

QUEBEC SIMPLIFIES GRANTS OF SECURITY IN FAVOUR OF THE AGENT FOR A SYNDICATE OF LENDERS

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With the passing last week of An Act mainly to implement certain provisions of the Budget Speech of 4 June 2014 and return to a balance budget in 2015-2016 (the "**Act**"), which received assent on April 21, 2015, the Quebec government has simplified the process for granting security in the province in favour of a syndicate of lenders and brought that process in line with that under the personal property security legislation of the common-law provinces ("**PPSAs**") and the Uniform Commercial Code ("**UCC**").

While the UCC and the PPSAs explicitly allow a debtor to grant security in favour of an agent, for and on behalf of present and future creditors, the absence of similar provisions in Quebec law have historically made doing so far more difficult. Since nothing in the Civil Code of Québec ("**CCQ**") directly permitted the granting of security in favour of a third party, it was necessary to create a more complex, indirect structure which often led to confusion and increased costs for lenders based outside the province and their counsel.^[1] As a result of the changes to Article 2692 of the CCQ embodied in the Act, this cumbersome structure is no longer necessary. Also problematic under the old formulation of Article 2692 was the requirement that a particular notarial form of hypothec be used in all cases where the obligations secured included payment of a title of indebtedness, even if there was only a single creditor. This requirement led most legal practitioners in Quebec to strongly resist the practice, almost universal in other jurisdictions, of issuing promissory notes for indebtedness where the payment thereof would be secured by a hypothec, for fear that the hypothec would be invalidated if not in notarial form.

The terms of the new Article 2692 of the CCQ now explicitly provide that a legal person, partnership or trustee may grant a hypothec in favour of the "hypothecary representative" for all present and future creditors of the obligations secured. Such hypothecary representative may be appointed either by the debtor or one of the creditors, and may be a creditor of the secured obligations, or a third party. Any obligations may be secured in this way and the ability to secure obligations in favour of a third party is no longer limited to the payment of titles of indebtedness. The hypothec granted in favour of a hypothecary representative must still be in notarial form, with certain exceptions.

Moreover, while it is still possible under the new provision to appoint a third party to hold a hypothec securing

payment of a title of indebtedness, it is now also possible for a creditor in a non-syndicated transaction to hold such security directly, thereby avoiding the additional cost and formalities involved in using a notarial form of hypothec. Furthermore, a creditor can now obtain promissory notes from a borrower, without any concern that doing so might invalidate the hypothec granted by the borrower in his favour, even if it was not in notarial form.

Overall, the amendments have simplified and clarified the mechanism for taking security in the context of a syndicated loan and brought them into line with the practice in other North American jurisdictions.

by Yonatan Petel

[1] The most commonly used structure involved the granting of a hypothec by the debtor in favour of an agent appointed as the person holding the power of attorney ("**fondé de pouvoir**") for the present and future creditors, the issuance of a collateral demand debenture in favour of that agent under and secured by such hypothec, followed by the pledge of the debenture in favour of the syndicate members, to be held by the agent on their behalf.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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