Securitisation Comparative Guide

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1.Legal and regulatory framework

1. 1. Which laws typically govern securitisations in your jurisdiction?

Canada
Miller Thomson LLP

Generally speaking, by virtue of the constitutional division of power and authority to the federal government and the provinces, securitisations in Canada are governed by a collection of provincial and federal regulations and legislation, including the following:

- provincial and territorial securities regulatory legislation and the regulations promulgated thereunder;
- for every province and territory, other than Quebec, each such province's respective personal property security legislation (ie, the Personal Property Security Acts), which govern the perfection and protection of transactions intending an assignment of receivables and the granting of security interests in personal property;
- for Quebec, the Civil Code of Quebec, which governs the perfection and protection of transactions intending assignment of receivables and the granting of security interests (ie, hypothecs) in personal property;
- federal banking legislation, including the Bank Act (Canada) and related guidelines, which govern federally regulated financial institutions; and
- federal bankruptcy and insolvency legislation, including:
    - the Bankruptcy and Insolvency Act (Canada);
    - the Companies' Creditors Arrangement Act (Canada); and
    - the Winding-Up and Restructuring Act (Canada).
- provincial and Territorial laws relating to fraudulent conveyances and preferences.

1. 2. Which bodies are responsible for regulating securitisations in your jurisdiction? What powers do they have?

Canada
Miller Thomson LLP

As outlined in question 1.1, due to the fact that securitisation transactions in Canada are subject to various legislative and regulatory regimes, there are a number of regulatory bodies that may assume the role of regulator in a specific securitisation transaction, including the following:

- the respective securities commissions in each province and territory of Canada (ie, the Ontario Securities Commission, the Alberta Securities Commission and the British Columbia Securities Commission, and each such other applicable securities regulatory authority.). The provincial and territorial securities commissions regulate the issuance of securities and the rights and responsibilities of issuers and investors in Canada in respect of such issuances; and
- the Office of the Superintendent of Financial Institutions, which regulates banking and other federally regulated financial institutions governed by the Bank Act (Canada). OSFI regulates the activities of certain financial institutions in Canada, including in respect of their financing and investment activities.

1. 3. What is the regulators' general approach in regulating securitisations?

Canada
Miller Thomson LLP

We refer to securities regulatory and banking authorities in our response to this question, as these are the principal regulatory authorities for purposes of securitisation in Canada. Depending on the originator, the securitisation funder and the assets in question, other regulatory bodies could play a role in the securitisation transaction in question.

Specifically, as pertains to securities regulation, the respective securities regulators of the various provinces and territories in Canada may take a different approach to securitisation transactions.

Generally, asset-backed securities (ABS), when distributed privately or 'over the counter', are considered to be 'exempt market' securities. As a result, they are subject to the various rules and regulations surrounding exempt market distributions, including the relevant provisions of the provincial/territorial securities acts and those outlined in National Instrument 45-106 – Prospectus Exemptions. Public offerings of ABS, on the other hand, are generally subject to the prospectus requirements of applicable provincial securities legislation, which prescribe specific disclosure requirements and mandate the full, plain and true disclosure of all material facts. In addition, issuers of ABS that are offered publicly by way of prospectus will be subject to continuous disclosure requirements imposed by the Canadian Securities Administrators under National Instrument 51-102 – Continuous Disclosure Obligations.

Insofar as banks and other federally regulated financial institutions are active participants in securitisation transactions in Canada, OSFI plays an important role in the securitisation market. OSFI is charged with the supervision of federally regulated financial institutions and, among other considerations, reviews the prudent and responsible allocation of bank capital for the benefit of a bank's stakeholders.

1. 4. What role, if any, does the central bank play in the securitisation market in your jurisdiction?

Canada
Miller Thomson LLP

The central bank in Canada is referred to as the Bank of Canada. The primary role that the Bank of Canada plays is to develop and implement monetary policy. The Bank of Canada routinely purchases securitised products to provide liquidity to the system. Over the years, the Bank of Canada has developed various programmes that involve purchasing securities issued by banks and other federally regulated financial institutions, including those that are backed by securitised receivables originated by such institutions.

While not an instrument of the Bank of Canada, it is customary to also refer to the activities of the Canada Mortgage and Housing Corporation (CMHC), an instrumentality of the federal government, when contemplating activities in support of the securitisation market sponsored or administered by or on behalf of Canada's federal government. Through the CMHC, the Canadian federal government supports the securitisation market by providing mortgage insurance for eligible mortgages, which backstops specified mortgage-backed securities (MBS). One such example is the ability of financial institutions to issue MBS backed by pools of residential mortgages insured under the National Housing Act (NHA). NHA MBS investors are not subject to payment risk or the underlying mortgage credit risk, owing to the CMHC's timely payment guarantee of interest and principal, as well as the insurance on the underlying mortgages.

2.Market and motivations

2. 1. How sophisticated is the securitisation market in your jurisdiction and how has it evolved thus far?

Canada
Miller Thomson LLP

Canada has a sophisticated and robust securitisation market, although its marketplace remains comparatively small in comparison to the securitisation markets of the United States and Europe. Canada's securitisation market was significantly affected by the financial crisis of 2007-2008, which reduced its size and caused a decline in an active investor base. Following the financial crisis, the Bank of Canada:

- introduced transparency requirements and minimum quality standards for asset-backed commercial paper (ABCP) accepted as collateral in its liquidity facilities;
- increased transparency on the part of bank sponsors; and
- enhanced transparency and disclosure measures for both ABCP and term asset-backed securities introduced by credit rating agencies.

2. 2. In which industry sectors, if any, is securitisation most common in your jurisdiction? What major securitisations have been effected thus far?

Canada
Miller Thomson LLP

As of January 2023, as reported by DBRS Morningstar, the Canadian securitisation market (excluding private placements) was dominated by credit card and auto-related transactions, which accounted for 38.6% and 21.25% of the total market, respectively. In addition to the foregoing, residential mortgages, home equity lines of credit and commercial mortgages accounted for 16.3%, 6.3%, and 4.7%, respectively. As a result, one can conclude that credit cards, automobiles and related assets and mortgages and related assets are the most commonly securitised assets in Canada.

2. 3. What are the benefits of securitisation, for both originators and investors?

Canada

Miller Thomson LLP

One of the main benefits offered by securitisation is that it allows for the originators of the securitised assets to access diverse pools of capital (which is often much needed) at competitive all-in funding costs. In addition, securitisation offers investors the opportunity to diversify their portfolios and purchase financial products and instruments that are generally unavailable to most investors, thus providing increased liquidity to the markets. Investors and other funding parties are attracted to securitisation because of some of the structuring enhancements when compared to traditional debt or credit products.

2. 4. What are the risks of securitisation, for both originators and investors?

Canada
Miller Thomson LLP

Among the main risk associated with securitisation is the risk of default on the obligations issued by the originator of the securitised assets or the special purpose vehicle created to implement the securitisation transaction. The investors may not be paid in full for amounts owing to them when due if:

- the underlying obligors of the securitised assets do not promptly remit payment for their obligations when due;
- the servicer of the securitised assets does not perform its obligations; or
- the enhancement features of the securitisation facility are determined to be insufficient.

In addition, often there may be a general lack of transparency and/or understanding regarding the assets underlying a specific class of securities, which may lead investors to purchase securities without a full understanding of the inherent risks involved.

2. 5. Is there a developed covered bond market in your jurisdiction and how does it compare and compete with securitisation as means of disintermediation and recycling bank capital?

Canada
Miller Thomson LLP

Canada has a developed covered bond market, with the 'Big Six; Canadian banks (Royal Bank of Canada, Canadian Imperial Bank of Commerce, The Toronto-Dominion, The Bank of Nova Scotia, Bank of Montreal and National Bank of Canada) having approximately C$206.97 billion in covered bonds outstanding at the end of 2022, and covered bond issuance continuing to increase year on year from 2021 to 2022. In 2022, Canadian covered bond issuances were oversubscribed due to a flight to quality given Canada's high debt ratings, highly rated issuing banks and strong financial regulatory and oversight regime, including the Canada Mortgage and Housing Corporation's active oversight of covered bond programmes.

Historical losses and delinquencies in Canada's covered bond market remain low, at less than 0.10% and 0.50% respectively. Both delinquencies and defaults are much lower than US prime borrower loan performance, which averaged 30-plus day delinquencies of 0.63% as of May 2022. As opposed to other jurisdictions, Canadian borrowers typically have all their accounts with a single bank, affording banks better insight into a borrower's financial condition and allowing them to proactively offer assistance prior to the borrower becoming materially delinquent. In addition, most Canadian provinces also allow for recourse to the borrower in case of default on a loan; and as such, there is an incentive for borrowers to work with the servicer to resolve any loan delinquencies.

2. 6. To what extent does the government intervene as a state actor in securitisation (eg, by guaranteeing certain securitised assets, providing credit enhancement to impact transactions or sponsoring public bodies to act as originator of or investor in asset-backed securities issues)?

Canada
Miller Thomson LLP

Aside from its involvement in insuring mortgages backed by the National Housing Act (see question 1.4), the federal government does not actively intervene in the securitisation market on a regular basis and is not an active market participant in ordinary circumstances. The federal government has encouraged the issuance of securitisation products and the purchase of those products periodically through various programmes designed to encourage the enhanced liquidity of the securitisation market.

Provincial governments, through governmentally held crown corporations, are active participants in the securitisation market. As of 31 March 2023, Ontario – Canada's most populous province – had issued C$420.5 billion worth of debt to the public as well as institutional investors; and it continues to rank among the largest issuers of debt of any subnational jurisdiction in the world.

3.Structures

3. 1. What securitisation structures are most commonly used in your jurisdiction?

Canada
Miller Thomson LLP

The most common securitisation structure involves a transaction intended as a sale whereby the originator of certain receivables sells a pool of receivables to a bankruptcy-remote special purpose vehicle (SPV) through a receivables purchase agreement or similar agreement. The SPV can issue notes and/or asset-backed securities (ABS) to third-party investors, the proceeds of which are used to make the closing payment to the originator; the balance of the purchase price (if any) may be paid through surplus collections. For certain transactions, undivided co-ownership interests may also be issued to investors. Other securitisation structures are used in Canada to address specific circumstances.

Alternatively, if the transaction is not marketed to third-party investors through the issuance of notes or similar instruments, an SPV can issue notes to, or enter into a credit facility with, a bank-sponsored or captive originator asset-backed commercial paper (ABCP) conduit. Third-party investors that purchase such ABCP are collateralised by the portfolio of assets and the various transactions that have been consummated with or acquired by the conduit. To offset any timing mismatches between the rollover of ABCP and collections, the investors may get the benefit of programme-level liquidity support from the conduit sponsor and other credit enhancement features.

With respect to servicing the underlying assets in question, it is common for the originator to sell its assets on a fully serviced basis and it is generally engaged to be the initial servicer of the portfolio. However, the structure may also engage back-up servicers that participate in varying capacities and which are ready to take over if the originator (as the initial servicer) is unable to perform its duties.

3. 2. What is the split between 'term' and asset-backed commercial paper transactions?

Canada
Miller Thomson LLP

According to market data provided by DBRS Morningstar, current as of January 2023, the total amount outstanding in the Canadian securitisation market was C$99.8 billion. Of that total, ABS comprised 47.6%, while ABCP comprised 42.9%. The remaining 9.5% is made up of private placement transactions.

3. 3. What are the advantages and disadvantages of these different types of structures?

Canada
Miller Thomson LLP

Issuers that have seasonality to their receivables may prefer revolving ABCP structures because such structures can provide them with short-term funding that can be increased when needed or reduced during the low season. Additionally, an issuer using a bank-sponsored ABCP conduit may have access to favourable interest rates when compared to its own commercial paper programme. For the securitisation of discrete asset pools, ABS transactions may be preferred by the issuer. Furthermore, the transactions under a bank-sponsored ABCP programme are usually kept anonymous to the final investor; therefore, an ABS programme provides exposure to third-party investors for issuers that want to increase their marketability.

3. 4. What other factors should originators consider when deciding on a structure?

Canada
Miller Thomson LLP

The operating jurisdiction of the parties, along with tax considerations (including the application of withholding and sales taxes), will drive the transaction structure and/or the type of entity used for the SPV. For certain issuers, it will also be important to consider the regulated nature of their businesses and the composition of their obligor base when conceiving of the appropriate securitisation structure. By virtue of applicable law, there are constraints to the assignment and securitisation of certain receivables – particularly

those where the underlying obligor is a governmental entity.

4.Eligibility

4. 1. What requirements and restrictions apply to prospective originators in your jurisdiction?

Canada
Miller Thomson LLP

In Canada, there is no sole regulatory body, individual government regulator or piece of legislation that governs securitisations and originators. Separate individual parts of the Canadian securitisation market are regulated both federally and/or provincially. There are several contextual factors of the assets being securitised that influence whether provincial or federal laws will apply at various points of the transaction's lifecycle, including:

- the types of parties involved in the transaction;
- the types of securities being offered;
- the nature of the assets being securitised; and
- the location of the assets.

The table below provides a few non-exhaustive examples of different aspects of securitisation and how regulatory jurisdiction shifts depending on the stage.

Federal	**Provincial**	**Federal and provincial**
Banking regulations and the Bank Act regulate financial institutions that are administered by the Office of the Superintendent of Financial Institutions (OSFI). Securitisation and market participants must abide by the anti-money laundering requirements under the Proceeds of Crime (Money Laundering) and Terrorist Financing Act.	Provincial securities acts govern the offering of securitised products.	Federal and provincial consumer protection can impose disclosure requirements; provide rescission and prepayment rights; and limit interest rates, fees and penalties. Privacy legislation can impose requirements on a securitisation based on the type of assets securitised.
Federal insolvency and bankruptcy laws will determine whether a special purpose vehicle (SPV) is bankruptcy remote.	Provincial Personal Property Security Acts govern the assignment of receivables and the distribution of security interests in personal property, which apply to the granting of security over a securitised asset portfolio.	Federal and provincial tax legislation can influence the choice of SPV and the structure of a securitisation in order to minimise tax costs.

Often, originators are banks, trust and loan companies, insurance companies and pension plans. If originators fall within one of those designations, they are subject to the rules and guidance of OFSI in particular. OSFI regulates originators by providing guidance on:

- capital adequacy;
- accounting practices;
- risk management; and

- governance of regulated entities.

For example, OSFI's Capital Adequacy Requirements Guideline and Guidelines B-5 and B-5A outline the capital treatment of securitisation exposures and investments in securitisations. The aim of Guidelines B-5 and B-5A is to align with the Basel Committee recommendations.

Originators can also be subject to the guidance and oversight of the Canada Mortgage and Housing Corporation, if the originators are dealing in the government-backed securitised assets in the National Housing Act Mortgage-Backed Securities Programme or the Canada Mortgage Bonds Programme.

Finally, depending on the originator in question and the nature of its industry, other provincial or federal legislative regimes may apply to govern the implementation of a securitisation programme.

4. 2. What requirements and restrictions apply to prospective investors in your jurisdiction and how are retail and wholesale/professional investors distinguished?

Canada
Miller Thomson LLP

With respect to the requirements applicable to prospective investors in Canada, 'over the counter' offerings of asset-backed securities (ABS), which are typically available only to wholesale/professional investors, will be subject to the exempt market distribution guidelines as enumerated in the provincial securities acts, as well as National Instrument 45-106 – Prospectus Exemptions. Retail investors will generally participate in the securitisation market through public offerings of ABS, in which case the originators of such securities will be required to adhere to the prospectus regime, as outlined in the provincial securities acts and National Instrument 41-101 – General Prospectus Requirements.

4. 3. What requirements and restrictions apply to custodians and servicers in your jurisdiction?

Canada
Miller Thomson LLP

Custodians and servicers of the type often engaged in securitisation in Canada – such as trustees operating as trust companies – are governed by the Canada Business Corporations Act (CBCA) and the Trust and Loan Companies Act (TLCA). The requirements of these acts include the following:

- Qualifications: Trust companies must be licensed under one or both of applicable provincial or federal law in Canada. All federal loan and trust corporations must be federally incorporated and are governed by OSFI.
- Obligations to act in good faith: The CBCA and the TLCA impose certain statutory obligations on trustees to observe fiduciary duties and the duty of care. Under the CBCA and the TLCA, a trustee, in exercising its powers and discharging its duties, must:
    - act honestly and in good faith with a view to the best interests of the holders of the debt obligations issued under the trust indenture; and
    - exercise the care, diligence and skill of a reasonably prudent trustee.

Under both the CBCA and the TLCA, a trustee cannot be relieved of the duties imposed on the trustee through any terms of a trust indenture or other agreement.

- Obligation to avoid conflicts of interest: The CBCA and the TLCA impose certain statutory obligations on trustees to avoid conflicts of interest. Under the CBCA and the TLCA, no person may be appointed as trustee if there is a material conflict of interest between its role as trustee and its role in any other capacity. A trustee must, within 90 days of becoming aware that a material conflict of interest exists, eliminate the conflict of interest or resign from office. A trust indenture, any debt obligations issued thereunder and a security interest affected thereby are valid notwithstanding a material conflict of interest of the trustee.

4. 4. What classes of receivables and other assets may be securitised in your jurisdiction? What requirements and restrictions apply in this regard?

Canada
Miller Thomson LLP

Canada's securitisation market has a wide range of asset classes. ABS in Canada can either be longer-term ABS that mature past a year or shorter-term asset-backed commercial paper (ABCP) that matures in under a year. Canada's securitisation market is largely comprised of consumer-related receivables such as:

- auto loans and leases;
- credit cards;
- secured and unsecured lines of credit;
- consumer loans; and
- residential mortgage loans.

Other examples of assets classes are:

- equipment leases and loans;
- floorplan loans;
- fleet leases;
- trade receivables;
- insurance commission receivables; and
- cell tower and data centre revenues.

4. 5. What measures, if any, have been taken in your jurisdiction to promote investor involvement in securitisations?

Canada
Miller Thomson LLP

We highlight certain securities law amendments for this question. Following the 2008 financial crisis, the Canadian Securities Administrators (CSA) amended National Instrument 45-106 – Prospectus Exemptions to address investor protection concerns. As part of the CSA's amendments, measures were introduced aimed at addressing systemic risk concerns by:

- modifying the credit ratings required to distribute short-term debt – primarily corporate commercial paper – under the 'short-term debt exemption';
- making the 'short-term debt' prospectus exemption unavailable for short-term securitised products – primarily composed of ABCP; and
- creating a new prospectus exemption for the distribution of short-term securitised products, known as the 'short-term securitised products exemption'.

The aforementioned changes aimed to increase market efficiency and fairness, while improving practices in the ABCP market.

5.Special purpose vehicles

5. 1. What forms do special purpose vehicles (SPVs) typically take in your jurisdiction and how are they established?

Canada
Miller Thomson LLP

As in many other jurisdictions, Canadian securitisation transactions typically use a bankruptcy-remote SPV to which assets are sold or transferred to by an originator. Often, an SPV will take the form of a trust or a limited partnership; these are not strict legal entities, but relationships recognised at law. A trust will appoint a trustee to manage the affairs of the trust and administer the trust property; and a limited partnership will delegate the same duties to the general partner, which is typically a bankruptcy-remote corporation. Although trusts and limited partnerships are the most common forms of SPVs, there are no restrictions on an SPV being a corporate entity.

5. 2. Are SPVs typically established locally or offshore? What are the benefits and risks of each?

Canada
Miller Thomson LLP

Typically, SPVs are established locally within Canada under the federal laws of Canada or those of a province. Tax considerations may motivate the parties to a securitisation transaction to establish an SPV in a foreign jurisdiction. In addition, the location of an SPV's formation may be determined by the jurisdiction of the originator or funding party. An SPV formed locally within Canada will be attractive to Canadian investors, service providers and originators, as there will be no obvious foreign tax considerations. For foreign investors and other stakeholders, it will be important to get Canadian tax advice about the tax consequences of receiving distributions, payments and compensation from a locally formed SPV under federal or provincial laws.

5. 3. How is the SPV typically owned?

Canada
Miller Thomson LLP

The ownership and/or administration of an SPV is generally determined by its structure. In the case of a trust, an arm's-length party is usually appointed as trustee. It is not uncommon for the originator to retain a limited partner interest in an SPV formed as a limited partnership.

5. 4. What requirements and restrictions apply to SPVs in your jurisdiction?

Canada
Miller Thomson LLP

There is no specific guidance and/or legal requirements imposed on SPVs. Furthermore, there are no specific legal guidelines/requirements on the types of assets that may be securitised. There are tax, corporate and regulatory considerations that may be relevant for SPV formation and governance. An SPV formed as a limited partnership, for instance, will need to comply with provincial limited partnership legislation.

5. 5. What requirements and restrictions apply to the directors of the SPV? What are their primary duties?

Canada
Miller Thomson LLP

Aside from the general requirements and restrictions on the directors imposed by a province's corporate legislation and any separateness covenants imposed by a funding entity or lender, there are no specific requirements applicable to the directors of an SPV imposed by applicable law in Canada.

5. 6. What measures can be implemented to ensure, as far as possible, the insolvency remoteness of the SPV?

Canada
Miller Thomson LLP

In many securitisation transactions, in order to ensure the bankruptcy remoteness of the SPV, it must be made clear that the commercial intention among the parties to the securitisation transaction is to effect a transaction or 'true sale' resulting in a purchase and sale between an originator and an SPV. Whether the assets in question, in the event of the bankruptcy or insolvency of the originator, form part of the estate of such originator, or are concluded to have been sold to the purchaser entity in an off-balance sheet transaction, is a question of critical importance. Accordingly, creating a legal 'true sale' helps to ensure the bankruptcy remoteness of an SPV. We explore the criteria in Canada for legal true sale characterisation in question 6.5.

Similarly, it is common to structure the affairs and governance of an SPV so that the SPV operates separately and distinctly from the originator and conforms to key separateness covenants set out in its constituent or constating documents. It is important for the parties to a securitisation transaction to conclude that the insolvency of an originator or servicer will not trigger or include the insolvency of a related SPV created for a particular securitisation transaction.

5. 7. If the originator becomes insolvent, is there a risk that the assets of the SPV may be consolidated with its own by the courts? If so, how can this be mitigated?

Canada
Miller Thomson LLP

Yes, there is a risk that a court may find that the assets of an SPV may be consolidated with the assets of an originator. Ensuring that the transaction between an originator and SPV is structured as a 'true sale' helps to mitigate the risk of consolidation. In addition, it is important for the parties to conclude that there should be not be substantive consolidation of an SPV in the event of a bankruptcy or insolvency of an originator. This can be accomplished by creating discernible separateness between the SPV and the originator. A number of considerations are relevant for determining whether a court of competent jurisdiction would likely consolidate or include the SPV with the bankruptcy or insolvency proceedings of other relevant parties like the originator. These considerations are routinely considered with counsel.

6.Transfer of receivables

6. 1. Can the transfer of receivables to the SPV be governed by laws other than your local law? If so, what laws are typically chosen?

Canada
Miller Thomson LLP

Generally, courts of competent jurisdiction in Canada, when properly applying the guiding law, will recognise choice of law clauses when dealing with the issue of governing laws in contracts. Parties can agree to have the transfer of receivables to the SPV be governed by the laws of their chosen jurisdiction in the choice of law clause in the agreement. Typically, the law governing the transfer of receivables by the originator to the SPV will be informed by:

- the principal location of the originator and SPV;
- the principal location of the receivables in question; and
- the primary place of business of the lender or other funding entity.

If more than one location is relevant given the above factors, the parties often elect a major Canadian financial centre, such as the province of Ontario, to be the governing law for the applicable definitive agreements. There are, however, limits to what foreign laws can be chosen to transfer receivables, which are discussed below.

6. 2. What local law requirements (documentary and procedural) are required to ensure that foreign law documents are recognised and enforceable locally?

Canada
Miller Thomson LLP

Canadian courts will not enforce a choice of law clause if the courts find that:

- the foreign law is not *bona fide*; or
- there is a reason to avoid the choice based on public policy grounds.

Canadian courts will also not enforce a contract with a choice of law clause with foreign laws if the provisions of the foreign law:

- have not been adduced by expert testimony;
- are inconsistent with domestic procedural law or have an overriding effect; or
- obligate performance that would be illegal under the laws of any jurisdiction in which the obligation would be performed.

6. 3. How does the transfer of receivables from the originator to the SPV typically take place? What are the formal, documentary and procedural requirements for perfecting the transfer?

Canada
Miller Thomson LLP

The transfer of receivables from the originator to the SPV often follow the following structures:

- An originator assigns a pool of receivables to an SPV under a purchase and sale agreement, in exchange for a closing payment and often deferred consideration payable from residual collections on the pool.
- Another typical structure involves the assignment of a co-ownership interest in a pool of receivables to an SPV under a co-ownership agreement, while continuing to hold a retained interest in the pool in exchange for a closing payment and the right to receive cash flows from the retained interest and residual cash flows from the assigned co-ownership interest.

The Provincial Personal Property Security Acts (PPSAs) require that an interest be perfected to gain priority over a trustee in bankruptcy and third-party creditors of the originator or SPV, as applicable. Perfection is generally achieved through registering a financing statement in the PPSA registry in an originators jurisdiction.

In Quebec, under the Civil Code of Quebec, an absolute assignment of the receivables must be 'set up' to be perfected against the underlying obligors and third parties. An absolute assignment of the receivables may be set up against the underlying obligors and third parties as soon as the underlying obligors have acquiesced in it or received a copy or a pertinent extract of the agreement that giving rise to the absolute assignment.

If the assignment of receivables constitutes a 'universality of claims', perfection against the receivables debtors and third parties can be achieved by registering with the Register of Personal and Movable Real Rights – provided, however, that the other formalities whereby the assignment may be set up against the underlying obligors mentioned above have been observed.

In all provinces and territories, including Quebec, the assignment of a financing statement by one secured party to another secured party need not be registered to maintain perfection of the security interest against the debtors. An assignment may be completed, however, in order for an SPV to receive notices relating to the security interests attached to the respective receivables.

In Quebec, the assignment of a hypothec by one secured party to another secured party must be registered to maintain the perfection against subsequent assignees.

6. 4. What other requirements and restrictions apply to the transfer of receivables?

Canada
Miller Thomson LLP

Transfers of receivables are structured as absolute assignments and as such there are generally no requirements imposed on the transfer of receivables in the securitisation context. We refer to question 6.3 about the steps necessary to protect or perfect an assignment.

Unless the agreement between the underlying obligor and the originator states that the receivables are not assignable without the consent of, or notice to, the obligors, the obligors need not be notified of the assignment of their receivables to effect an absolute assignment.

Special requirements may be imposed by legislation for certain unique assets or obligors. Provincial personal property security legislation includes provisions relating to the effectiveness of restrictions on the assignment of receivables.

The Financial Administration Act (Canada) provides that an assignment of receivables owed by the federal government and other federal instrumentalities are invalid unless certain conditions are met:

- The assignment in question must be absolute; and
- Notice of assignment must be provided as prescribed by a government representative.

Similar legislation has been passed by several provincial governments as well with respect to the assignment of receivables owned by a provincial government.

6. 5. Is there a doctrine under which a transaction describing itself as a sale can be recharacterised by the courts as a financing secured by assets which are the subject of the purported transfer? How can the application of this doctrine be overcome?

Canada
Miller Thomson LLP

A Canadian court may recharacterise a sale of receivables by an originator to an SPV as financing secured by assets. Jurisprudence in Canada that speaks to what determines a 'sale' as opposed to a secured loan in the context of securitisation is limited. In *Metropolitan Police Widows and Orphans Fund v Telus Communications Inc* the court specified the factors below, which indicate a sale rather than a secured loan:

- The originator and the SPV intended to effect a sale of the receivables, as evidenced by their documents, conduct and communications;
- The risk of ownership of the receivables has passed from the originator to the SPV and the SPV's recourse against the originator is limited;
- The originator and the SPV can identify the receivables that have been sold and to calculate the purchase price of those receivables;

- The right to retain surplus collections on the receivables has passed from the originator to the SPV;
- The originator has no repurchase or redemption rights in respect of the receivables; and
- The responsibility for collecting the receivables has passed from the originator to the SPV.

By following these suggestions, the risk of having a sale of receivable recharacterised as a loan is reduced. Although it is not a requirement to satisfy all of the listed factors, the presence of a repurchase or redemption right in favour of the selling originator may recharacterise the sale as a secured loan.

6. 6. If the originator becomes insolvent, is there a risk that the transfer of receivables may be unwound? If so, how can this be mitigated?

Canada
Miller Thomson LLP

The ability of creditors to unwind a transaction is primarily governed by certain provisions of the Bankruptcy and Insolvency Act (BIA) – known as transfers at undervalue and preferences – and provincial legislation governing fraudulent conveyances, assignments and preferences.

A transfer to undervalue under the BIA refers to a transaction where the debtor transfers assets to another party for less than the fair market value. Depending on the timing of the transaction, relative to the bankruptcy filing of the originator, a challenging trustee or creditor may not have to prove an intent to defraud, defeat or delay a creditor.

Similarly, a preference transaction allows a creditor to unwind a transfer of property made to a creditor within three months (if with a non-arm's length party) or 12 months (if with an arm's-length party) of the originator's bankruptcy filing (or certain other 'initial bankruptcy events'). For any transaction within the applicable 'look-back periods', a rebuttable presumption exists that any such transaction was made with a view to giving a preference if the transition had the effect of preferring one creditor over another. Provincial statutes governing fraudulent conveyances and preferences operate in a similar fashion. Depending on the applicable provincial law, there may be some technical differences in the criteria. Generally, a transfer of property while a person or entity is insolvent or rendered insolvent that is made with the intent to hinder, defraud, defeat or delay creditors may be unwound by a creditor.

Strategies exist to mitigate against this risk. First, ensuring a transfer of receivables occurs at fair market value is the strongest mitigation strategy. Fair market value in reviewable transaction litigation is typically proven through valuation evidence. To the extent the originator sells receivables at a discount, documentation establishing the appropriateness of the discount should be developed. The lender should conduct due diligence on the originator to ensure it is not insolvent or being rendered insolvent by the sale transactions. Documentation should clearly pass title to the receivables to the assignee upon transfer to ensure the transfer is viewed as a true sale by a court. Lastly, evidence of receipt by the originator of the consideration actually received for the receivables should be readily available and maintained.

7.Security

7. 1. What types of security interests can be taken over the assets of the SPV in your jurisdiction? Which are most commonly used?

Canada
Miller Thomson LLP

Generally, the SPV will grant a security interest over the securitised assets, which is typically registered under the applicable provincial Personal Property Security Act (PPSA) or analogous legislation in the province of Quebec, in favour of the noteholders or lenders that funded the SPV's purchase of the securitised assets. In structures involving the loan of funds to an SPV to fund the purchase of securitizsd assets, it is common for the SPV to grant a security interest over all of such securitised assets and over all of the personal property and undertaking of the SPV. All provinces other than Quebec have personal property security legislation that apply to transactions involving the granting of a security interest. In Quebec, the Civil Code of Quebec (CCQ) contains provisions with similar characteristics to provincial PPSAs. Since it is common for a general security interest to be granted over all of the assets and undertakings, present and after-acquired, of the SPV, it is not uncommon for a single, dedicated SPV be created for each transaction.

7. 2. What are the formal, documentary and procedural requirements for perfecting a security interest?

Canada
Miller Thomson LLP

The PPSAs and CCQ set out comprehensive regimes governing the creation, attachment and perfection of security interests, establishing the priorities of competing security interests and setting out the rights and remedies of secured creditors on enforcement. Most commonly, a financing statement is registered in the applicable PPSA registry to perfect a security interest in personal property. In Quebec, a 'hypothec' is registered. The validity and perfection of security interests in intangibles are governed by the law of the jurisdiction where the debtor is located at the time the security interest attaches – determining the location of a debtor will depend on the specific provisions of the applicable PPSA or CCQ.

7. 3. What charges, fees or taxes arise from the perfection of a security interest?

Canada
Miller Thomson LLP

The costs of filing a financing statement are assessed on a per registration basis under the applicable PPSAs and do not take into account the nature of the assets or the amount of the debt obligations. The number of jurisdictions and the term of a registration may impact the costs associated with same.

7. 4. What other considerations should be borne in mind when perfecting a security interest in your jurisdiction?

Canada

Miller Thomson LLP

An agreement that creates or provides for an interest in personal property to secure the payment or the performance of an obligation typically falls within the scope of the applicable PPSA or CCQ. Although similar, the respective provincial personal property security regimes contain important distinctions that, if not carefully taken into consideration when perfecting a security interest, may jeopardise both the validity and the perfection of such security interest.

7. 5. What are the respective obligations and liabilities of the parties under the security interest?

Canada
Miller Thomson LLP

A security agreement will normally include the obligors' representations and covenants regarding the collateral and the preservation of any liens that are supposed to have been generated in the creditors' favour.

7. 6. In the event of default, what options are available to enforce the security interest? Is self-help available in your jurisdiction or must enforcement action go through the courts? Are there insolvency regimes such as conservatorship or examinership that impose an automatic stay on the exercise of self-help remedies?

Canada
Miller Thomson LLP

The provincial PPSAs and the CCQ deal with the rights and remedies of creditors with the respect to enforcing their security interests. Some of the options available to a secured party include the right to dispose, retain or take possession of the collateral.

The Bankruptcy and Insolvency Act and other insolvency legislation provide for the enforcement of security and the appointment of receivers. A secured creditor typically enforces its security through a court-appointed receiver. However, a security agreement typically provides for the appointment of a private receiver and other rights and remedies of the creditor.

7. 7. Will local courts recognise a foreign court judgment in favour of an investor?

Canada
Miller Thomson LLP

As long as the foreign court possessed jurisdiction in accordance with the Canadian courts' own requirements for jurisdiction, the Canadian courts will accept and uphold foreign judgements. In *Club Resorts Ltd v Van Breda*, the Supreme Court of Canada identified the following connecting factors that can give rise to a rebuttable presumption of jurisdiction:

- The defendant is resident in the province;

- The defendant carries on business in the province; and
- A contract connected with the dispute was made in the province.

Some of the limitations on enforcements of foreign judgments by Canadian courts include the following:

- The judgment was obtained through fraud;
- The foreign proceeding in question did not meet the standards of 'natural justice'; or
- Enforcement of a foreign judgment would contravene 'public policy' as such term is defined in Canadian jurisprudence.

7. 8. If the servicer becomes insolvent, will an enduring power of attorney/mandate granted by the servicer in favour of the secured parties be recognised and enforceable post-insolvency of the servicer?

Canada
Miller Thomson LLP

It is common in Canadian securitisation for the originator to be appointed as initial servicer of the securitised assets on behalf of the SPV purchaser. It is similarly common for such servicer to grant an enduring power of attorney coupled with an interest in favour of lender or its agent under a securitisation in the definition documents or in a standalone power of attorney. Assuming the power of attorney is coupled with an interest, the general view is that such a power of attorney is enforceable notwithstanding the bankruptcy or insolvency of the grantor servicer.

7. 9. Do limited recourse, non-petition and subordination provisions bind creditors of SPVs in your jurisdiction and what are the applicable qualifications?

Canada
Miller Thomson LLP

Properly crafted limited recourse and subordination provisions are often expected to be enforced by a Canadian courts. Enforceability may be limited or precluded to or by third parties which may claim to be beneficiaries of a contract but not direct parties thereto.

The enforceability of non-petition clauses has been minimally considered by Canadian courts. As such, it is unclear whether a non-petition clause would be enforced by the court; but generally, such clauses are included in Canadian securitisation contracts and complied with by the contracting parties.

8.Registration and disclosure

8. 1. What public disclosure and reporting requirements apply to securitisations in your jurisdiction?

Canada
Miller Thomson LLP

There are no specific ongoing public disclosure rules for securitisation securities in any Canadian province, other than the general securities law requirements, as outlined in the respective securities acts of each province, as well as Canadian Securities Administrators guidelines. The application of securities laws to Canadian securitisation is outlined in question 1.3.

8. 2. What registration requirements, if any, apply to securitisations in your jurisdiction?

Canada
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There is no specific requirement for registration *per se* in order to effect a securitisation transaction. Rather, as it pertains to securitisation transactions, registration in the appropriate Personal Property Security Act registries results in the perfection of the sale of receivables to the SPV and of any security granted by the SPV. Certain securities issued by an SPV or other securitisation party may attract securities laws filing or reporting requirements.

8. 3. Is there any requirement to notify obligors of a securitisation? If so, how is this effected?

Canada
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There is no obligation to provide the underlying obligors notice of an assignment from the seller to the SPV in order for the assignment to be effective as against the seller. However, until the obligors are provided with notice, they are permitted to discharge their obligations by continuing to make payments to the seller. Furthermore, an obligor will retain any defences it has against the seller until receipt of such notice.

In Quebec, an assignment is effective against the underlying obligors and third parties as soon as the underlying obligors have acquiesced in it or received a copy or a pertinent extract of the agreement that giving rise to the absolute assignment.

In Quebec, an assignment of a 'universality of claims' can be perfected via registration under the Civil Code of Quebec, provided that the other formalities whereby the assignment may be set up against the underlying obligors mentioned above have been observed. There is no definition of what constitutes a 'universality of claims'; however, practice has evolved such that a sale of all receivables that are originated between two dates and are of a specific type or meet certain criteria is generally considered a universality. To the extent that a sale of receivables does not constitute a universality of claims, it must be perfected by providing notice to the obligors.

Except as expressed above in Quebec, there is no precise or specific legal form or delivery mechanism by which obligors must be notified.

9.Credit rating agencies

9. 1. What requirements and restrictions apply to credit ratings agencies in your jurisdiction? Are there specific provisions that regulate their relationship with issuers?

Canada
Miller Thomson LLP

The Canadian regulatory framework governing credit rating agencies was established in 2012 under National Instrument 25-101 – Designated Rating Organizations (NI 25-101). This provides that a credit rating agency may apply to be recognised as a designated rating organisation (DRO), therefore allowing its ratings to be eligible for use across various securities laws. Although the regulatory framework has been adopted nationally, the principal regulator of DROs is the Ontario Securities Commission.

Among other criteria, National Instrument 25-101 requires DROs to maintain and comply with a code of conduct that include policies on:

- creating and using rating methodologies;
- monitoring and updating credit ratings;
- ensuring a robust and sound rating process;
- complying with certain governance requirements; and
- avoiding conflicts of interest.

DROs must also:

- appoint a compliance officer; and
- maintain their books and records in accordance with National Instrument 25-101.

9. 2. What are the main factors that rating agencies consider when rating the securities of the issuer?

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Depending on the asset class that is the subject of a proposed transaction, rating agencies will generally apply several methodologies when rating a securitised product. In general, rating agencies will look at the following components regardless of industry or asset class:

- transaction features (eg, priority of payments, eligibility criteria, performance triggers);
- legal structure;
- operational history and financial performance of the seller, servicer(s), trustee and counterparties;
- performance metrics and quality of the asset pool; and
- credit enhancement (eg, subordination, overcollateralisation, cash reserves, excess spread).

For popular asset classes such as auto loans and leases, residential mortgages or equipment loans and leases, agencies may have a specific methodology that discusses the above components in more detail, along with other features and transaction considerations that have specific relevance.

10.Taxation

10. 1. What tax considerations should be borne in mind from the perspective of the originator? What strategies, if any, are available to mitigate them?

Canada
Miller Thomson LLP

As the entity owed payments for the securitised assets, goods or services, an originator will be taxed on the payments received from the entity/obligor for the goods or services provided or rendered by said originator. When said assets are securitised, an originator should consider ensuring that the securitisation is ideally through a 'true sale' of the assets (instead of a lease, licence or similar arrangement). Additionally, and in the context of a deferred component to the purchase price being paid and received for the sale of the assets, the originator should consider the tax treatment of such deferred component.

If the originator is also a servicer (ie, services and administers the collection of the payments on the securitised asset), the sales tax aspects of its services as a services must also be considered.

Strategies to mitigate tax issues to the originator include careful consideration of the contractual language to ensure a 'true sale' and satisfaction of the administrative/judicial criteria for the same. Consideration should also be given to delineation between consideration for the securitised assets and consideration for any servicing to be provided such that the sales tax aspects can be addressed separately.

10. 2. What tax considerations should be borne in mind from the perspective of the issuer? What strategies, if any, are available to mitigate them?

Canada
Miller Thomson LLP

The issuer will typically wish to 'run flat' on its income and expenditures in a securitisation structure. An issuer will be taxable on any profits in incurs through its purchase of the securitised assets and therefore will generally seek to ensure that its expenses are equal to its income through the collection on its portfolio of assets. In addition, an issuer will wish to be mindful of its sales tax exposure as any sales tax paid on services rendered to the issuer are likely to be unrecoverable to the issuer. For issuers that are trusts, consideration should also be given to the tax consequences of allocating any income to its beneficiaries to potentially reduce the impact of any tax on the structure if the issuer does not 'run flat'.

Non-Canadian issuers should also consider whether any aspect of the transaction (sale of assets or servicing) could lead to withholding tax in Canada or lead to the issuer being considered to be carrying on business in Canada.

Mitigation strategies include reduction of any potential sales tax exposure and careful consideration of the relationship between the issuer and the originator such that the issuer is not considered to be carrying on business in Canada. This may include, for example, avoidance of dependent agent status for the originator.

10. 3. What tax considerations should be borne in mind from the perspective of investors? What strategies, if any, are available to mitigate them?

Canada
Miller Thomson LLP

Investors should consider the impact of withholding tax (if any) on loans made to the issuer if the investor is non-resident. Arm's-length investors should not have any withholding tax concerns as long as the interest on the debt is not contingent on profitability, revenue, cash flow or other such similar criteria.

11.Trends and predictions

11. 1. How would you describe the current securitisation landscape and prevailing trends in your jurisdiction? Are any new developments anticipated in the next 12 months, including any proposed legislative reforms?

Canada
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We do not foresee material changes or updates to the key legislative or regulatory environment in which securitisation in Canada operates in the next 12 months; nor do we anticipate material changes to transaction structures or practice for securitisation in Canada in the next 12 months.

One trend that practitioners are observing within the structured finance and securitisation space is the securitisation of novel or emerging asset classes. Many of these novel asset classes do not have any or material underlying tangible assets that can be used as collateral as exist in 'traditional' asset classes. In many of the novel or emerging asset clauses that are developing in Canada in the absence of hard or tangible collateral assets, the only real security on payment that originators may have is the underlying obligor's covenant to pay. Examples of novel classes of securitised assets in Canada include internet service payments and insurance premium origination fees or commissions.

12.Tips and traps

12. 1. What are your top tips for the smooth conclusion of securitisations and what potential sticking points would you highlight?

Canada
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One of the keys to a successful securitisation is ensuring that all relevant parties have a common understanding of the salient features of the contracts and assets forming part of the purchased receivables. This involves having relevant parties complete thoughtful business, tax, legal and regulatory diligence on the assets forming the pool of receivables to be purchased. We have seen numerous cases where a commercial deal is reached at a high level based on a superficial knowledge of the receivable pool; but after further diligence is conducted in order to implement the commercial deal into definitive documents, obstacles to a timely consummation of the deal emerge as a consequence of an inadequate understanding of important matters relating to the underlying receivable pool such as:

- the manner in which receivables are documented;
- consents or notices required of or by third parties to the proposed assignment;
- the retention by the related obligors of rights of set-off, counterclaim or other defences conditioning future payment obligations; or
- retained rights of the obligor to terminate the continued servicing of the contracts in certain future circumstances.

It is important for a successful securitisation that the relevant parties – in particular, the securitisation purchaser – have a view informed by thorough diligence and the advice of counsel as to how the receivables in question are documented, originated, serviced or otherwise created and the tax, legislative and regulatory landscape in which such receivables exist.

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