Secured financing transactions are frequently used in Canada, and occur where the borrower, or other relevant credit parties, grant a security interest over certain assets in favour of a lender to secure its payment and performance of obligations. The common forms of security and the regime for taking security in Canada are discussed below.

Personal property – tangible property

Common law provinces

Each of Canada's common law provinces and territories[14] has its own personal property security statute (collectively, the PPSAs) similar to Article 9 of the US Uniform Commercial Code (UCC).[15] To have a valid and enforceable security interest under the PPSA against third parties, the security interest must attach to the collateral and the attached security interest in the collateral must be perfected. In the Canadian market, tangible property typically means goods that are equipment or inventory.

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

15 Article 9 of the UCC recently underwent significant amendments. No amendments to the PPSAs have been announced but it is likely that changes reflecting those made to the UCC will occur.

Attachment of a security interest generally requires the satisfaction of four elements:

a value must be given to the debtor by the secured party;

b the debtor must have rights in the collateral;

c the debtor must either sign a security agreement containing a sufficient description of the collateral, or the secured party must have possession or control of the collateral; and

d there must be no postponement of attachment.

Typically, attachment to tangible personal property occurs when a debtor grants the creditor a security interest in that property through the granting clause of a security agreement. Perfection of the security interest, in most cases, requires the registration of a financing statement in the province or territory where the assets are physically located. If the assets are located in more than one province or territory, the secured party must file under the PPSAs in every applicable province or territory.

Certain classes of personal property (such as chattel paper, instruments, negotiable documents of title and money) may be perfected by possession or repossession of these assets by the secured creditor or another party on its behalf.[16]

Quebec

In Quebec, security over tangible movable property is created by a hypothec. Perfection of the hypothec requires registration at the Register of Personal and Movable Real Rights (RPMRR) and occurs upon physical delivery of the pledged collateral to the pledgee.

Federal jurisdiction

Federal legislation in Canada governs security in aircraft, ships and most railways. Security interests in this collateral can be taken under PPSAs or the Quebec Civil Code (QCC), but secured parties should consult the applicable federal legislation to ensure they have established a first-ranking claim over the described assets.

Personal property – intangible property

Common law provinces

Claims and receivables, contractual rights and intellectual property (IP) rights are varieties of intangible property frequently dealt with in the Canadian market. Like tangible property, intangibles are generally secured by way of a security agreement and perfected by registration under the PPSAs. The location of the debtor at the time of attachment determines the governing law, and therefore the secured party must file under the PPSA in the province or territory where the debtor is located to achieve perfection.

IP rights are governed by federal legislation; therefore, secured creditors may also, but are not required to, file a copy or notice of the security agreement with the Canadian Intellectual Property Office.

16 In Ontario and Saskatchewan perfection of chattel paper in this way applies only to tangible chattel paper. Following amendments to their corresponding PPSAs, electronic chattel paper cannot be perfected by possession and may only be perfected by registration or control.

Quebec

Intangibles in Quebec are secured under the QCC by way of a hypothec and perfected by filing in the RPMRR. In the case of monetary claims, a hypothec is perfected by obtaining a control agreement with the financial institution holding the bank account.

Cryptocurrency

With the prevalence of cryptocurrency, borrowers are increasingly interested in its use as collateral in lending transactions. The PPSAs do not expressly include reference to cryptocurrency, but it most likely falls under intangibles, in accordance with its classification in the US.[17] A lender can perfect a cryptocurrency by registration but may also obtain control over cryptoassets by entering into a control agreement, taking possession of the cryptographic private key, or appointing a licenced trustee or custodian to hold the cryptoassets. Lenders should take care when dealing with the taking and perfection of a security interest in cryptocurrency and ensure that the cryptoassets being used as collateral are described in accurate detail.

Personal property – investment property

When taking and perfecting a security interest in investment property, the PPSAs must be considered in conjunction with the Securities Transfer Act (STA) or similar legislation of each of the common law provinces and territories. The QCC also contains provisions addressing investment property specifically. Investment property includes certificated and uncertificated securities, security entitlements, securities accounts, futures contracts and futures accounts. A security interest in investment property is created by entering into a security agreement. Perfection of a security interest in investment property can occur either by registering a financing statement under the applicable PPSA or taking control (as defined in the PPSAs and STA) of the investment property. Generally, perfection by registration is unsatisfactory as it may result in a loss of priority to subsequent security interests perfected by control. Therefore, secured parties should be sure to perfect a security interest by control either alone or in addition to perfection by registration.

Certificated securities

Perfection by control is generally achieved upon the secured party receiving both the share certificates and an endorsement for transfer in blank (usually on a separate instrument) signed by the certificate holder.[18]

17 Uniform Law Commission, Overview of 2022 Amendments to the Uniform Commercial Code – Emerging Technologies (2023) https://www.uniformlaws.org/committees/community-home?communitykey=1457c422-ddb7-40b0-8c76-39a1991651ac accessed 25 April 2023.

18 Delivery of the share certificates without an effective endorsement is sufficient to perfect a security interest in a certificated security, but obtaining both delivery and an endorsement is the most common and effective way to obtain control of certificated securities under both the STA and PPSAs.

Uncertificated securities

Control is achieved either when the uncertificated security is delivered to the lender (when the lender becomes the registered owner or another person becomes the registered owner on behalf of the lender) or the issuer of the uncertificated security enters into an issuer control agreement with the lender and the registered owner, whereby it agrees to comply with instructions from the lender without further consent by the debtor or registered owner.

Securities accounts and securities entitlements

Perfection of a security interest in securities accounts and securities entitlements held in a securities account may occur by taking control in one of three ways:

a the secured party becomes the entitlement holder, which is usually accomplished by the secured party requiring that the pledged security entitlements be credited to the secured party's own securities account;

b another person acquires control of the security entitlement on behalf of the secured party; or

c the secured party enters into a securities account control agreement with the securities intermediary and the pledger.

Real property

A number of statutes in each province and territory govern security interests in real property. Separate legislation governs taking security on real property falling under the Canadian federal jurisdiction, such as government lands and buildings, national parks and international airports.

Interests in real property are perfected by the secured creditor registering a mortgage, debenture, immovable hypothec or trust deed against the title to the debtor's real property in accordance with the applicable real property title system.[19]

All or substantially all of the debtor's assets

Common law provinces

A general security agreement (GSA) typically grants security over all of a debtor's present and after-acquired personal property in each common law province. A GSA must include a description of the collateral, and must be perfected by registering under the PPSA filing regime in each applicable province where collateral is located.

A GSA typically does not extend to real property, so mortgages must be registered and used in combination with the GSA to encompass all of the debtor's assets.

Real and personal property may be secured in a single document such as a debenture.

19 Real estate in the common law provinces and territories includes land, airspace above land, crops, forests, non-navigable waters, easements, subsurface land rights, rental income and other profits derived from land and leasehold interests. Under the QCC, real estate includes land; any construction or work 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; and actions to assert such rights or to obtain possession of immovables.

Quebec

All of a debtor's present and after-acquired personal property in Quebec may be secured by way of a movable hypothec, which is perfected by filing in the RPMRR.

Bank Act security

Certain regulated banks may take a security interest under Section 427 of the Bank Act. Under a Bank Act security the bank receives title to the collateral from the debtor but the debtor retains the ability to use and deal with the collateral. Bank Act security is granted less frequently than security under the PPSAs because it is limited to certain lenders, classes of collateral and specified industries and may only be taken to secure present and future advances.[20]

ii Guarantees and other forms of credit support

Guarantees

A guarantee agreement will typically be entered into when security is to be taken from a subsidiary or affiliate of a borrower or primary obligor. Under the guarantee agreement such persons agree to guarantee the payment and performance of the borrower's or primary obligor's obligations under the financing agreement.[21]

Corporate benefit considerations

Generally, directors of a corporation have the duty to act reasonably, prudently and in the best interests of the corporation. As long as the directors act accordingly, corporations may provide a guarantee, pledge, mortgage or charge of other security interests without any reciprocal benefit to the corporation.

Financial assistance

Financial assistance is no longer restricted by legislation. Several provinces permit financial assistance without restrictions, while other provinces subject the assistance to a solvency test or disclosure requirements.

Agency concept

Aside from Quebec, every Canadian jurisdiction recognises the concept of agency and agents are often used to represent lenders in a syndicate or to hold collateral on behalf of lenders. In Quebec, security is granted in favour of a hypothecary representative, a role often undertaken by the financial institution acting as administrative agent.

20 Bank Act security taken in respect of minerals and mining rights is governed by Section 426 of the Bank Act.

21 A guarantee provided by an individual in Alberta must comply with the Guarantees Acknowledgment Act, R.S.A. 2000, c. G-11. For the guarantee to have legal effect it must be signed in the presence of a lawyer and the lawyer must sign a certificate confirming his or her satisfaction that the guarantor is aware of and understands the contents of the guarantee. The guarantor must also sign the certificate.

Challenging security under Canadian law

Remedies for reviewable transactions are prescribed under federal insolvency legislation and provincial legislation.

Under Section 95 of the Bankruptcy and Insolvency Act (BIA), a bankruptcy trustee may attack a transaction entered into by a bankrupt debtor as a preference. For an arm's-length transaction to be found to be a fraudulent preference, a conveyance or transfer of property or payment must have been made by the debtor to a creditor within three months of the bankruptcy event, the debtor must be insolvent at the time of the transfer and the transfer or payment must have been made by the debtor with a view to giving the creditor a preference over other creditors. If the preference is proven, the transaction or payment is void against the trustee in bankruptcy.

A trustee in bankruptcy can also challenge transactions where persons gave the debtor inadequate consideration for assets, goods or services within prescribed periods before insolvency proceedings in respect of the debtor were commenced under Section 96 of the BIA. If a transfer at undervalue is found, the court can declare it void and may also order that the person pay back the difference between the value of consideration received by the debtor and the value of the consideration given by the debtor.

Provincial legislation also offers opportunities for creditors or trustees to attack preferential transactions, specifically fraudulent conveyances and unjust preferences. If deemed fraudulent conveyances or unjust preferences, transactions can be voided as against creditors.

Finally, creditors may rely on provincial and territorial corporate law's oppression remedy if a corporation or its directors were involved in a transaction whereby they acted in a manner that was oppressive, unfairly prejudicial or unfairly disregarded the interests of certain parties' creditors. Canadian courts may grant any remedy they deem appropriate upon a finding of oppressive conduct.

iii Priorities and subordination

Priorities

Each province's PPSA establishes the priorities of competing security interests.

The general priority rule for all personal property is a first-in-time system, granting priority to the party that is either the first to register or first to perfect, with priority going to a perfected security interest over an unperfected security interest. There are exceptions to this rule including priority rules for investment property that is based on the method of perfection, and favours perfection by control over perfection by registration. To maintain perfection of a security interest, lenders should be sure to register a financing change statement before the registration period's expiration.

Certain statutory claims will have priority over those of a secured lender in an insolvency proceeding commenced under the Companies' Creditors Arrangement Act (CCAA) or the BIA. In a bankruptcy these include employee claims such as claims for unremitted employee source deductions. Unless otherwise agreed upon by the parties, a CCAA restructuring or BIA proposal must provide for payment of certain employee or other claims.

On 18 April 2023, the Senate passed Bill C-228, amending the BIA and the CCAA to expand the list of pension liabilities with super priority beyond employer pension liabilities whose values are known or easily knowable. This change will significantly impact borrowers with defined pension plans and lenders will be unable to determine the breadth of potential pension liability in the event of a future bankruptcy.

Second lien financings

Second lien loans are an increasingly popular source of financing in Canada. Often, although not always, providers of second lien loans to Canadian borrowers are non-bank entities (e.g., hedge funds, private equity funds, distressed debt funds).

Intercreditor agreements

Lenders, each having a security interest, enter into an intercreditor agreement that governs the priority of their security interests and relative rights of enforcement should an event of default occur. An intercreditor agreement will generally be upheld by Canadian courts, unless the borrower is subject to an insolvency proceeding whereby the court may make an order that is inconsistent with the provisions of the intercreditor agreement.

The most important provisions in an intercreditor agreement are the payment subordination, security subordination and standstill provisions. Intercreditor agreements also address ssues including refinancing rights, application and turnover of proceeds derived from the collateral and payment blockage periods.

V LEGAL RESERVATIONS AND OPINIONS PRACTICE

Typically, in the Canadian market an opinion is provided by the debtor's counsel and is addressed to the lender in a bilateral transaction, or the administrative agent in a syndicated transaction. Opinions are often a condition precedent to closing the transaction and advancing funds, and provided at the debtor's expense.

Where financing is provided by a foreign lender, lenders may wish to obtain opinions from foreign counsel on the enforceability of documents and choice of law and submission to jurisdiction with respect to the Canadian law-governed documents. A lender may also consider obtaining the 'business of banking' opinion, which assures the lender that it will not be deemed to be carrying on the business of banking in the local jurisdiction.

i Choice of law

Generally, Canadian courts will apply the law chosen and agreed upon by the parties to the documents in a secured financing transaction. Exceptions to this rule include if the choice was not made in good faith; or public policy in the applicable jurisdiction provides a reason for avoiding the chosen law.

ii Enforcement of foreign judgments

Generally, when an action in Canada is brought within an applicable limitation period, Canadian courts will issue judgments in Canadian dollars based on final and conclusive foreign judgments brought against the person for a specified amount without reconsideration of the merits. Canadian courts may, in certain situations, stay or decline to hear an action based on a foreign judgment. Additionally, to prevent recognition and enforcement of a foreign judgment against them, Canadian debtors may rely on certain defences, including when the foreign judgment was obtained by fraud or the judgment is contrary to public policy.

VI LOAN TRADING

Syndicated loans continue to be a commonly used loan structure in the Canadian market, but secondary trading in loans is limited. All syndicated loan facilities will have assignment provisions in the loan agreement, stipulating that assignments may be subject in some cases to consent of the agent and all of the lenders, minimum amount and fees. A lender may, subject to the loan agreement, assign its rights and obligations under the loan agreement to an eligible assignee.[22]

Loan participations in Canada are limited likely due to the participant's assumed risks, lack of direct contractual relationship with the borrower and lack of direct interest or rights under the credit documents.

VII OTHER ISSUES

i Reduced liquidity in funding markets

Lower levels of liquidity in funding markets, as recently evidenced in the failure of three medium-sized regional US banks and challenges for Credit Suisse, could result in strained funding markets, and an abrupt repricing of risk could trigger a broader tightening of lending standards.[23]

ii Sustainability-linked loans

On a global scale, sustainable lending returned to growth in 2021, with sustainability-linked loans accounting for 30 per cent of the annual total.[24] To remain competitive, Canada will prioritise building a framework that supports large-scale, long-term investments and continued competition in key industries. Budget 2023 outlines initiatives that will contribute to this framework, including the following:[25]

a the Canada Infrastructure Bank will invest at least C$20 billion to support the building of major clean electricity and clean growth infrastructure projects; [26]

b C$500 million will be provided over 10 years to the Strategic Innovation Fund to support the development and application of clean technologies in Canada;[27]

c eligibility for the clean technology investment tax credit will be expanded, and available to businesses investing in certain geothermal energy systems;[28] and

d the federal government, through the Investing in Canada Infrastructure programme, will provide more than C$33 billion in funding for public infrastructure across the country.[29]

22 Eligible assignees, or the type of eligible assignee, are typically defined in the loan agreement. Typically assignments to defaulting lenders and natural persons are prohibited. It also may be the case that assignments to the borrower or its affiliates may be prohibited.

23 Budget 2023 see footnote 2 at 14.

24 Canada, Department of Finance, Budget 2023 Tax Measures: Supplementary Information (Ottawa: Department of Finance, 2023) https://www.budget.canada.ca/2023/pdf/tm-mf-2023-en.pdf accessed 30 March 2023 at 71.

25 Budget 2023 see footnote 2 at 71.

26 ibid. at 81.

27 ibid. at 90.

28 ibid. at 91.

29 ibid. at 104.

iii Bill 96, An Act Respecting French, the Official and Common Language of Quebec

Bill 96, An Act Respecting French, the Official and Common Language of Quebec (Bill 96), was passed into law on 1 June 2022 with an aim to promote and protect the French language.[30] Beginning 1 September 2022, applications for registration of any security in Quebec must be made exclusively in the French language. Parties involved in secured finance and lending transactions in Quebec are urged to monitor new impacts of Bill 96 as different sections of the law are enacted progressively.

iv Prohibition on the Purchase of Real Property by Non-Canadians Act

The Prohibition on the Purchase of Real Property by Non-Canadians Act came into force on 1 January 2023 following a brief consultation period. This Act is a temporary two-year measure in response to urgent housing affordability concerns experienced by Canadians. This prohibition extends beyond purchasers of non-residential property and includes 'every person or entity that counsels, induces, aids or abets or attempts to counsel, induce, aid or abet a non-Canadian to purchase, directly or indirectly, any residential property knowing that the non-Canadian is prohibited under this act from purchasing the residential property.'[31] Lenders providing financing for these purchases will likely be deemed as aiding and abetting non-Canadian purchasers (including corporations with 10 per cent or more direct or indirect equity or voting control owned by non-Canadians), and therefore must make themselves aware of the purpose of loans and the nature of the borrower's structure and revise loan agreements to ensure compliance with this new prohibition.

v Cessation of CDOR

CDOR was developed as the basis for pricing bankers' acceptance (BA)-related credit facilities.[32] As BAs are inherently interconnected with CDOR, it is likely that many Canadian banks will move away from the BA lending model upon CDOR's discontinuation. This will have major implications for the Canadian financing market as many Canadian credit facilities are set up using a BA funding mechanism.[33]

VIII OUTLOOK AND CONCLUSIONS

Despite ongoing challenges in the economy, Canada's lending and secured finance market remains strong. As environmental initiatives are implemented on a global scale, fintech lending evolves and inflation continues on its downward trend, the Canadian financial market will remain competitive.

30 Statement given by Quebec language minister Simon Jolin-Barette to the *Montreal Gazette* in May 2022.

31 Prohibition on the Purchase of Residential Property by Non-Canadians Act, SC 2022, c.10 s. 6(1).

32 Canadian Alternative Reference Rate Working Group, CARR's Review of CDOR: Analysis and Recommendations (Canadian Alternative Reference Rate Working Group, 2021) https://www.bankofcanada.ca/wp-content/uploads/2021/12/CARR-Review-CDOR-Analysis-Recommendations.pdf accessed 25 April 2023 at 1.

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