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The International Comparative Legal Guide to:

# Securitisation 2016

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# Canada

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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) No, whether there is an enforceable debt will be determined by evidence of the intention of the parties. Nevertheless, receivables are typically not eligible for purchase unless evidenced by written documentation.

(b) Yes, if they are sufficient to identify and describe the transactions.

(c) Yes, but purchasers typically require written documentation.

**1.2 Consumer Protections. Do your jurisdiction'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) Under the Interest Act (Canada), any agreement which stipulates an interest rate must contain an annual interest rate or, where the rate is for a period of less than one year, an express statement of the annual equivalent interest rate. Failure to do so will result in the imposition of an interest rate not to exceed five per cent per year. In addition, where agreements are secured by real property, a higher rate of interest cannot be recovered on amounts in arrears. Even where no real property security is involved, a stepped-up interest rate after default may be unenforceable as a penalty.

The Criminal Code (Canada) makes it a criminal offence to receive an effective annual rate of interest that exceeds 60 per cent. Interest, under the Criminal Code, is broadly defined to include interest, fees, fines, penalties, commissions and similar charges and expenses that a borrower pays in connection with the credit advanced.

(b) Generally, no.

(c) Each province has consumer protection legislation which provides cooling-off periods with respect to sales made outside the seller's place of business (e.g. door to door sales) as well as certain types of consumer contracts. In addition, certain provinces provide consumers with rights of cancellation if the seller fails to meet certain mandatory disclosure requirements. Such information requirements may include cost of borrowing disclosure and other product and pricing information.

(d) Under the Interest Act, natural persons have a right in certain circumstances to prepay a mortgage in full (together with payment of an additional three months interest) at any time after five years from the date of the loan if principal or interest under the mortgage are payable more than five years after the date of the loan.

**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?**

Yes, assignments of certain debts owed by the government of Canada and many federal Crown corporations are invalid unless the assignment is absolute and notice in the prescribed form has been given to and acknowledged by the appropriate government official. Some provinces have similar restrictions. Complying with these restrictions may be onerous and time consuming. Therefore, government receivables are often excluded as ineligible unless they comprise a large portion of the pool, in which case the statutory requirements must be complied with.

## 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 your jurisdiction that will determine the governing law of the contract?**

If the parties do not specify a choice of law, the court will apply the law of the jurisdiction with the most real and substantial connection with the contract. The court will consider such factors as the place where the contract was entered into and is to be performed, the form and language of the contract, residence of the parties, and any arbitration or submission to jurisdiction clauses. Contract law is a matter of provincial jurisdiction, so the applicable jurisdiction in each case will be a particular province.


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

Subject to certain exceptions and conditions discussed in question 2.3, courts will generally recognise and apply the parties' choice of governing law.

**2.3 Freedom to Choose Foreign Law of Non-Resident Seller or Obligor. If the seller is resident in your jurisdiction but the obligor is not, or if the obligor is resident in your jurisdiction 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 your jurisdiction 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?**

Courts generally recognise and apply contractual choice of law clauses if expert evidence of the foreign law is adduced, the choice is *bona fide* and legal and there is no reason for avoiding it on public policy grounds.

However, the court:

- will apply Canadian laws relating to procedural matters or laws having overriding effect (such as bankruptcy and insolvency, tax, securities or criminal law);
- will not give effect to foreign revenue, expropriatory or penal laws (except in Québec, where there is reciprocity); and
- will not enforce any obligation whose performance would be 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 your jurisdiction?**

Yes, it is in effect.

## 3 Choice of Law – Receivables Purchase Agreement

**3.1 Base Case. Does your jurisdiction'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., your jurisdiction's laws or foreign laws)?**

Generally, no; however, perfection of the security interest deemed to be created by the absolute assignment of the receivables will be governed by the applicable domestic or foreign personal property security regime irrespective of which law governs the sale agreement or the receivables. The governing law for perfection purposes will be determined by conflict of law rules that cannot be varied by contract. For the purposes of this question and each example below, we have assumed that the reference to the domestic jurisdiction is a reference to a particular Canadian province.

**3.2 Example 1: If (a) the seller and the obligor are located in your jurisdiction, (b) the receivable is governed by the law of your jurisdiction, (c) the seller sells the receivable to a purchaser located in a third country, (d) the seller and the purchaser choose the law of your jurisdiction to govern the receivables purchase agreement, and (e) the sale complies with the requirements of your jurisdiction, will a court in your jurisdiction 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)?**

Yes; however, the purchaser will also need to perfect the security interest deemed to be created as described in question 3.1. In addition, for the sale to be effective against the obligor, the obligor must be notified of the assignment as further described in question 4.4.

**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 your jurisdiction, will a court in your jurisdiction 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?**

Yes, subject to the considerations regarding choice of law, perfection and notice to obligors referred to in questions 2.3, 3.1. 3.2 and 4.4; provided that the obligor is located in another jurisdiction, the effectiveness of such sale against the obligor will be subject to the laws of the jurisdiction of the obligor.

**3.4 Example 3: If (a) the seller is located in your jurisdiction 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 your jurisdiction 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 your jurisdiction's own sale requirements?**

Yes, subject to the considerations referred to in questions 2.3, 3.1, and 3.2. In particular, while a court may recognise the choice of law of the receivables purchase agreement, as discussed in question 2.3, a court will apply Canadian laws having overriding effect, such as insolvency law. Accordingly, in an insolvency of the seller, in order for the sale to be recognised as effective against creditors or insolvency administrators of the seller, the sale may need to satisfy Canadian true sale requirements. In addition, the effectiveness of such sale against the obligor will be subject to the laws of the jurisdiction of the obligor.



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**3.5 Example 4: If (a) the obligor is located in your jurisdiction 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 your jurisdiction 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 your jurisdiction's own sale requirements?**

Yes, subject to the considerations referred to in questions 2.3, 3.1, 3.2 and 4.4.

**3.6 Example 5: If (a) the seller is located in your jurisdiction (irrespective of the obligor's location), (b) the receivable is governed by the law of your jurisdiction, (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 your jurisdiction 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 your jurisdiction and any third party creditor or insolvency administrator of any such obligor)?**

Yes, subject to the same considerations referred to in question 3.4.

## 4 Asset Sales

**4.1 Sale Methods Generally. In your jurisdiction 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?**

The sale of receivables (other than lease receivables) is typically documented as an absolute assignment of the receivables and related security and is generally referred as a sale, transfer and/or absolute assignment. The receivables sold may consist of revolving or amortising pools of whole receivables or undivided interests in such receivables.

For "pay through" debt securities, the seller typically assigns the receivables as a single step transaction to a special purpose vehicle (SPV) under a purchase agreement. For "pass through" securities, the seller assigns the receivables to a custodian or an intermediary SPV which then issues securities in the form of certificates representing sales of undivided ownership interests in the pools of assets. This intermediate assignment is required chiefly to comply with securities legislation that requires a distinct issuer.

Lease receivables are generally transferred pursuant to a concurrent lease or sale/sale leaseback transaction because a sale of unaccrued lease receivables may create undesirable tax consequences. Lease securitisation transactions are also generally structured as two-step transactions in order to limit the risk that the original lessor may disclaim the lease in any insolvency proceeding. The first step of such transaction is the conveyance of the leased assets to a SPV which then concurrent leases the asset to the "purchaser".

**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?**

An absolute transfer of receivables is deemed to create a security interest, whether or not it secures an obligation. This must be perfected to be enforceable against third parties, usually by registering a financing statement under the applicable Personal Property Security Act (PPSA) in the common law jurisdiction where the seller is deemed to be located for the purposes of the relevant PPSA (in all provinces except Ontario, the seller's chief executive office, but in Ontario, its jurisdiction of formation). Failure to do so does not invalidate the sale, but the SPV's ownership interest both may become subject to competing claims of the seller's secured creditors and would be ineffective against an insolvency official.

An assignment of receivables payable in Quebec or subject to Quebec law must be perfected under Quebec law. Perfection by registration in the Quebec central registry is only possible if the receivables transferred constitute a "universality of claims" (that is, all of the receivables in a specified category). Otherwise notice must be given to each obligor, which is usually not practicable or desirable.

Where the receivables are evidenced by chattel paper (including both monetary obligation and the security interest that secures it) unless the purchaser takes possession of the chattel paper, a good faith purchaser from the seller without notice of the purchaser's interest could acquire it free of the purchaser's interest.

**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?**

Promissory notes that constitute bills of exchange under the Bills of Exchange Act (Canada) are assigned by endorsement and physical delivery. Promissory notes that are do not meet the requirements of the Bills of Exchange Act are regarded simply as evidence of the debt, assignments of which may be effected and perfected like any other receivable.

The PPSAs do not apply to transfers of interests in real property (such as mortgages), (although they do apply to assignments of mortgage receivables that do not transfer the real property interest). Transfers of mortgages must be registered on title to the land to be effective against third parties. Registrations are typically not made until enforcement (sale or foreclosure), under powers of attorney delivered on closing. Unregistered beneficial assignments of mortgages can still be recognised as effective sales.

Transfers of marketable debt securities are governed in most provinces by Securities Transfer Acts (STAs). Under the STAs, directly held certificated securities are transferred by delivery of the certificate to the transferee together with an endorsement (on the certificate or on a separate stock transfer/power of attorney). Registration on the books of the issuer of the security is necessary for the security to be enforceable against the issuer. Securities held indirectly with securities intermediaries through the tiered holding system and immobilised in clearing agencies are acquired when the securities intermediary credits the transferee's account with the security, giving rise to a "security entitlement" to the security.

No additional requirements are required in connection with sales of consumer loans.



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The PPSAs do not apply to a transfer of an interest or claim in or under any policy of insurance or annuity. Security over an insurance policy may require compliance with provincial insurance legislation, which for some types of insurance requires the policy owner to execute a collateral assignment and give notice to the insurer, which must be acknowledged. However, under the Civil Code of Québec (Civil Code), insurance policies can be charged by a hypothec. Priority over the insurance policy is established by notice to the insurer and priority is established by the date of registration of the hypothec. Furthermore, the insurer can be required to pay the proceeds of insurance directly to the secured party by notice to the insurer.

**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?**

To effect a full legal assignment entitling the transferee to enforce the receivable against the obligor without joining the assignor, the transferor must give notice of the assignment to the obligor.

Under the PPSAs, notice to the obligor is not required for the security interest constituted by the assignment of a receivable to be effective against creditors of the seller, provided the security interest is perfected by registration of a financing statement. However, the obligor for an assigned receivable is obligated to pay the receivable directly to the assignee/secured party only after receiving notice reasonably identifying the relevant rights. Except for certain consumer receivables, an agreement by the obligor cutting off defences as against an assignee is generally enforceable by a good faith assignee for value without notice. Absent such an agreement, the obligor under an assigned receivable may assert against the assignee any defences against the assignor arising under the underlying contract or a related contract and may set off any debts owing to the obligor payable before the obligor received notice of the assignment. Consent of the obligor is generally not required for the sale to be effective against the obligor, but see discussion under questions 3.3 and 4.6.

Under the Civil Code, as described in question 4.2, if the assignment of receivables does not constitute a universality of claims, the assignment may only be opposable against creditors of the seller if notice is given to the respective obligors.

**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 specific requirements regarding the form of notice given to obligors or how it must be delivered. The notice must be sufficient to reasonably identify the rights being assigned and, if requested by the obligor, further proof must be provided within a reasonable time that the assignment has been made. There is no specific time limit.

**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)?**

A restriction on the assignment of the seller's rights under an agreement giving rise to receivables without the consent of the obligor will generally be interpreted as prohibiting a transfer of the underlying receivables without such consent. A restriction on the transfer or assignment of the underlying agreement without such consent will generally be interpreted the same way, since an assignment of an agreement is usually understood to include an assignment of rights. However, a restriction on assignment that refers only to an agreement's obligations would not be interpreted as prohibiting transfer of receivables.

**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 your jurisdiction? Are there exceptions to this rule (e.g., for contracts between commercial entities)? If your jurisdiction 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?**

Under most PPSAs, terms in a contract that prohibit or restrict the assignment of or granting of a security interest in receivables arising thereunder are unenforceable against third parties. However, these saving provisions only apply to assignments of whole receivables, not to undivided or partial interests. There are no similar saving provisions under the Civil Code. In addition, the seller may still be subject to a claim for breach of contract as the statutory provisions do not affect the enforceability of such restrictions between the seller and the obligor.

The effect on a purported assignment of a contract in breach of a negative covenant prohibiting assignment without the consent of the obligor (either subject to the Civil Code or not covered by the PPSA saving provision) is unclear. However, one view is that such an assignment would be invalid and unenforceable. As a result, such an assignment might not constitute a true sale that would be effective against an insolvency official. Therefore, receivables subject to restrictions on assignment are often excluded as ineligible.



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**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?**

In order to constitute a true sale, among other criteria, the receivables being sold must be sufficiently described so that they can be accurately identified as having been sold. However, the sale document does not need to specifically identify each receivable so long as there is some mechanism for identifying which receivables or interests therein have been sold. In addition, although not a sale requirement, for the sale to be constitute a "universality" under the Civil Code, the receivables must be identified by category or type (including "all" receivables) to be opposable to third parties. While a transfer of all receivables other than certain specified receivables may be sufficient for sale purposes, it may not constitute a "universality" unless the excluded receivables are identified by objective criteria sufficient to be accurately identified by a third party without additional information.

**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?**

Courts generally respect the intent of the parties to effect a legal sale as evidenced by the language used in the relevant documents and other communications even where the economic substance of the transaction may resemble a secured loan. However, the following additional factors will also be taken into account in determining whether a transaction constitutes a true sale:

- Whether the ownership/collection risk passes to the purchaser and recourse to the seller is limited: full recourse to the seller for "collectability" of the receivables is permitted, but not "economic recourse" whereby the seller agrees to pay the purchaser a specified rate of return regardless of whether the receivables are collected.
- Whether the transferred assets can be identified and the purchase price calculated at any time.
- Whether the right to retain surplus collections passes to the purchaser.
- Seller's rights to repurchase the receivables: the seller cannot retain an unlimited right to redeem or repurchase the receivables.
- Whether responsibility for collection of the receivables passes to the purchaser: although servicing and collection of the receivables by the purchaser would support a true sale, it is not determinative, and sellers commonly retain servicing rights.

While the forgoing factors are relevant to determining whether the transaction constitutes a true sale, they will not affect whether the assignment of receivables is perfected under the PPSA.

**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?**

A seller can agree to continuous sales of receivables. However, with respect to sales arising following the seller's insolvency, see questions 6.1, 6.2. 6.3 and 6.5 below.

**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, generally a seller may sell all present and future receivables. The sale should be structured as a present sale of all present and future receivables (or an undivided interest in them) as opposed to a future sale of new receivables. The terms of the sale related to the future receivables must also be sufficiently certain to satisfy requirements for enforceability and true sale. With respect to receivables that arise after the seller's insolvency, see questions 6.1, 6.2. 6.3 and 6.5 below.

**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 transferred receivables (i.e. liens against vehicles) may be assigned to the purchaser along with the related receivables, provided that such security is expressly included in the transferred assets. Perfection of the security interest constituted by an assignment of receivables does not apply to assignments of the related intangible security as such (unless incorporated in chattel paper). A financing change statement may be registered to record the assignment of the underlying security interest to the purchaser. However, such registrations are not mandatory and are usually not done where large numbers of liens are involved.

As noted in question 4.3, the PPSAs do not apply to transfers of real property interests.

Under the Civil Code, the transfer of most leases and conditional sale agreements must be registered:

- If the lien is a lease or conditional sale, reference to the underlying lien can be made in the registration of the assignment of the receivables.
- If the lien is a hypothec, registration is required and a copy of the certified statement of registration must be provided to the account debtors.

If these formalities are not satisfied, the assignment is not perfected against a subsequent assignee who has complied with them. However, the insolvency official is not a subsequent assignee for these purposes.





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**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?**

As noted in question 4.4, an obligor's set-off rights with respect to obligations owing to it by the assignor of a receivable generally terminate when the obligor receives notice of the assignment unless these rights are terms of the underlying contract. The assigned receivable will continue to be subject to the terms of the underlying contract (including contractual set-off) and any defences or claims arising therefrom or a closely connected contract and any other defences or claims unless the obligor has made an enforceable agreement not to assert such defences. The seller may be liable for damages caused by the termination if the contract prohibited such assignment.

## 5 Security Issues

**5.1 Back-up Security. Is it customary in your jurisdiction 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. If the sale is recharacterised as a security interest, the sale document will constitute the security agreement and perfection of the assignment under the PPSA will suffice.

**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 your jurisdiction, and for such security interest to be perfected?**

This is not applicable in Canada.

**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 your jurisdiction to grant and perfect a security interest in purchased receivables governed by the laws of your jurisdiction and the related security?**

In the common law provinces, a purchaser would typically grant security over all its present and after acquired personal property in a general security agreement, which would include receivables. The provider of funding would perfect its security interest by registering a financing statement under the applicable PPSA filing regime, as determined by the PPSA conflict of laws rules.

In Quebec, a hypothec may be granted by a purchaser to secure any obligation, and may create a charge on movable (personal) or immovable (real) property. Registration of the hypothec in the public registry provided for under the Civil Code is required to render the hypothec opposable (enforceable) against third parties.

**5.4 Recognition. If the purchaser grants a security interest in receivables governed by the laws of your jurisdiction, 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 your jurisdiction or must additional steps be taken in your jurisdiction?**

Under the conflict of law provisions of the PPSAs, the validity, perfection and priority of a security interest in receivables is generally governed by law of the jurisdiction where the debtor granting the security interest (in this case, the purchaser) is deemed to be located (see question 4.2 above). Accordingly, if under the laws of the jurisdiction in which the purchaser is located the security interest is valid and perfected, it will be likewise regarded in Canada.

Under the conflicts of laws provisions of the Civil Code, the validity of a hypothec charging receivables is governed by the law of the domicile of the grantor (in this case, the purchaser) at the time of the grant of such hypothec, while perfection is governed by the grantor's current domicile. For a legal person, the domicile corresponds to the head office.

**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?**

Subject to the requirements discussed in question 4.3, there are no additional requirements in connection with taking security over promissory notes, consumer loans or marketable debt securities.

For insurance policies, see question 4.3 above.

As noted in question 4.3, the PPSAs do not apply to transfers of interests in real property. Separate technical provisions in each province apply to taking security over real property.

**5.6 Trusts. Does your jurisdiction 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?**

Trusts validly constituted under their jurisdiction of establishment are generally recognised.

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

Yes, provincial law recognises escrow accounts, subject to the terms of the applicable escrow account agreement.

The PPSAs and the Civil Code permit a lender to take security over deposit accounts. Deposits in bank accounts are treated as receivables owed by or claims against the depository bank. Security over bank accounts is typically granted by a security agreement under the PPSAs and by way of a hypothec under the Civil Code. Security over deposit accounts can be perfected by registering a PPSA financing statement (or its equivalent under the Civil Code) in the province in which the debtor is deemed to be located. In



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addition, the Civil Code permits a secured party to perfect a hypothec in deposit accounts by control. Where the creditor is also the account bank, the creditor obtains control by the account holder consenting to the monetary claims securing performance of its obligations to the creditor. Where the creditor is not the account bank, the creditor obtains control by either: (i) entering into a control agreement with the account bank and the debtor, pursuant to which the account bank agrees to comply with the creditor's instructions, without the additional consent of the debtor; or (ii) becoming the account holder.

Courts would recognise a foreign law grant of security provided that it satisfies the requirements for creation of a security under the PPSA or Civil Code, as applicable.

**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?**

Subject to the terms of the applicable security documents or blocked account agreement, on default by the debtor, the secured party has the right to direct the depository bank to transfer or sweep funds from the bank account to the secured party to satisfy the obligations secured.

**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; however, if the account is subject to a blocked account agreement, rights of access may be limited even prior to enforcement.

## 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 your jurisdiction'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?**

Provided that the receivables were validly and effectively sold to the purchaser, an insolvency stay of proceedings against the seller will not prohibit the purchaser from exercising transfer and ownership rights over collected receivables. To the extent that the receivables have not been collected at the time the stay comes into effect: (i) the enforcement of the purchaser's rights to such payment may be stayed until the insolvency official or the court confirms that the sale is a valid transfer of the receivables; (ii) costs associated with collection of the receivables may be charged against the amounts collected; (iii) the terms of the stay may preclude the purchaser from notifying the relevant obligors of the sale until validity of the sale has been determined; and (iv) where the seller and/or creditors of the seller contest the validity of the sale (or otherwise asserting a claim to those receivables), the purchaser may be required, commence proceedings against the seller or third parties. In addition, if collected receivables become commingled with the other assets of the seller, such that they are not identifiable as property of the purchaser, the purchaser may not be successful in reclaiming its property by way of a trust or proprietary claim made in the insolvency proceeding.

If the purchaser is deemed to only be a secured party rather than an owner of the receivables, then the stay of proceedings would generally prohibit the purchaser from taking any collection and/or enforcement action. The stay typically lasts for the whole of the proceeding. Large company reorganisation proceedings can take, on average, between 6–18 months to complete. Liquidation proceedings have shorter timelines.

**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)?**

An insolvency official has authority to seek an order of the court prohibiting a purchaser's exercise of its rights where there is a credible dispute as to the validity of the sale of receivables or the validity of the purchaser's security over such receivables. The court has jurisdiction to grant any order it deems appropriate including an injunction, stay or order resolving the dispute.

**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 your jurisdiction for (a) transactions between unrelated parties, and (b) transactions between related parties?**

Insolvency officials (and in some cases, creditors) have the power to set aside transactions that confer a preference on the debtor/seller's creditors or that constitute a transfer of property or services for no consideration (or consideration conspicuously less than fair market value). The review period under federal legislation is as follows: (i) preferences – three months (unrelated parties) and 12 months (related parties) from the commencement of the insolvency proceeding; and (ii) transfers at undervalue – 12 months (unrelated parties), one year (related parties) and five years (unrelated parties, where the debtor was insolvent at the time of transfer) from the commencement of the insolvency proceeding. Various provincial statutes also provide remedies for preferences and fraudulent transactions. Provincial look-back periods are typically two to six years.

**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?**

Insolvency legislation contains no express authority for a court to grant a substantive consolidation order (except in limited circumstances not relevant hereto). However, a bankruptcy court has the inherent equitable jurisdiction to substantially consolidate the assets and liabilities of related entities in appropriate circumstances. Canadian law on the point is unsettled and no clear and comprehensive test for the appropriateness of




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substantive consolidation has yet emerged. Orders for substantive consolidation in Canada have been rare. In those cases, courts have considered a number of factors, including: (i) the financial and operational integration of the debtor entities; (ii) the degree to which the separate legal personalities of the debtor entities are respected; (iii) the balancing of economic prejudice to creditors resulting from consolidation *vs.* non-consolidation; (iv) whether consolidation would prevent a harm or confer a benefit on creditors generally; and (v) the administrative efficiencies of dealing with separate *vs.* joint estates. Substantive consolidation is generally considered an extraordinary remedy and will rarely be made over the objections of prejudiced creditors.

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

Insolvency proceedings provide for two general categories of proceeding: reorganisation proceedings; and liquidation proceedings. Reorganisation proceedings are primarily debtor driven processes, where the debtor continues to conduct its business under the supervision of the court and an insolvency official. Liquidation proceedings are primarily creditor driven and are characterised by the replacement of a debtor's management with an insolvency official for the purposes of liquidating the debtor's business. In reorganisation proceedings, a seller/debtor would typically have the authority to continue to perform contracts in the ordinary course, including a receivables purchase agreement for existing and future receivables. Performance under the contract may be stayed if the agreement is characterised by the court as creating a security interest in receivables, rather than a proprietary interest. The seller/debtor may also terminate the purchase agreement (if it is an executory contract), with the consent of the insolvency official or the court. In the event of termination, the purchaser may assert a damage claim in the proceeding. Finally, the seller/debtor may also assign the sales contract (if it is an executory contract) to a third party with the consent of the purchaser or by court order.

In liquidation proceedings, the seller/debtor typically ceases to perform its contracts and the purchaser may treat the contract as terminated. However, if the insolvency official continues to operate the business in order to preserve going-concern value, it may be authorised to assign the sale contract to a third party. In general, the insolvency official may terminate contracts (or cease to perform them) in a liquidation proceeding.

**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?**

Where the purpose of the limited recourse provision is to shield parties from liability in their personal capacity (for example, a trustee or partner), then it is likely that the counter-party to the contract will be prohibited from pursuing an insolvency proceeding against such a party. The effect of such a limited recourse provision will be highly dependent on the wording of the provision.

## 7 Special Rules

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

There is no specific legislative regime governing securitisations and no single regulatory authority has jurisdiction over securitisation transactions. Special legislation governs covered bonds secured by uninsured residential mortgages and issued by financial institutions registered with the Canada Mortgage and Housing Corporation. Various aspects of securitisation transactions may be subject to the common law and a variety of provincial and federal statutes, regulations and regulators, depending on the following:

- type of assets securitised (for example, consumer loans or government receivables);
- transaction parties (for example, federally regulated financial institutions);
- means by which the securities are offered to investors (for example, public offering or private placement); and
- location of the originator and the obligors.

General laws relevant to securitisation include the:

- PPSAs and Civil Code, as applicable;
- Bank Act (Canada) and the Office of the Superintendent of Financial Institutions (OSFI) guidelines;
- provincial securities legislation;
- federal insolvency legislation;
- provincial fraudulent conveyances and preferences legislation;
- provincial consumer protection legislation; and
- Financial Administration Act (Canada).

**7.2 Securitisation Entities. Does your jurisdiction 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?**

No. Historically SPVs have been structured as trusts because it is a flexible organisational form and is not subject to federal or provincial capital taxes. However, provincial capital taxes have largely been eliminated.

No specific statute governs the establishment of trusts. The requirements and attributes of a trust are generally determined under common law. A trust is not a separate legal entity, but is a relationship that arises when a person (the trustee) agrees to hold property for the benefit of other persons (the beneficiaries). The creator of the trust (either by a declaration of trust or a trust agreement) establishes the SPV.

An institutional trustee is generally appointed to carry out the activities of the trust and hold title to the trust property. The beneficiary is usually a charitable or non-taxable institution which does not retain the power to dissolve or wind up the trust. There are no regulatory requirements related to the creation of a trust (except for legislation requiring registration of business names) and there are no directors or shareholders of the trust.



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A trust pays income tax at the highest marginal rate on its income, so cash flows are structured to match expenses (including interest payable to investors, deferred purchase price payable to the originator and trust expenses).

SPVs can also take the form of corporations or limited liability partnerships.

**7.3 Limited-Recourse Clause. Will a court in your jurisdiction 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?**

Yes, if the contract is governed by the laws of a Canadian province. If the agreement is governed by the laws of a foreign jurisdiction, the enforceability of such a limitation on recourse will depend on the laws of that jurisdiction, to the extent recognised and applied by the Canadian court and subject to the considerations in question 2.3.

**7.4 Non-Petition Clause. Will a court in your jurisdiction 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?**

Non-petition clauses have received very limited judicial consideration. Based on general contract law, a court would likely give effect to such provision, subject to any defences to enforceability of the contract (such as duress, mistake, etc.) and provided that the provision is otherwise enforceable under contract law.

There is some older judicial authority for the proposition that a provision that prohibits a creditor from commencing insolvency proceedings are not enforceable as they contravene bankruptcy laws. However, in our view, a court is not likely to follow that line cases.

**7.5 Priority of Payments "Waterfall". Will a court in your jurisdiction 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?**

Yes, subject to any defences to enforceability of the contract and provided that the provision is otherwise enforceable under contract law.

**7.6 Independent Director. Will a court in your jurisdiction 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?**

As fiduciaries, Canadian corporate directors may not fetter their discretion by agreeing in advance not to take certain actions. However, a court will generally give effect to such a provision in the corporation's organisational documents (which would include a unanimous shareholder agreement stripping the directors of their powers). If a party fails to comply with such a provision, it does not affect the validity of the transaction but will merely give rise to a potential claim for breach of contract or a shareholder remedy.

## 8 Regulatory Issues

**8.1 Required Authorisations, etc. Assuming that the purchaser does no other business in your jurisdiction, 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 your jurisdiction? Does the answer to the preceding question change if the purchaser does business with other sellers in your jurisdiction?**

There are no general restrictions on ownership or collection and enforcement of receivables by foreign persons; however, under the Bank Act, a "foreign bank" is generally not permitted to engage in or carry on business in Canada except through a foreign bank subsidiary, an authorised foreign branch or other approved entity. A "foreign bank" is broadly defined and includes any foreign entity that (i) is a bank under the laws of a foreign country in which it carries on business or carries on business in a foreign country which would be considered the business of banking, (ii) provides financial services and uses the word "bank" in its name, (iii) is in the business of lending money and accepting deposit liabilities transferable by cheque or other instrument, (iv) provides financial services and is affiliated with a foreign bank, or (v) controls a foreign bank or a Canadian bank.

However, the Bank Act would not prohibit a foreign bank from providing financing to a Canadian person as long as the nature and extent of its activities in Canada do not amount to engaging in or carrying on business in Canada.

The Bank Act itself does not provide guidance on the factors that OSFI may take into account in determining whether a foreign bank is engaging in or carrying on business in Canada. However, OSFI has cited the following factors as relevant in past:

1. where the elements leading to formation of the agreements take place (i.e. location of negotiation and the decision to enter);
2. location of execution and delivery;
3. where operations are carried out;
4. where services are delivered and paid for;
5. where services are marketed; and
6. the relationship between activities that are carried on inside and outside Canada.

Such a determination is a weighing exercise, with no single factor necessarily tipping the balance. The more indicia pointing to a Canadian nexus, the greater the likelihood of an adverse finding.

In addition, a foreign corporation may be required to obtain an extra-provincial licence in each province in which it is considered to be carrying on business under provincial corporate law. Such determination may vary somewhat in each province however similar factors to those above will be relevant. A corporation which owns or leases real property in, or has an employee or agent that is resident in, such province will generally be considered to be carrying on business in that province.





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**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?**

Subject to question 8.1, generally a seller does not require a licence to continue to enforce and collect receivables so long as the account debtor is not notified of the sale; however, a third party replacement servicer will generally be required to be licensed as a collection agent under applicable provincial legislation to collect debts from an obligor on behalf of another person. Failure to register typically constitutes a provincial offence rendering the offender subject to fines or imprisonment. Amendments to some provincial collection agency legislation are pending that will exempt most securitisation sales from these requirements.

**8.3 Data Protection. Does your jurisdiction 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?**

The Personal Information Protection and Electronic Documents Act (Canada) (PIPEDA) regulates the collection, use and disclosure of personal information in the course of commercial transactions. Such protections generally apply to public and private information about individuals (as opposed to commercial entities). In addition, certain provinces have adopted comprehensive and/or industry-specific privacy legislation, though in contrast the application of provincial legislation has not generally limited to commercial transactions. In those provinces which have adopted privacy legislation substantially similar to PIPEDA, the federal legislation does not apply other than with respect to areas and industries of federal jurisdiction.

**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 your jurisdiction? Briefly, what is required?**

Purchasers will generally be required to comply with provincial and/or federal consumer protection legislation. Federally regulated financial institutions (i.e. banks) will be required to comply with the consumer protection provisions of federal legislation related to financial institutions, including matters related to credit cards and fees. As a result of a recent landmark decision, provincial consumer protection legislation may also apply to federally regulated institutions.

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

No; however, payments may be subject to anti-money laundering and terrorist financing legislation.

## 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 your jurisdiction? 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?**

Most conventional interest payments to arm's length non-residents are not subject to withholding tax under Canadian domestic tax law. Under the Canada – United States Income Tax Convention, conventional interest payments to related non-residents entitled to claim the benefit of the Treaty are exempt from withholding (other Canadian tax treaties generally reduce the withholding rate on such interest from 25% to 10%).

**9.2 Seller Tax Accounting. Does your jurisdiction 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 compute their income for income tax purposes in accordance with Canadian generally accepted accounting principles, subject to provisions of the Income Tax Act (Canada) which permit (or require) differing treatment. Special rules apply to "Financial Institutions" who hold and dispose of "specified debt obligations" (each as defined in the Income Tax Act).

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

Generally, no.

**9.4 Value Added Taxes. Does your jurisdiction 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?**

Sales of financial instruments (such as loans and receivables) are generally exempt from the federal goods and services tax/harmonised sales tax (GST/HST) and provincial sales taxes (PST). Sales of goods and services are generally subject to the GST/HST and, in the province of Québec, PST. In those provinces which have a PST (other than Québec) sales of most tangible goods (and some services) are subject to PST. Collection agent services are generally subject to GST/HST. To minimise such taxes, receivables are often sold on a fully serviced basis, such that such services are not considered to be a separate supply for GST/HST purposes. This technique generally only works if the originator provides the servicing.



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**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?**

Generally, GST/HST and PST are tax liabilities of the purchaser of the goods and services giving rise to the receivables, not the seller. However, the seller will typically have an obligation to collect and remit such taxes on behalf of the relevant tax authorities. For GST/HST purposes, where a receivable includes amounts payable on account of GST/HST in respect of the sale of goods or services giving rise to the receivable, the originator is deemed to have collected, at the time of assignment, the amount of GST/HST not previously paid, and any amounts collected after such time is deemed not to be on account of GST/HST, such that the purchaser should not be liable for the seller's unremitted GST/HST.

**9.6 Doing Business. Assuming that the purchaser conducts no other business in your jurisdiction, 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 your jurisdiction?**

Generally, no.

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