

# The International Comparative Legal Guide to: Securitisation 2007

**A practical insight to cross-border Securitisation Law**



**Published by Global Legal Group with contributions from:**

Accura Advokataktieselskab

Arendt & Medernach

Attorneys at law Borenus & Kempainen Ltd.

Attorneys at law Foigt & partners / Regija Borenus

Babbé

Baker & McKenzie Raisbeck, Lara, Rodríguez & Rueda

Boga & Associates

Branko Maric Law Office

Bugge, Arentz-Hansen & Rasmussen

Camilleri Preziosi

Caspi & Co.

Cervantes, Aguilar-Alvarez y Sainz, S.C.

Cleary Gottlieb Steen & Hamilton LLP

Cornelius, Lane & Mufti

Corrs Chambers Westgarth

Dave & Girish & Co.

Dorda Brugger Jordis

Eiger Capital Limited

Estudio Beccar Varela

Estudio Echecopar

Freshfields Bruckhaus Deringer

Gárdos, Füredi, Mosonyi, Tomori

Headrick Rizik Alvarez & Fernandez

Karanovic & Nikolic

Kim & Chang

Latham & Watkins

Lejins, Torgans & Partners

Lenz & Staehelin

Levy & Salomão Advogados

Liniya Prava

Loyens & Loeff N.V.

Luiga Mody Hääl Borenus

Macchi di Cellere Gangemi

Magister & Partners

Mayer, Brown, Rowe & Maw LLP

Morais Leitão, Galvão Teles, Soares da Silva & Associados

Morrison & Foerster LLP

Mourant du Feu & Jeune

Nishimura & Partners

Odvetniki Selih & partnerji, o.p., d.n.o.

Pachiu & Associates

Patton Moreno & Asvat

Philippi, Yrarrázaval, Pulido & Brunner

Porobija & Porobija

ProI & Asociados

Slaughter and May

Soewito Suhardiman Eddymurthy Kardono

Stikeman Elliott LLP

Tods Murray LLP

Valko & Partners

Wardynski & Partners

# Canada

Mark McElheran



Sterling Dietze



## Stikeman Elliott LLP

### 1 Receivables Contracts

**1.1 Formalities.** In order to create an enforceable debt obligation of the debtor 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 historic relationships?

- (a) This will depend upon the type of contract in question; certain contracts that are consumer contracts or that are subject to sale of goods legislation are required to be in writing and are required to satisfy certain formalities. With respect to other types of contracts, a formal receivable contract may not strictly be necessary but may assist, as an evidentiary matter, in proving the existence and terms of the contract.
- (b) Invoices alone may be sufficient so long as they contain sufficient detail and satisfy any requisite formalities referred to above.
- (c) This may be possible in certain circumstances, although as noted above there may be specific formalities that arise by virtue of the type of contract in question.

**1.2 Consumer Protections.** Do your country’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; or (c) provide other noteworthy rights to consumers with respect to receivables owing by them?

- (a) Yes, there is both federal and provincial legislation that may apply. Subject to certain limited exceptions, Section 347 of the *Criminal Code* of Canada makes it an indictable offence to charge in excess of the “criminal rate” of interest which is presently 60%. Interest is broadly defined to include the aggregate of all interest, fees, charges and expenses. The *Interest Act* (Canada) prohibits charging an increased rate of interest on arrears of principal or interest that is secured by a mortgage on real property.  
  
Certain provinces have legislation that applies to lending transactions where, having regard to the risk and to all the circumstances, the cost of a loan is excessive and the transaction is harsh and unconscionable and permits courts a variety of remedies, including reopening the transaction or reducing the amount payable by the borrower. There is also common law that may impair the enforceability of provisions that provide for interest to be paid at a higher rate after rather than before default.
- (b) Generally no in the Canadian common law jurisdictions, but

- if an action to enforce payment is commenced which results in a judgment, the court would have discretion to award pre-judgment interest calculated at a prescribed rate. Under Quebec law, there may in certain circumstances be a statutory right to interest if the payment of a sum is made late.
- (c) It is difficult to highlight any specific rights as consumer protection matters and legislation fall within provincial jurisdiction and, accordingly, the specific laws vary among jurisdictions.

**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 of receivables?

The *Financial Administration Act* (Canada) (and similar legislation in certain provinces) prohibits the assignment of receivables of certain governmental entities without consent. Notice in the prescribed form and manner must be given to the relevant government or governmental agency in order to ensure that receivables owing by such governmental entities may be validly assigned.

### 2 Choice of Law - Receivables Contracts

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

Canadian courts would apply the principles of private international law in determining the jurisdiction with the most significant connection to the contract and the proper law of the contract. This would entail an assessment and weighing of the factors which connect a contract or transaction with a particular law or jurisdiction. These factors would include the domicile, residence, nationality or place of incorporation of the parties and the place(s) where the contract has been concluded and/or performed.

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

Generally no. Contracting parties are generally free to choose the

governing law of their contract and Canadian courts will as a general matter enforce typical choice of law provisions in contracts. A Canadian court may not uphold the parties' choice of law if the choice is not *bona fide* and legal. So long as there is some connection with the jurisdiction selected or there is a *bona fide* commercial reason for the selection, the choice of law would likely be *bona fide* and legal.

Once the court determines that the choice is *bona fide* and legal, a Canadian court will apply the parties' chosen law to govern all contract law aspects of the receivable contract. The court (i) will not take judicial notice of the provisions of the foreign law and will only apply these provisions to the extent that they are proven by expert testimony; (ii) will apply provincial procedural laws and will not apply foreign procedural laws; (iii) will apply provincial laws that have overriding effect (namely laws that are not contract laws, such as personal property security laws); (iv) will not enforce a foreign law against public policy of the province (or, in Quebec, rules of public order as understood in international relations); and (v) will not apply, directly or indirectly, any foreign revenue, penal, expropriation or certain other public laws. Under Quebec law, if there is no foreign element the contract will continue to be subject to mandatory provisions of the law applicable if none had been chosen. For consumers as debtors, additional provisions may also apply.

It should be noted that contract and property law matters are matters of provincial jurisdiction. Nine of Canada's ten provinces are common law jurisdictions and the laws applicable in these provinces are substantially similar in many respects. The Province of Quebec is a civil law jurisdiction and the laws applicable in Quebec may differ in many respects from the laws applicable in the common law provinces.

**2.3 Freedom to Choose Other Law.** If the seller and the debtors are resident in your country, and the transactions giving rise to the receivables and the payment of the receivables take place in your country, can the seller and the debtor choose a different country's law to govern the receivables contract and the receivables?

Yes insofar as contractual matters are concerned so long as there is a *bona fide* commercial reason for the choice. Refer to question 2.2 above.

**2.4 Seller Resident.** If the seller is resident in your country, and the seller and the debtor choose the law of your country to govern their receivables contract, will a court in your country give effect to their choice of law?

Yes insofar as contractual matters are concerned. Refer to question 2.2 above.

**2.5 Debtor Resident.** If the debtor is resident in your country, and the seller and the debtor choose the law of your country to govern their receivables contract, will a court in your country give effect to their choice of law?

Yes insofar as contractual matters are concerned. Refer to question 2.2 above.

### 3 Choice of Law - Receivables Purchase Agreement

**3.1 Freedom to Choose Other Law.** If your country's law governs the receivables, and the seller sells the receivables to a purchaser in another country, and the seller and the purchaser choose the law of the purchaser's country or a third country to govern their sale agreement, will a court in your country give effect to their choice of law?

Yes insofar as contractual matters are concerned. Refer to question 2.2 above.

**3.2 Other Advantages.** Conversely, if another country's law governs the receivables, and the seller is resident in your country, are there circumstances where it would be beneficial to choose the law of your country to govern the sale agreement?

Although it is difficult to comment, it is unlikely that it would be beneficial to choose Canadian law to govern the sale agreement. As noted above, this choice would only be effective with respect to matters of contract law and would not determine what substantive laws would apply in the particular circumstances.

**3.3 Effectiveness.** In either of the cases described in questions 3.1 or 3.2, will your country's laws apply to determine (i) whether the sale of receivables is effective as between the seller and the purchaser; (ii) whether the sale is perfected; and/or (iii) whether the sale is effective and enforceable against the debtors?

(i) Whether the sale is effective as between the seller and the purchaser (in the sense that ownership of the receivables has been transferred from the seller to the purchaser) and against the debtors would likely be a matter for the proper law of the debt, which in most cases is the law governing the receivable. Accordingly, if Canadian law governs the receivables, Canadian law would govern the property law requirements for an effective sale.

Under Quebec law, the assignability of a receivable and relations between the assignee and the debtor are governed by the law governing relations between the debtor and the assignor. In most cases, the law chosen by the parties will determine whether the sale is effective as between the seller and the purchaser.

(ii) Under applicable personal property security legislation in Canadian common law jurisdictions, whether the sale is perfected would be determined by the law of the jurisdiction where the seller is located at the time that the security interest created by virtue of the sale attaches. Accordingly, if the seller is located in Canada when the receivable is transferred, applicable provincial law would determine whether the sale is perfected.

In Quebec, although there is no clear rule, it is generally held that the law of the jurisdiction where the receivables are payable determines whether a true sale is perfected. In the absence of contractual provisions between the seller and the debtor specifically stating where the receivable is payable, it is likely that the receivable is payable at the location of the debtor.

(iii) Refer to (i) above.

## 4 Asset Sales

### 4.1 Sale Methods Generally. In your country what is (are) the customary method(s) for a seller to sell accounts receivables to a purchaser?

Typically an agreement of purchase and sale is entered into that identifies and conveys the receivables and related security from the seller to the purchaser.

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

In order for the sale to be perfected in Canadian common law jurisdictions, a financing statement in proper form must be registered under the applicable personal property security registration system in the jurisdiction in which the seller is located.

A distinction under Quebec law must be made between a security interest and an absolute assignment. In order for an absolute assignment of receivables to be perfected, if Quebec law applies to the matter, it is possible, if the receivables assigned constitute a universality (roughly equivalent to a category of receivables), to register a registration form in the central Quebec registry. This registration may only occur once the agreement has been executed. If the receivables do not constitute a universality, the only way to perfect the assignment is to notify each debtor. The sale must be perfected in Quebec if the receivables are payable in Quebec.

### 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?

Except where the seller's interest in the real property is not conveyed, the sale of mortgage loans is generally not governed by personal property security legislation. Registration of the transfer of the mortgagee's legal interest in the mortgage loans may be made in the applicable land registry offices at the outset of the transaction, or powers of attorney may be obtained from the seller which would permit the purchaser upon enforcement to register transfers of the mortgagee's legal title either to itself or to a third party purchaser or custodian.

The requirements that apply to promissory notes and marketable debt securities raise a number of complex issues that require situational-specific analysis and advice. Methods of transfer for securities depend on the type of security. These issues rarely arise in practice in the context of a conventional Canadian securitisation transaction. It is worth noting that some provinces (including Ontario) have implemented (or are in the process of implementing) securities transfer legislation that, among other things, deals comprehensively with the transfer and holding of securities and interests in securities; in essence this legislation adopts Article 8 of the U.S. Uniform Commercial Code.

The transfer of promissory notes, while not expressly excluded from the application of provincial personal property security legislation, is governed by the *Bills of Exchange Act* (Canada). The *Personal Property Security Act* (Ontario) (the "Ontario PPSA") expressly provides that the rights of a holder in due course of a bill, note or cheque are to be determined without regard to the Ontario

PPSA. While not expressly provided for in other provincial personal property security legislation, this would also likely be the case on constitutional grounds.

Promissory notes that trade publicly (bankers' acceptances for example) can be deposited in the CDS Clearing and Depository Services, and transfer of such notes is governed by the procedures of the *Depository Bills and Notes Act* (Canada).

Under Quebec law, a mortgage loan would most likely correspond to a loan secured by a hypothec on immovable property. If the sale is in respect of a universality of mortgage loans, then the registration at the central Quebec registry will be sufficient to perfect the sale of the loan portion. As a general rule, the hypothec, being an accessory, will follow such assignment. In order for the assignment of an immovable hypothec to be enforceable as against a subsequent transferee, it must be registered in the relevant land register. A subsequent transferee does not include a trustee in bankruptcy. For lease obligations and receivables arising out of certain instalment sale contracts, additional registrations may also be necessary.

Although consumer protection laws impose various requirements on consumer loans, there are no additional or different requirements that apply insofar as sale and perfection are concerned.

### 4.4 Debtor Notification. Must the seller or the purchaser notify debtors of the sale of receivables in order for the sale to be an effective sale against the debtors?

Yes, notification is required although, subject to the terms of the receivable contract, this need not be done at the time of sale. It should be noted that notice of the assignment will not preclude the debtor from relying on equitable set-off (to the extent applicable) or contractual rights of set-off even if they arise or mature after notice or on legal set-offs arising before notice.

If the assignment is of receivables that do not constitute a universality and Quebec law applies to the question, it will be necessary to notify each debtor in order for the assignment to be perfected.

### 4.5 Debtor Consent. Must the seller or the purchaser obtain the debtors' consent to the sale of receivables in order for the sale to be an effective sale against the debtors? Does the answer to this question vary if (a) the receivables contract does not prohibit assignment but does not expressly permit assignment; or (b) the receivables contract expressly prohibits assignment?

Subject to the applicability of the *Financial Administration Act* (Canada) (or similar legislation in certain provinces) which prohibits the assignment of receivables of certain governmental entities without consent, consent is not required unless the receivable contract or applicable law prohibits assignment without consent.

- (a) No, subject to the applicability of the *Financial Administration Act* (Canada) (or similar legislation in certain provinces) as noted above, the absence of a prohibition on assignment is generally interpreted (subject to the overall construction and interpretation of the contract as a whole) to mean that the receivable may be sold without the debtor's consent.
- (b) In Ontario, the predominant view at present is that such a clause prevents the assignee from acquiring any property rights in the contract. The personal property security legislation of the common law provinces (other than Ontario) provides that a prohibition on the assignment of an account

is binding on the assignor, but only to the extent of making the assignor liable in damages for breach of contract, and is unenforceable against third parties; it is worth noting that this will also become the law in Ontario due to amendments that have been proclaimed into force effective August 1, 2007. This is also likely the case in Quebec. A potential cause of action, depending upon the circumstances, may exist against the buyer for the tort of inducing a breach of contract.

---

**4.6 Liability to Debtor.** If the seller sells receivables to the purchaser even though the receivables contract expressly prohibits assignment, will the seller be liable to the debtor for breach of contract?

---

Yes as noted in question 4.5(b).

---

**4.7 Identification.** Must the sale document specifically identify each of the receivables to be sold? If so, what specific information is required (e.g., debtor name, invoice number, invoice date, payment date, etc.)? Do the receivables being sold have to share objective characteristics?

---

No, the sale document need not specifically identify each of the receivables to be sold but it must contain a description of the receivables sufficient to enable them to be identified. This may be achieved by selling all receivables of the seller, all of a described class or specifically identified receivables. The receivables do not have to share objective characteristics, although in Quebec the presence or absence of any shared objective characteristics would likely impact the analysis of whether the receivables assigned constitute a universality. As discussed in question 4.4 above, this would impact the manner in which the sale may be perfected in Quebec.

---

**4.8 Economic Effects on Sale.** 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; and (c) control of collections of receivables without jeopardising perfection?

---

Economic characteristics do not impact or impair the ability to perfect a sale. However, they may cause an issue in regards to whether a sale is a true sale.

Canadian courts will generally look to the substance of a transaction over its form. Notwithstanding this, the courts will generally respect the characterisation chosen by the parties so long as the terms and concepts used by the parties are predominantly consistent with the chosen characterisation.

In the only Canadian authority directly on point (*Metropolitan Toronto Police Widows and Orphans Fund et al v. Telus Communications Inc.*) (Ontario Superior Court of Justice, overturned on appeal by the Ontario Court of Appeal), the lower court reviewed the factors to be considered in determining whether a securitisation transaction is a true sale or a secured loan that would negate the clear wording of the agreement and the clear intention of the parties that the transaction be a true sale of receivables. The court considered the following factors: (i) the intention of the parties, which can be ascertained not only from a review of the wording of the contract but also by examining how the relationship transpired and the conduct of the parties, i.e. whether their actions and communications were consistent with a sale; (ii) the transfer of ownership risk and recourse to the purchaser; (iii) the right to any surplus; (iv) certainty of the

purchase price; (v) the ability to identify the assets sold; (vi) the appointment of the seller as the servicer of the assets sold; and (vii) whether the seller retained a right of redemption with respect to the assets sold (which the court described as the “ultimate test” to be applied to determine the characterisation of the transaction). Although this decision was overturned on appeal, the Ontario Court of Appeal affirmed the lower court’s analysis of the factors to consider in determining whether a sale constitutes a true sale.

There is no bright line test that would determine the extent to which the seller may retain credit risk in relation to the receivables that have been sold. In the *Telus* case, the court distinguished between recourse as to collectibility and economic recourse which guarantees a return on an investment regardless of the quality of the assets sold. In commenting that the recourse available to the purchaser was not in all events a full recourse with respect to collectibility and was not an economic recourse in the sense of guaranteeing the repayment of the purchase price and a calculated yield thereon, the court found that the recourse available to the purchaser in the circumstances of the particular case did not preclude a determination that the transaction was a sale.

The appointment of the seller as the servicer of the receivables is generally not considered to impair the true sale analysis (which the court confirmed in the *Telus* case). The manner in which interest rate risk is retained would need to be assessed on a case-by-case basis.

---

**4.9 Continuous Sales of Receivables.** Can the seller agree in an enforceable manner (at least prior to its insolvency) to continuous sales of receivables?

---

Yes. However, receivables generated after commencement of insolvency proceedings may not be subject to the sale based on the theory that they are receivables of the insolvency official, not the seller from that point on. Also, court orders made in debtor in possession type proceedings may alter these contractual rights with respect to post-proceedings receivables.

Under Quebec law, a registration may be required for each “sale” of a universality. If not, account debtors may need to be notified.

---

**4.10 Future Receivables.** Can the seller commit in an enforceable manner (both prior to and after its insolvency) to sell receivables to the purchaser that come into existence after the date of the sale contract (as in a “future flow” securitisation)?

---

Yes insofar as the period prior to insolvency is concerned. Refer also to question 4.9.

---

**4.11 Related Security.** What additional formalities must be fulfilled for the concurrent transfer of related security to be enforceable? If not all related security can be enforceably transferred, what methods are customarily adopted to provide the purchaser the benefits of such related security?

---

For many types of security, assuming that there are no contractual prohibitions applicable to the transfer, nothing formal will be required apart from an agreement conveying the seller’s interest in the related security. A transfer of certain security (for example, security in respect of mortgage loans which is registered in land registry offices) may need to be effected in order to enforce the benefits of such security and a delay in doing so may impair the priority of the purchaser in respect of such security. There will also be specific requirements to comply with, to the extent that the

related security includes policies of insurance.

Under Quebec law, additional registrations may be necessary in respect of leases and instalment sales contracts.

## 5 Security Interests

**5.1 Back-up Security.** Is it customary in your country to take a “back-up” security interest over the seller’s ownership interest in the receivables and the related security, in the event that the sale is deemed by a court not to have been perfected?

No. A court could, irrespective of whether it has been perfected, find that a transfer of receivables is not a true sale and recharacterise the transfer as a grant of a security interest. However, under applicable personal property security legislation in the Canadian common law jurisdictions, a sale of receivables is deemed to be a security interest and therefore the same registrations would be effected regardless of whether a transfer is an absolute assignment or an assignment intended as security.

Under Quebec law, the likelihood of recharacterisation is low. If the transaction is recharacterised, the sale would likely not constitute a movable hypothec without delivery. See questions 5.2 and 5.3.

**5.2 Seller Security.** If so, what are the formalities for the seller granting a security interest in receivables and related security under the laws of your country, and for such security interest to be perfected?

Not applicable in common law jurisdictions. Under Quebec law, appropriate charging language and charging amount in Canadian dollars would need to be included in the documentation. A registration would also be necessary. See question 5.3.

**5.3 Purchaser Security.** What are the formalities for the purchaser granting a security interest in receivables and related security under the laws of your country, and for such security interest to be perfected?

For provinces other than the Province of Quebec, the test is a substantive one; that is, whether in substance a security interest has been created. Simple language expressing the purchaser’s intention to grant a security interest in specified property would be sufficient. However the absence of an express grant of a security interest may not necessarily be determinative since the test is a substantive one. For example, if a court were to find that what was in form a sale was in substance a security interest, the absence of an express grant of a security interest would not prevent the “secured party” from treating the agreement as a security agreement.

In order for the security interest to be perfected, a registration must be made in the relevant provincial personal property security registry. This registration may be made either before or after the grant of security interest.

For the Province of Quebec, a more formalistic approach is required. If Quebec internal law applies to the validity of a security interest, in order for a non-possessory security interest to be granted, it must be in writing, the grantor must specifically hypothecate and there must be a charging provision in Canadian dollars, and generally there is an annual interest rate stated to apply. Additionally, the collateral must be appropriately described in the instrument. For purposes of a non-possessory security interest on general intangibles, other than a title in bearer form, Quebec law

will look to the internal law of the domicile of the grantor to determine validity and perfection. Under Quebec law, the debtor and the guarantor of a debtor must also be notified in order for a sale of receivables to be perfected as against them.

**5.4 Recognition.** If the purchaser grants a security interest in the receivables under the laws of the purchaser’s country or a third country, and that security interest is valid and perfected under the laws of that other country, will it be treated as valid and perfected in your country?

Yes if that other country is the place where the purchaser is located and no if it is not. As a general matter, where the purchaser is assigning or granting security in receivables, applicable provincial law will look to the jurisdiction where the purchaser is “located” at the time that the security interest attaches in order to determine the validity, perfection and effect of perfection or non-perfection of the security interest. Under applicable personal property security legislation, the purchaser would be located at the purchaser’s place of business if there is one and at the purchaser’s chief executive office if there is more than one place of business.

Location for purposes of Quebec law is where the grantor is domiciled at the relevant time. Domicile for a corporation is generally where its registered office is located. The law of the location of the grantor only applies if a security interest is granted and not for an absolute assignment. See question 1.3 above.

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

Refer to question 4.3 above. As noted above, Canadian law in regards to the transfer and holding of securities and interests in securities is in a state of transition. Generally, a financing statement may be filed for security interests in securities although greater rights may be obtained (to the extent applicable in the relevant jurisdiction) where the securities are delivered to the secured creditor or where the secured creditor obtains control of the securities. As the law in Canada is not uniform, perfection issues in regards to securities should be considered with counsel on a security-by-security basis.

Generally, if a Quebec hypothec charges loans that are secured by a hypothec on movable property, it is required that a registration be made in the central Quebec registry. For a non-possessory security interest under Quebec law in promissory notes or marketable debt securities, other than the formalities of obtaining a valid security and perfecting through registration, there are no additional requirements.

## 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 country’s insolvency laws automatically prohibit the purchaser from collecting, transferring or otherwise exercising ownership rights over the purchased receivables (“automatic stay”? Does the insolvency official have the ability to stay collection and enforcement actions until he determines that the sale is perfected?

Depending upon the insolvency regime that governs, which in turn depends on the type of entity that the seller is and whether the seller is in liquidation or intending to reorganise, there may either be an

automatic stay or a stay may be (and typically is where the seller is granted bankruptcy protection and is intending on reorganising) granted on the *ex parte* application by the insolvent seller. The stay would typically be broad enough so as to stay the purchaser from collecting or exercising its ownership rights with respect to the receivables. The likelihood of an order being granted by a court which lifts the stay in relation to the receivables and the purchaser increases significantly where the assets have been sold in a true sale (as opposed to simply being perfected).

**6.2 Insolvency Official's Powers. If there is no automatic stay, 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)?**

Refer to question 6.1 above. Where a stay is not automatic (for example, where the insolvent seller commences proceedings under the *Companies' Creditors Arrangement Act* (Canada)), the insolvent seller (not an insolvency official) would be the one to apply for a stay of proceedings.

**6.3 Suspect Period. 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?**

There is both federal and provincial legislation that may be relied upon by an insolvency official in order to rescind or reverse fraudulent or preferential transactions, some of which apply during a "suspect" or "preference" period prior to insolvency. The legislation that applies will depend upon the type of entity in question and the jurisdiction in which the entity is located. Under the *Bankruptcy and Insolvency Act* (Canada) which will apply to most sellers, the period begins 90 days prior to the commencement of bankruptcy proceedings. Under certain provincial legislation there are no true "suspect" periods but a rebuttable presumption of a preference may apply within a specified time period. For example, under the *Assignments and Preferences Act* (Ontario), a rebuttable presumption of a preference applies with respect to transactions that have the effect of preferring a creditor where the proceedings to set the transfer aside are commenced within 60 days of the transfer. Proceedings may still be brought outside of this period but the complainant will not benefit from the presumption.

Under Quebec law, a creditor or trustee in bankruptcy may apply for relief under a paulian action. For example, if a debtor renders or seeks to render itself insolvent, or being insolvent grants a preference to another creditor, a declaration may be sought to obtain relief. Generally, this must be brought within one year of the creditor learning of the prejudice, or by the trustee in bankruptcy one year from the date of its appointment.

The facts or circumstances which may give rise to the rescission or reversal of a transaction will depend upon the wording of the particular legislation that applies but would generally include things such as entering into a transaction with the intention of preferring certain creditors, or hindering, delaying or impeding creditors from exercising their remedies or defrauding creditors. Transactions entered into at less than fair market value may also be a consideration in certain circumstances.

**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?**

A distinction needs to be drawn between substantive and procedural consolidation. Substantive consolidation is the consolidation of the assets and liabilities of separate entities in bankruptcy or re-organisation proceedings that results in the creation of a common fund from which the claims of all creditors are administered. This is to be distinguished from procedural consolidation, which is the bringing of a single insolvency proceeding with respect to multiple related insolvent entities and joint administration of these proceedings, but without consolidating the assets and liabilities into a common fund. Procedural consolidation is common. Canadian courts have considered substantive consolidation in relatively few cases and a consistent application of the doctrine has not yet emerged from that case law. The most prevalent analysis in the existing case law is one that considers three factors, namely (i) the nature and extent of the corporate interrelationships; (ii) whether a consolidating order would prevent a harm from occurring or effect a benefit to creditors generally; and (iii) balancing the economic prejudice to them of not consolidating. A properly instructed court would likely consider each of these factors.

**6.5 Effect of Proceedings on Future Receivables. What is the effect of the initiation of insolvency proceedings on (a) sales of receivables that have not yet occurred or (b) on sales of receivables that have not yet come into existence?**

Refer to question 4.9 above.

## 7 Special Rules

**7.1 Securitisation Law. Does your country have laws specifically providing for securitisation transactions? If so, what are the basics?**

No, there are no such laws.

**7.2 Securitisation Entities. Does your country 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 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, there are no laws providing for the establishment of special purpose securitisation vehicles. Special purpose entities are typically common law trusts or corporations established under business corporation laws of general application.

**7.3 Non-Recourse Clause. Will a court in your country give effect to a contractual provision (even if the contract's governing law is the law of another country) limiting the recourse of parties to available funds?**

Provisions of this nature are generally viewed to be enforceable provided that those persons to whom the limitations apply have expressly agreed to such limitations and subject to certain potential exceptions where the entity is purporting to contract out of liability in respect of acts or omissions that may be illegal, fraudulent or

involve wilful misconduct or gross negligence.

**7.4 Non-Petition Clause.** Will a court in your country give effect to a contractual provision (even if the contract'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?

This is not clear as there is no relevant case law, but a provision preventing a party from bringing insolvency proceedings would likely not be enforceable. A provision preventing court proceedings may be if it is in substance a limitation of liability clause. However, a blanket clause preventing access to the courts would not likely be enforceable.

**7.5 Independent Director.** Will a court in your country give effect to a contractual provision (even if the contract'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?

It is unclear whether such a provision would be enforceable; it may not be to the extent that it can be considered to be inconsistent with the legal obligations and fiduciary duties of directors under applicable federal or provincial legislation to act with a view to the best interests of the corporation and not unduly fetter their discretion to do so. This assessment would need to be made by the directors at the time that the particular circumstances exist, taking into account the interests of all relevant stakeholders.

## 8 Regulatory Issues

**8.1 Required Authorisations, etc.** Assuming that the purchaser does no other business in your country, 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 license or its being subject to regulation as a financial institution in your country? Does the answer to the preceding question change if the purchaser does business with other sellers in your country?

If the purchaser is a foreign bank within the meaning of applicable Canadian law, the purchaser would need to be licensed as such if it is considered to be carrying on the business of banking in Canada. The purchaser may need to be extra-provincially registered to do business in a province if it is considered to be carrying on business in the province or to commence a legal action in the province. Assuming that the purchaser does no other business in Canada, its purchase and ownership or its collection and enforcement of receivables would not likely require the purchaser to be licensed as a foreign bank or to be extra-provincially registered (unless and until the purchaser wishes to commence legal action in a Canadian province). In order to avoid becoming subject to regulation in Canada, it would be advisable for the purchaser to limit its connections to Canada by ensuring, as much as possible, that the following occur: (i) that the decision to purchase the receivables evidenced by the relevant sale agreement is made outside Canada; (ii) that all negotiations relating to the purchase of the receivables are either conducted outside Canada or are conducted by telephone communications during which all officers and employees of the purchaser participating in the communications are outside Canada

and all related documentation is prepared and finalised outside Canada; (iii) that the funding for the purchase of receivables occurs outside Canada; and (iv) that the purchaser executes and delivers the documentation relating to the purchase outside Canada.

**8.2 Data Protection.** Does your country have laws restricting the use or dissemination of data about or provided by debtors? If so, do these laws apply only to consumer debtors or also to enterprises?

Yes. The *Personal Information Protection and Electronic Documents Act* (PIPEDA) is federal legislation that governs the collection, use and disclosure of personal information of individuals. Certain provinces have also implemented similar legislation. PIPEDA will apply to all sellers of receivables except in connection with activities occurring solely within a province that has been found to have legislation substantially similar to PIPEDA, in which case the provincial legislation will apply. The privacy legislation only applies to individuals, not to commercial enterprises. Common law confidentiality requirements may apply in the case of commercial enterprises.

**8.3 Consumer Protection.** If the debtors are consumers, will the purchaser (including a bank acting as purchaser) be required to comply with any consumer protection law of your country? Briefly, what is required?

The purchaser, in its dealings with debtors, will be bound by the same consumer protection laws that would apply to the seller in its dealings with debtors. Generally speaking there are consumer protection laws that apply to matters such as the extension of credit and the collection of receivables which may impose initial and ongoing contractual disclosure requirements and may have the effect of requiring disclosure with respect to, and may limit the amount of, credit charges imposed on debtors. Certain laws may impose statutory liabilities upon creditors who fail to comply with their provisions which may affect a purchaser's ability to enforce contracts that constitute consumer finance contracts. Certain laws may also have the effect of subjecting a seller or lender (and its assignees) in a consumer credit transaction to any claims and defences that a debtor could assert against the seller of the goods or services giving rise to the receivable, thereby limiting the ability of the purchaser to collect any amounts owing from the debtor. The assignee may also be bound by the obligations of the assignor to the consumer.

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

No, there are no laws in Canada restricting the exchange of Canadian currency for other currencies or the making of payments in Canadian dollars to persons outside the country.

## 9 Taxation

**9.1 Withholding Taxes.** Will any part of payments on receivables by the debtors to the seller or the purchaser be subject to withholding taxes in your country? 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?

Payments of interest by Canadian-resident debtors to the seller or

the purchaser could be subject to Canadian withholding tax if the seller or the purchaser is a non-resident of Canada. The rate of Canadian withholding tax is 25% on the gross amount of interest paid, but this amount is often reduced to 10% by an applicable Income Tax Convention between Canada and the seller or purchaser's country of residence. Typically, receivables acquired by a purchaser that is not resident in Canada will not bear interest, or if there is stipulated interest on such receivables, such interest is specifically excluded from the purchaser's acquired interest in the receivables. The difference between the amount paid by a non-resident purchaser for the receivables and the amount paid to the purchaser by the debtor (the discount) should not be subject to Canadian non-resident withholding tax.

---

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

---

No, such specific accounting policy is not required in Canada.

---

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

---

No, there are no stamp duties or other documentary taxes on sales of receivables.

---

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

---

The Canadian federal government imposes a value added tax called the goods and services tax ("GST"), which generally applies at the rate of 6% to most goods and services supplied in Canada. This tax is normally fully refundable on a current basis by a taxpayer, except where the taxpayer is engaged in certain exempt supplies. The sale of receivables (which are considered to be "financial instruments") falls within the definition of a "financial service", and as such is generally exempt from GST. Subject to a number of exceptions, fees for administrative services, including administrative services in relation to the payment or receipt of interest, other than solely the making of the payment or the taking of the receipt, are generally subject to GST. If the services are solely for the making of the interest payment or the taking of the interest receipt, these services will generally be exempt from GST.

Nine of Canada's ten provinces (all of the provinces except Alberta) have some form of provincial sales tax. The provinces of Newfoundland, Nova Scotia and New Brunswick have harmonised their sales taxes with the federal GST. Goods and services provided in these provinces will be subject to a 14% (which includes the 6% GST) Harmonized Sales Tax ("HST"). The HST applies in the same manner as the GST, above. The province of Quebec has a 7.5% sales tax ("QST"), which generally mirrors the GST, and applies to the GST included price. One exception is that financial services are generally "zero-rated" (i.e. tax applies at the rate of 0%) rather than exempt. This difference is relevant only with respect to claiming input tax credits (in effect refunds) for QST paid by entities engaged in financial services.

Prince Edward Island, Ontario, Manitoba, Saskatchewan, and British Columbia levy provincial sales tax on the sale of tangible personal property and on the provision of certain taxable services (each of these taxes is individually referred to as "PST"). Sales of receivables and collection agent services will not be subject to any PST.

---

**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 against the purchaser or on the receivables or collections for the unpaid tax?

---

While sellers are generally not required to pay the GST, HST, QST or PST upon the sale of goods or services that give rise to the receivables, sellers are generally required to collect and remit the applicable GST, HST, QST or PST from the debtors. If the seller does not collect and remit the appropriate taxes, then for GST, HST and QST, the taxing authorities will not be able to make claims against the purchaser or on the receivables or collections for the unpaid tax. For PST purposes, the various taxing authorities will only be able to make a claim against the purchaser to the extent that part of the receivable is considered to be "as, or on account of" PST. For example, if a seller sells goods to a third party in Ontario for \$114 (\$100 base price plus \$6 GST plus \$8 PST), does not remit any of the PST to Ontario's Ministry of Finance, and then sells the entire receivable to a purchaser, the Ontario Ministry of Finance could claim that \$8 of the \$114 collected from the third party was an amount collected "as, or on account of" PST, and thus must be remitted by the purchaser to the Ontario Ministry of Finance.

---

**9.6 Doing Business.** Assuming that the purchaser conducts no other business in your country, 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 debtors, make it liable to tax in your country?

---

Refer to question 9.1 above for applicable withholding taxes.

If a non-resident purchaser is considered to be carrying on business in Canada, it will be required to file a Canadian income tax return, and, absent an applicable Income Tax Convention between Canada and the non-resident purchaser's country of residence, will be required to pay Canadian income tax on the amounts earned from carrying on business in Canada. Most income tax conventions between Canada and other countries limit liability to Canadian tax for residents of the other country to income earned from a business carried on through a permanent establishment in Canada. Whether or not the purchaser is carrying on business in Canada, or has a permanent establishment in Canada, is a question of fact and would need to be considered on a case-by-case basis.

Typically, the contractual arrangements governing the purchaser's purchase of the receivables, its appointment of the seller as its servicer and collection agent, or its enforcement of the receivables by the servicer against the debtors are structured such that the purchaser would not be considered to be carrying on business in Canada (or to have a permanent establishment in Canada).

**Mark E. McElheran**

Stikeman Elliott LLP  
5300 Commerce Court West, 199 Bay Street  
Toronto, Ontario  
Canada M5L 1B9

Tel: +1 416 869 5679  
Fax: +1 416 947 0866  
Email: [mmcelheran@stikeman.com](mailto:mmcelheran@stikeman.com)  
URL: [www.stikeman.com](http://www.stikeman.com)

Mark McElheran is a partner in the Toronto office of Stikeman Elliott LLP and a member of its Banking and Structured Finance and Financial Products practice groups. His practice includes corporate and commercial law, with a significant emphasis on public and private securitisation, structured finance, banking, secured financing and derivative products transactions. He represents a broad range of market participants, including domestic and foreign banks, trust companies, investment dealers, issuers, and rating agencies. Mr. McElheran is recognised as a leading practitioner in asset securitisation by *The Canadian Legal Lexpert Directory 2007* and in structured finance and derivatives in the 2006 edition of *The Best Lawyers in Canada*.

**Sterling H. Dietze**

Stikeman Elliott LLP  
1155 René-Lévesque Blvd. West, 40th Floor  
Montréal, Quebec  
Canada H3B 3V2

Tel: +1 514 397 3076  
Fax: +1 514 397 3576  
Email: [sdietze@stikeman.com](mailto:sdietze@stikeman.com)  
URL: [www.stikeman.com](http://www.stikeman.com)

Sterling Dietze is a partner in the Montréal office whose practice covers aspects of institutional financing and banking, with extensive experience in international transactions. Mr Dietze has acted for borrowers and lenders in transactions including gold loans, asset-based lending, securitisations, syndicated loans and participation agreements, international financial transactions, project finance, aircraft financing, derivative products and credit support documents. He has advised foreign financial institutions on the regulatory environment in Canada and the Province of Quebec, and was special international counsel to a presidential commission in Haiti on the reform of secured transaction laws. Mr Dietz is recognised by Lexpert as a leading practitioner in the banking (including financial institutions regulatory law) and asset securitisation sectors. Also included in the 2007 *Guide to the Leading 500 Lawyers in Canada* and the 2006 *Best Lawyers in Canada*. A member of the Inter-American Bar Association. He is fluent in English, French and Spanish. Quebec Bar (1991) and Ontario Bar (1996).

**STIKEMAN ELLIOTT**

STIKEMAN ELLIOTT LLP

A firm of 440 lawyers, Stikeman Elliott LLP is recognised internationally for sophisticated practice in all areas of business law, including corporate / commercial, M&A, tax, corporate finance and securities, banking, insolvency and restructuring, competition, real estate, intellectual property and litigation. With offices in Canada's major business centres including Montreal and Toronto, Stikeman Elliott LLP is a leader in both common law and Quebec civil law and offers its full range of services in both English and French. The firm's international practice, established in London in 1969, has since grown to include New York and Sydney. Stikeman Elliott is recognised as one of Canada's best business law firms in national and international directories including the 2006 edition of IFLR 1000 - The Guide to the World's Leading Law Firms which ranks the firm as "tier one" in the areas of bank lending, capital markets (including securitisation) and M&A.

Widely considered a leader in Canada's securitisation and derivative products, Stikeman Elliott LLP's Structured Finance and Financial Products Group has assisted Canadian and international clients in developing, structuring and implementing a wide variety of structured finance and financial products, transactions and vehicles for nearly 20 years. In *The Canadian Legal Lexpert Directory 2006*, more Stikeman Elliott practitioners are recognised in the area of asset securitisation than any other firm. Also, of six lawyers listed in derivatives in the 2006 edition of *The Best Lawyers in Canada*, five are members of Stikeman Elliott LLP.