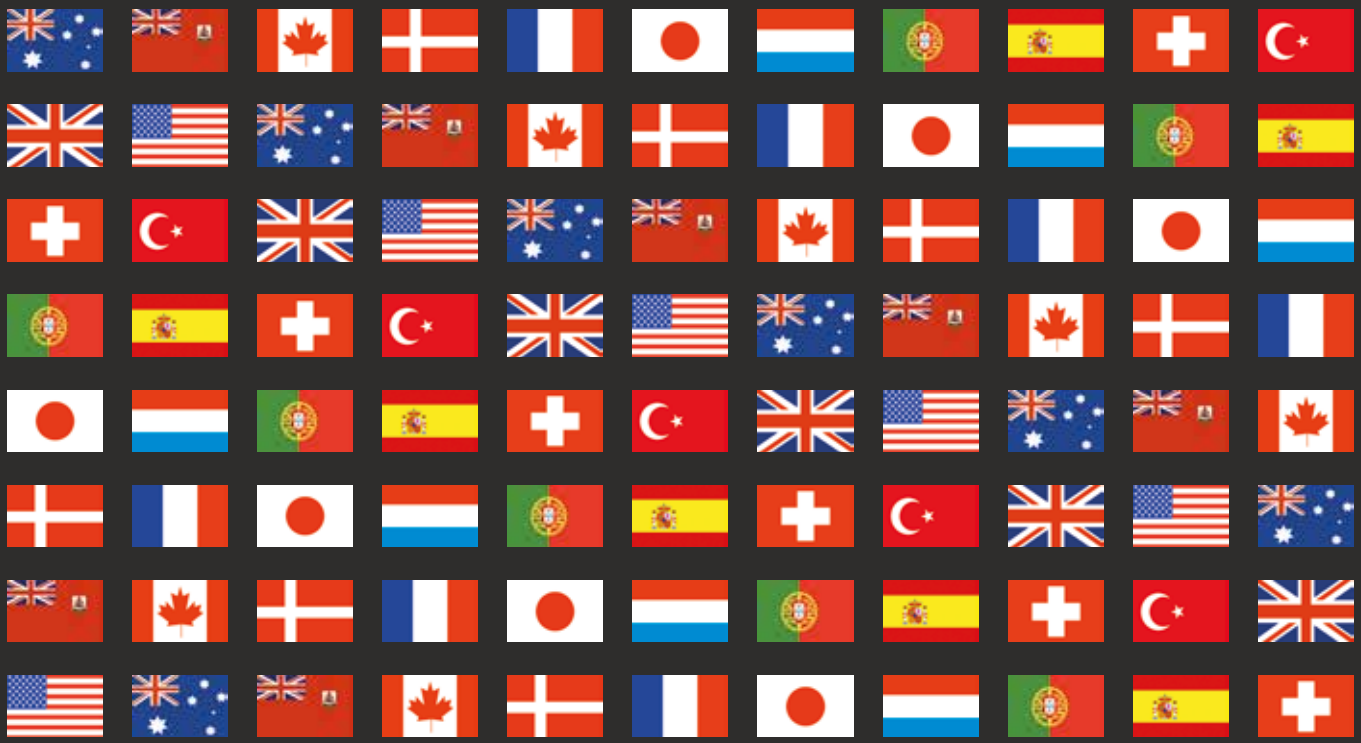
Structured Finance & Securitisation

Contributing editor
Patrick D Dolan



2019

GETTING THE DEAL THROUGH

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Structured Finance & Securitisation 2019

Contributing editor

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Structured Finance & Securitisation 2019

Fifth edition

Getting the Deal Through is delighted to publish the fifth edition of S*tructured Finance & Securitisation*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Bermuda and Australia.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Patrick D Dolan of Norton Rose Fulbright US LLP, for his continued assistance with this volume.

GETTING THE DEAL THROUGH

London
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Canada

Elana Hahn

Norton Rose Fulbright Canada LLP

General

1 What legislation governs securitisation in your jurisdiction? Has your jurisdiction enacted a specific securitisation law?

No. Canada does not have a specific securitisation law at either the federal or provincial level. Various aspects of securitisation legal structures and documentation, and the consumer contracts underlying securitisations, are governed by common law and federal and provincial statutes, as further discussed herein. Some parties to securitisations are regulated entities (see questions 4 and 5).

2 Does your jurisdiction define which types of transactions constitute securitisations?

No. As Canada does not have a specific securitisation law, there is no general Canadian law definition of a 'securitisation'. However, aspects of securitisations are governed by Canadian common law and federal and provincial statutes, and some of the parties to securitisations are regulated entities in Canada, as outlined herein (see questions 4 and 5). Some of these Canadian statutes and regulations contain definitions of securitisation concepts for their purposes.

3 How large is the market for securitisations in your jurisdiction?

According to DBRS Limited (DBRS) Securitization Servicer Report (Canadian Securitization Market Overview; September 2018), as of 30 September 2018, the total amount of securitisations outstanding in the Canadian market was C$92.2 billion. Term ABS and CMBS represented 56.6 per cent of the total securitisation market, followed by ABCP at 35.6 per cent and private placements at 7.9 per cent.

Regulation

4 Which body has responsibility for the regulation of securitisation?

Canada does not have a specific securitisation law at the federal or provincial level (see question 1); therefore, there is not a single regulatory body in Canada that has responsibility for securitisation per se.

However, various regulatory bodies at the federal and provincial levels have responsibility for the administration of statutes that are relevant to securitisation legal structures, and documentation and the consumer contracts underlying securitisations. Also, certain parties to securitisations in Canada are regulated entities, and their activities (including securitisations) are regulated; for example, financial institutions are regulated by the Office of the Superintendent of Financial Institutions (OSFI). Certain public-sector securitisation programmes, such as the National Housing Act residential mortgage-backed securities programme (NHA MBS) of Canada's housing agency (the Canada Mortgage and Housing Corporation (CMHC)), are quasi-regulated through the requirements of the CMHC.

5 Must originators, servicers or issuers be licensed?

Canada does not have a specific securitisation law at the federal or provincial level (see question 1), and therefore, Canadian originators or issuers are not required to be licensed to engage in securitisation per se.

However, certain parties to securitisations in Canada are regulated entities; for example, financial institutions and their activities (including holding and servicing of consumer receivables and engaging in securitisation, whether as originators or servicers) are regulated by the OSFI. Similarly, trustees must be licensed in any provinces in which they engage in the trustee business. Certain Canadian provinces have collection agency statutes or mortgage broker licensing requirements that may apply to any entity that collects mortgages or other receivables. The applicability of Canadian bank, servicer and trustee licensing requirements on the securitisation structure must be looked at on a case-by-case basis, particularly in the case of a non-Canadian issuer, since this depends on the nature of the parties, the receivables, the jurisdiction of the parties and the receivables, the servicing structure and the nature of the sale.

6 What will the regulator consider before granting, refusing or withdrawing authorisation?

Not applicable.

7 What sanctions can the regulator impose?

Not applicable.

8 What are the public disclosure requirements for issuance of a securitisation?

Securities issuances in securitisations are made either by way of an offering to the public using a prospectus, or pursuant to a private placement exemption under applicable securities legislation in Canada.

In either case, the entity that issues securities is required to comply with the registration and prospectus requirements (or the exemptions therefrom), of applicable securities legislation in Canada. Each province of Canada has enacted its own securities legislation. Compliance with securities legislation is enforced by a securities commission or equivalent regulatory body in each province. The provincial bodies coordinate regulatory initiatives through the Canadian Securities Administrators (CSA). In fact, the CSA, a voluntary umbrella organisation, has made progress in pursuing a national system of harmonised securities laws. The CSA has implemented a national passport system in every province other than Ontario, which allows issuers and registrants to deal with only the regulator in their principal jurisdiction, and exempts such issuers and registrants from certain legal requirements in other provinces and territories.

Each of the Securities Act (British Columbia) (the BC Act), the Securities Act (Alberta) (the Alberta Act), the Securities Act (Ontario) (the Ontario Act) and the Securities Act (Quebec) (the Quebec Act) include detailed rules governing information that must be made available to investors in order to ensure that they have adequate information available to them on which to base their investment decisions. These disclosure requirements can be broken down into two categories: prospectus disclosure requirements and continuous disclosure requirements (see question 9). In cases where a prospectus is required for a public offering, it must be prepared in accordance with, and contain the information required by, the relevant securities laws and the rules and regulations promulgated thereunder. None of the Canadian provinces has specific prospectus disclosure rules for securitisation securities; the general rules applicable to securities issuers apply. Each of the BC Act, the Alberta Act, the Ontario Act and the Quebec Act, and the rules and regulations promulgated thereunder, contain certain specific exemptions from the prospectus requirement. National Instrument 45-106

– Prospectus Exemptions (NI 45-106), creates a national set of exemptions with only a few provincial differences.

The most commonly relied on exemption for the private placement of securitisation securities is the 'accredited investor' exemption, which includes institutional investors (eg, financial institutions, insurance companies and pension funds). In addition, highly rated short-term debt securities (ie, asset-backed commercial paper) can be distributed under an exemption from registration and prospectus requirements.

Where a prospectus exemption applies, the prospectus public disclosure rules do not apply. Resale restrictions applicable under provincial securities legislation apply to securities issued in reliance on an exemption. Under the 'closed system' of securities regulation in Canada, the first trade in securities issued in reliance on a prospectus exemption must generally either be made under a prospectus, pursuant to a further prospectus exemption or in compliance with the relevant resale restrictions (including hold period requirements), of provincial securities legislation. In contrast, when securities are distributed by way of a prospectus, they are thereafter freely tradeable, unless they form part of a control block.

9 What are the ongoing public disclosure requirements following a securitisation issuance?

The mechanisms employed in each of the BC Act, the Alberta Act, the Ontario Act and the Quebec Act to achieve their policy objectives include detailed rules governing information that must be made available to investors in order to ensure that they have adequate information available to them on which to base their investment decisions. As noted in question 8, these disclosure requirements can be broken down into two categories: prospectus disclosure requirements (see question 8) and continuous disclosure requirements. Such securities legislation contains provisions requiring public entities that are 'reporting issuers' under such legislation, to promptly report any material changes in their affairs, and to prepare quarterly interim and comparative annual financial statements, with accompanying notes and management discussion, and analysis of financial condition and results of operations.

Further, most reporting issuers are required to file an annual information form that provides supplemental analysis and background material relating to the issuer. Certain foreign reporting issuers, who are registrants under US securities legislation, are afforded relief from Canadian continuous disclosure requirements, provided that they comply with applicable foreign disclosure requirements. However, for Canadian private placement securitisations, the issuer is not considered to be a 'reporting issuer' subject to continuous disclosure requirements. In these cases, ongoing investor disclosure is driven principally by investor requirements and securitisation market practices. None of the Canadian provinces have specific ongoing public disclosure rules for securitisation securities; the general rules applicable to securities issuers apply.

Eligibility

10 Outside licensing considerations, are there any restrictions on which entities can be originators?

There are no general Canadian legal restrictions on which entities can be originators. However, in Canadian securitisations, like in other jurisdictions, there will be practical, commercial and marketing considerations as to which type of entity will be acceptable or appealing to investors and will support a credit rating of the securities.

11 What types of receivables or other assets can be securitised?

There are no general Canadian legal restrictions on which receivables or other assets can be securitised. However, in Canadian securitisations, like in other jurisdictions, there will be practical, commercial and marketing considerations as to which type of entity will be acceptable or appealing to investors and will support a credit rating of the securities. In particular, like in other jurisdictions, the assets must have a predictable payment and default pattern to generate a steady cash flow and provide sufficient collateralisation for the issued securities.

12 Are there any limitations on the classes of investors that can participate in an offering in a securitisation transaction?

There are no general Canadian legal restrictions on the classes of investors that can participate in a securitisation offering. However, in Canadian securitisations, like in other jurisdictions, there may be practical, commercial and marketing considerations of the originator, issuer and underwriter as to which types of investors the securitisation will be offered; for example, whether the securities will be broadly marketed publicly or only marketed to institutional investors as a private placement.

13 Who may act as custodian, account bank and portfolio administrator or servicer for the securitised assets and the securities?

There are no general Canadian legal restrictions on who may act in these roles. However, depending on the nature and location of the receivables and the parties, the parties playing these roles may need to be licensed (see question 5). Also, in Canadian securitisations, as in other jurisdictions, there may be practical, commercial and marketing considerations of the originator, issuer and underwriter, and credit rating agency requirements as to which parties may perform these roles.

14 Are there any special considerations for securitisations involving receivables with a public-sector element?

Certain Canadian public-sector securitisation programmes, such as the NHA MBS programme of the CMHC (see question 4), are quasi-regulated. Receivables due from the federal government and from certain provincial governments are generally not assignable (including to a securitisation special purpose vehicle (SPV)) unless certain procedural steps are taken under the Financial Administration Act or analogous provincial legislation.

Transactional issues

15 Which forms can special purpose vehicles take in a securitisation transaction?

Canada does not have specific laws pertaining to securitisation SPVs.

There are a variety of securitisation legal structures used in Canada that use a range of SPV entities (including corporations or partnerships). The most common SPV entities used in Canadian securitisations are common-law trusts and limited partnerships.

16 What is involved in forming the different types of SPVs in your jurisdiction?

A common-law trust SPV can be formed quickly and easily (at little legal cost) using a standard Declaration of Trust document in which a settlor designates an SPV trustee. The trustee will be a licensed entity that typically will be required to meet minimum independence and credit quality requirements (see questions 5 and 23). In cases of corporate or partnership SPVs, those entities can also be formed quickly, easily and inexpensively.

17 Is it possible to stipulate which jurisdiction's law applies to the assignment of receivables to the SPV?

Matters of contract law, such as receivables purchase agreements, are governed by provincial laws in Canada. Canadian provincial laws do not require a sale of receivables to be governed by the same law as the law governing the receivables. A Canadian court should recognise the choice of a foreign law, provided that the choice of law is bona fide and there are no public policy grounds for avoiding it. However, there are a number of limitations as to how foreign law would be applied in a Canadian court, including, but not limited to, the following:

- the court will apply Canadian provincial law to any procedural aspects of a matter;
- the court may only give effect to foreign law if it is pleaded and proven by expert testimony; and
- the court will apply Canadian provincial laws that have overriding effect (eg, certain provisions of the Personal Property Security Act (PPSA) in each province relating to enforcement).

Aside from recognising a choice of law, a Canadian court should recognise that a sale under foreign law is effective against the seller and other third parties in Canada as a true sale, provided that the Canadian law requirements for a true sale are satisfied (see question 33). However, while choice of law and true sale may be recognised by a Canadian court, as a practical matter, a true sale opinion is typically required for securitisations, and Canadian lawyers are only able to opine on

the enforceability of a receivables purchase agreement governed by Canadian law for these purposes. For these reasons, the parties will often choose Canadian provincial law as the governing law for the receivables purchase agreement when the securitisation involves a seller located in Canada and a true sale opinion is required. Also, regardless of choice of law governing the sale, see questions 19 and 20 as to the perfection requirements for a sale of receivables located in Canada to be effective.

18 May an SPV acquire new assets or transfer its assets after issuance of its securities? Under what conditions?

Yes. Under Canadian law, a seller may sell to an SPV receivables that are acquired or originated by the seller after issuance of securities by the SPV. While the SPV may commit to purchase future receivables at the time of issuance of its securities, the sale is only considered to occur when the receivable comes into existence and the purchase price is paid. See question 28 as to identification. However, it should be noted that for any receivables that come into existence and are assigned following the insolvency of the seller, there is a risk that the seller or an insolvency official may validly disclaim the sale in certain circumstances.

19 What are the registration requirements for a securitisation?

A securitisation per se does not need to be registered. However, the perfection of the sale of receivables to the SPV and of any security granted by the SPV is achieved through registration in relevant registries (see questions 20 and 26).

20 Must obligors be informed of the securitisation? How is notification effected?

There is no general Canadian legal requirement for obligors to be informed of a securitisation. However, in order for the sale to be effective against an obligor located in Canada, the obligor must be notified of the sale. Nonetheless, subject to Quebec law requirements for perfecting sales of Quebec receivables (outlined below), this is not typically required for Canadian securitisations. To the extent that obligors are notified, there is no specific legal form or delivery method required by law. It should be noted that if the obligors of the underlying receivables are located outside Canada, the effectiveness of the assignment against the foreign obligor would be governed by the law of the jurisdiction where the obligor was located. Notice to the obligors is not required in order for the sale to be effective against the seller and its creditors, provided that perfection requirements under relevant provincial law were satisfied in provinces other than Quebec. Instead, perfection is achieved by registration under the province's PPSA (that deems an absolute assignment of receivables to be a security interest), by registering a financing statement in the PPSA registry. In Quebec, an assignment of a 'universality of claims' (ie, a sale of all receivables of a particular type generated by a seller between two specified dates) may also be perfected by registration. However, in cases of sales of receivables in Quebec that are not sales of a 'universality of claims', the transfer must be perfected by notice to the obligors. Special procedures must be followed to assign receivables from government obligors (see question 14).

21 What confidentiality and data protection measures are required to protect obligors in a securitisation? Is waiver of confidentiality possible?

The Personal Information Protection and Electronic Documents Act is federal legislation that applies to the use, collection and disclosure of personal information in Canada. Certain provinces have also enacted data protection laws. While these laws only relate to data pertaining to individuals, the definition of 'personal information' is very broad. Individual consents to collection, use and disclosure are possible.

In practice, caution is required in transferring, handling and storing data pertaining to consumer credit, and other receivables that contain personal information and portfolio data may need to be anonymised.

22 Are there any rules regulating the relationship between credit rating agencies and issuers? What factors do ratings agencies focus on when rating securitised issuances?

In 2012, National Instrument 25-101 – *Designated Rating Organizations* (NI 25-101) came into force and, for the first time, subjects credit rating agencies to targeted regulation in Canada. NI 25-101 permits any credit rating organisation to apply to become a 'designated rating organisation' (DRO), and stipulates that a credit rating organisation must become a DRO for its ratings to be included in a Canadian offering document. NI 25-101 imposes certain requirements on DROs, including:

- adoption and publication of a code of conduct;
- incorporating procedures to ensure ratings are based on a thorough analysis of all available information;
- the establishment of managerial oversight committees; and
- various ratings of integrity, transparency, governance and independence mechanisms.

Under NI 25-101, DROs must not make a recommendation to an issuer about the corporate or legal structure, assets, liabilities or activities of the issuer, and DROs must disclose the details of compensation arrangements with the issuer. In addition, many of the credit rating agencies rating Canadian securitisations are US-headquartered or operate in the United States, or both, and, therefore, will also be subject to US regulations applying to them extraterritorially. The factors that rating agencies focus on in Canadian securitisations are outlined in their global or North American ratings methodologies for the relevant asset class (subject to adjustment for any Canadian law and market practice particularities). The Canadian rating agency, DBRS, also publishes some specific Canadian securitisation ratings methodologies based on the global and North American ratings methodologies.

23 What are the chief duties of directors and officers of SPVs? Must they be independent of the originator and owner of the SPV?

The most common SPV entities used in Canadian securitisations are common-law trusts and limited partnerships (see question 15). In the case of a common law trust, the trust's actions are carried out by the SPV trustee and, as such, there are no directors and officers of such an SPV. The chief duties and obligations of the SPV trustee are governed by the Declaration of Trust and general Canadian common law and statutory law pertaining to trustees. In cases where a corporate or partnership entity is used in a securitisation, the obligations of the directors and officers of the SPV, or the general partner of the SPV, are no different than those that would exist at law more generally (by application of Canadian common law and relevant provincial or federal company or partnership statute provisions). This includes a fiduciary duty to the corporation they serve and a duty of care. There is no specific Canadian legal requirement that the trustee or directors and officers must be independent of the originator entity. However, legal structuring and credit rating agencies' methodologies may impose certain independence requirements (see questions 13 and 32). In the case of financial institution originators who are seeking favourable Canadian capital treatment for the securitisation, OSFI Guidelines B-5 and B-5A create capital requirement disincentives for financial institutions setting up SPVs that are not fully independent. In cases where independence is required, a provision in the company's or partnership's constitutional documents to the effect that certain actions may not be taken without an independent director's approval should be legally effective, to preclude such action from being validly taken without such approval. A contractual restriction entered into by the SPV would mean that an action without such approval would be a breach of contract, but the action itself may not be invalid as a matter of corporate law.

24 Are there regulations requiring originators and arrangers to retain some exposure to risk in a securitisation?

Canada does not have such regulations. The CSA has taken the position that the Canadian securitisation market is, for the most part, free from incentive misalignment, owing to a number of factors:

- a large portion of the Canadian securitisation market is comprised of government-guaranteed securitised products (such as the NHA MBS);
- Canadian securitisers are generally subject to prudential oversight; and
- the 'originate-to-distribute' model is not prevalent in Canada.

Canadian securitisations also use forms of credit enhancement, which the CSA suggests achieve the objectives of risk retention:

- over-collateralisation;
- excess spread; and
- cash reserve accounts that trap cash-to-pay investors.

As a result of these factors, the CSA has specifically stated that Canadian securities regulators will not be introducing mandatory credit risk retention. However, the CSA does take the position that issuers should disclose clearly to investors whether and how a securitisation has been structured to align the interests of the securitisation parties with investors, and the extent of any risk retention. It should be noted that, to the extent that the securities of a Canadian securitisation are offered to US or EU-member investors, US or EU risk-retention rules may effectively apply to the securitisation extraterritorially.

Security

25 What types of collateral/security are typically granted to investors in a securitisation in your jurisdiction?

The SPV typically enters into a trust indenture with an indenture trustee. The trust indenture (and, in some cases, other ancillary security documents) typically includes a grant of security in the receivables and any other assets held by the SPV (including any bank accounts) to the indenture trustee on behalf the bondholders (or other relevant investors) and other secured creditors. In provinces other than Quebec, while security is granted by means of a written agreement, no particular document formalities need to be followed. In Quebec, a Quebec law hypothec document must be used and formalities pertaining to the granting of a hypothec must be followed. Where security is taken in bank accounts, the method for taking security depends on the type of account and the transaction structure.

26 How is the interest of investors in a securitisation in the underlying security perfected in your jurisdiction?

In provinces other than Quebec, perfection of security interests in personal property (including receivables and bank accounts) is achieved by registering a financing statement in the PPSA registry under each province's PPSA. Each PPSA requires the attachment of a security interest to the collateral for the security interest to be effective. The PPSAs provide that when attachment occurs, for example, a security interest in a receivable would 'attach' when the receivable comes into existence, value is given and the grantor has signed a security agreement in which the description is sufficient for the receivables to be identified. In Quebec, registration of the hypothec is required.

A security interest in real property (including a mortgage) is perfected by registering the interest in the applicable provincial land titles registry system. Typically, this would not be done at the time of the closing of the securitisation. Instead, a power of attorney will be granted to the indenture trustee that will allow it to register the interest at a later date in the event that certain trigger events occur. In addition, there are specific statutes, such as the Bills of Exchange Act and the Securities Transfer Act of most provinces, which govern the perfection of assignments and security interests in specific types of assets.

Whether or not these are relevant for a securitisation will depend on the relevant transaction structure and the types and location of assets over which security is being granted. Security interests in certain types of personal property may require the holder of the security interest to take possession or control of the asset. See question 20 regarding notice to obligors.

27 How do investors enforce their security interest?

The PPSAs in provinces other than Quebec, and the Civil Code of Quebec, contain comprehensive rules dealing with the rights and remedies of secured creditors following default by their debtors. The rights of a secured party include, but are not limited to, the right to take possession of the collateral, the right to retain the collateral or the right to dispose of the collateral. The PPSAs also enumerate the rights and remedies of the debtor. These include, but are not limited to, the right to redeem the collateral or a right to reinstate the security agreement, and the right to receive notice of the creditors' intentions on default. Each PPSA also specifies that, in addition to the rights and remedies enumerated in the PPSA, the principles of law and equity continue to apply, unless they are inconsistent with the express provisions of the legislation. Despite the differences in terminology, practices and procedures between Quebec and the PPSA provinces, in most cases, substantially the same or similar rights and remedies are available to creditors in Quebec as those that apply in PPSA jurisdictions.

28 Is commingling risk relating to collections an issue in your jurisdiction?

Commingling of collections can present an issue in Canadian securitisations. It is not necessary for each specific receivable to be identified in order for sales to be legally effective. However, the receivables purchase agreement must contain a sufficient description for receivables to be identified as belonging to the relevant class or classes of receivables.

It should be noted, though, that this type of identification of receivables classes may affect whether the receivables are considered to be a 'universality of claims' under Quebec law (see question 20). As a practical matter, even if the securitisation documents contain a term that the seller is holding collections belonging to the purchaser on behalf of the purchaser, commingling of collections with the seller's assets can be a risk to the extent that the collections cannot be clearly identified.

Taxation

29 What are the primary tax considerations for originators in your jurisdiction?

The income tax considerations will be specific to each originator. Canadian originators pay income tax in Canada in accordance with income calculated in a manner conforming with Canadian generally accepted accounting principles. In 2010, the handbook of the Canadian Institute of Chartered Accountants (CICA Handbook) was revised to incorporate International Financial Reporting Standards (IFRS) and Accounting Standards for Private Companies (ASPE). Public companies are required to adopt IFRS, and non-public companies may choose to adopt either IFRS or ASPE. Specific provisions under Canada's Income Tax Act apply to certain types of originators; for example, there are rules for financial institutions holding and disposing of specified debt obligations. See question 30 as to the applicability of value added taxes to service fees and sales of tangible assets.

30 What are the primary tax considerations for issuers in your jurisdiction? What structures are used to avoid entity-level taxation of issuers?

Federal goods and services tax and provincial sales tax are applicable to servicing fees and to the transfer of certain tangible assets in Canada.

Consequently, it is most common in Canadian securitisations to structure the assignment and servicing of receivables so that the receivables are sold to the issuer on a fully serviced basis, without a separate servicing fee being paid. It is worth noting that, with respect to cross-border transactions involving non-Canadian issuers, Canada has eliminated withholding tax on interest paid to arm's-length lenders other than participating debt interest. Therefore, withholding tax is no longer a concern for interest revenue from Canadian receivables purchased by an issuer outside of Canada. However, in the case of a non-Canadian issuer, an intermediate Canadian SPV will, in any event, often be established to purchase the receivables in order to mitigate the risk of the non-Canadian issuer being subject to Canadian income tax by being considered to be 'doing business in Canada' through the ownership and servicing of Canadian receivables. However, this needs to be looked at on a case-by-case basis, since the question of whether an entity is considered to be 'carrying on business in Canada' is very dependent on the specific facts and circumstances. Withholding tax of 25 per cent continues to be applicable on cross-border lease, royalty and dividend payments, subject to certain exceptions and to reduction under specific bilateral treaties.

31 What are the primary tax considerations for investors?

The income tax considerations will be specific to each investor, depending on where the investor is resident and in terms of how interest payments and sale, redemption or repayment of the bonds are treated in the investor's jurisdiction of residency. Canadian corporate investors pay income tax in Canada in accordance with income calculated in a manner according to Canadian generally accepted accounting principles. With respect to non-Canadian investors, Canada has eliminated withholding tax on interest paid to arm's-length lenders other than participating debt interest. Therefore, withholding tax is no longer a concern for interest payments to non-Canadian investors.

Bankruptcy

32 How are SPVs made bankruptcy-remote?

In order to mitigate the risk of consolidation (see question 34), the SPV is typically established as an orphan trust under the control of an arm's-length trustee. If corporate or partnership entities are used in the securitisation structure, they will typically be set up to have one or more independent directors (see question 23). The SPV is typically set up in a manner that ensures that it is operationally distinct from the originator; for example:

- it holds its own bank accounts;
- its assets are not commingled with those of the originator and are transferred to the SPV in a manner that satisfies the indicia for a true sale (see question 33);
- it has its own financial statements prepared;
- corporate formalities are followed in transferring assets and interacting with originator; and
- there are no originator guarantees.

Also, in order to ensure that the SPV is bankruptcy-remote, the SPV is set up in a manner to ensure, through its constitutional documents and contractual obligations, that it has no premises, no employees and only engages in the business of holding the receivables, issuing the bonds and related ancillary activities, such that it should have no creditors other than the securitisation creditors.

33 What factors would a court in your jurisdiction consider in making a determination of true sale of the underlying assets to the SPV (eg, absence of recourse for credit losses, arm's length)?

Generally speaking, Canadian courts should respect the intent of the parties for the transaction to be a sale, as evidenced by the documents, communications and conduct of the parties. In Canada's leading case on the recharacterisation of a sale as a secured loan (*Metropolitan Toronto Police Widows and Orphan Funds v Telus Communications Inc*, [2003] OJ No 128 (available on CanLII)(Ont Sup Ct), rev'd on other grounds (2005), 75 OR (3d) 784 (Ont CA)), the court noted a number of factors including:

- the transfer of risk;
- the ability to identify the sold assets;
- the level of recourse to the seller;
- any right of redemption by the seller or right to retain collections;
- responsibility for collections; and
- the ability to calculate the purchase price.

The most important indicator for the sale being recharacterised as not a true sale is the seller retaining a right of redemption in the assets or for the receivables to be sold back to it.

34 What are the factors that a bankruptcy court would consider in deciding to consolidate the assets and liabilities of the originator and the SPV in your jurisdiction?

There are no substantive consolidation provisions in Canadian insolvency statutes and there is very little Canadian case law on the topic.

However, substantive consolidation does fall within the general equitable jurisdiction of a Canadian court in an insolvency proceeding; therefore, it is acknowledged that this is a theoretical legal risk in the case of insolvency. The limited Canadian case law indicates that Canadian courts follow a balancing of prejudice test similar to the test used by US courts, in which the court weighs the prejudice that will be suffered by creditors if there is no consolidation against the prejudice that the debtor will suffer from its imposition. In applying the balancing of prejudice test, the court will look at the facts and circumstances and a number of factors, including the extent to which the SPV is operationally distinct from the originator or seller (see question 32).

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