Securing debts in Quebec: Important changes to consider

June 9, 2015

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On April 20, 2015, the National Assembly adopted *An Act mainly to implement certain provisions of the Budget Speech of 4 June 2014 and return to a balanced budget in 2015-2016* (S.Q. 2015, c. 8). Some of the many amendments introduced by that statute (the "Act") pertain to the securing of debts in Quebec. We have prepared this newsletter to inform you about important changes to consider in connection with financing transactions.

COMMERCIAL FINANCING: HYPOTHECS IN FAVOUR OF A FONDÉ DE POUVOIR (ARTICLE 2692 OF THE *CIVIL CODE OF QUÉBEC*)

Since coming into force in 1994, this article of the *Civil Code of Québec* (**the "Civil Code"** or **"C.C.Q."**) has frequently been used in connection with syndicated loans, to enable new lenders that join the syndicate (following an assignment made as part of the syndication of a credit facility, for example) or enable creditors of future obligations (under credit arrangements that involve many advances and repayments, for example) to benefit from a hypothec granted to a person representing

the creditors: *the fondé de pouvoir*.

It was mandatory that hypothecs granted pursuant to article 2692 C.C.Q. secure the payment of bonds (debentures) or other titles of indebtedness, and be created by notarial deed en minute. In syndicated loans not involving the issuance of bonds or other titles of indebtedness, a common process was to have the borrower, or another grantor, issue a debenture and then pledge it in order to benefit from the provisions of article 2692 C.C.Q.

The amendments to article 2692 C.C.Q., in force since April 21, have, among other things:

- eliminated the need to issue and pledge debentures (without forbidding this practice) by allowing the hypothec to directly secure the performance of obligations created under the terms of credit agreements;
- specified the process for appointing and replacing the *fondé de pouvoir* (now called the hypothecary representative); and
- confirmed that the hypothec must be created by notarial deed *en minute*, unless it is a movable hypothec with delivery.

Borrowers and lenders alike will benefit from these amendments to article 2692 of the Civil Code, which simplify the taking of security, notably in connection with syndicated loans, or financing arrangements made abroad.

HYPOTHECS WITH DELIVERY ON CERTAIN MONETARY CLAIMS

The Act introduces a new and more efficient way, inspired by US law, to create a security on sums of money, and gives that security a preferred rank. The security is on sums of money credited to a financial account (such as a deposit account held by a financial institution), on amounts given as security to a third person (an individual, or a legal person that can be, but need not be, a financial institution), or on a sum of money which the secured creditor owes the person creating the security. In all cases, the collateral is a claim held by the party creating the security **(the "monetary claim")**. Like all other hypothecs, the secured obligation can be the obligation of the person creating the security, or the obligation of a third person.

The security is a pledge (or "movable hypothec with delivery") that can be set up against third persons without being published in the Register of Personal and Movable Real Rights, and the "delivery" is effected by the "control" which the creditor must obtain over the monetary claim.

If the secured monetary claim is payable by the secured creditor to the person creating the security, control is obtained when that person consents to his claim's securing the performance of an obligation toward such creditor.

If the secured monetary claim is owed by a third person, control is obtained either by entering into a control agreement with that third person, under which such person agrees, among other things, to comply with the secured creditor's instructions, without the additional consent of the person creating the security (though the third person is not required to enter into such an agreement) or by becoming the holder of the financial account whose credit balance is the monetary claim.

It is important to note that neither the consent of the person creating the security (the grantor) nor the consent of the third person need be given in writing. However, it is preferable to obtain such consent in writing, to establish the parties' intent.

The Act also establishes the rank of hypothecs on monetary claims. It states that a movable hypothec with delivery, effected by control of a monetary claim obtained by a creditor, ranks ahead of any other movable hypothec encumbering that claim, from the time that control is obtained, regardless of when that other hypothec is published (and this includes movable hypothecs without delivery, published in the Register of Personal and Movable Real Rights) and it specifies ranking where several movable hypothecs with delivery encumber the same monetary claim (article 2713.8

of the Civil Code).

The new article 3106.1 C.C.Q. should be pointed out as well. It specifies the law that will govern the validity of a security encumbering a monetary claim, as well as the publication of the security and the effects of such publication, depending on whether that law has been expressly specified in an act governing the claim.

Although the amendments introducing a new system of hypothecs with delivery on certain monetary claims will only come into force on January 1, 2016, section 372 of the Act specifies that certain movable hypothecs with delivery effected by the creditor obtaining control of a monetary claim may not be cancelled or declared unenforceable against third persons on the grounds that control of the claim was obtained before January 1, 2016.

It is therefore very much in creditors' interests to consider acquiring now control over a monetary claim, even if it is only valid as of January 1, 2016. It is more than likely that financial institutions will need to adjust their practices to these new approaches.