

**ISDA® CREDIT SUPPORT ANNEX - QUEBEC LAW,  
CREDIT SUPPORT AND COUNTERPARTY AMENDMENTS,  
INSTRUCTIONS AND ADDITIONAL PROVISIONS**

**Schedule of Amendments to, and Instructions for, the New York Form  
of Credit Support Annex**

**Background**

The *Civil Code of Quebec* (the "**Civil Code**") provides for specific conflict of laws rules which refer to the laws of the jurisdiction which apply in determining the validity of a security interest created on movable or personal property. Such rules differ depending on the nature of the property in question as well as the type of security taken. The validity of a non-possessory security interest in a "title in bearer form" and of a possessory security interest in a "title" or a "title in bearer form" is governed by the law of the jurisdiction where the collateral is situated at the time the security interest is created. The validity of a non-possessory security interest in a security other than a title in bearer form, and in intangible personal property other than a title in bearer form, is governed by the law of the jurisdiction in which the grantor is domiciled at the time the security interest is created. These rules must be considered when determining the type of security interest which will be taken.

In some circumstances, it may be difficult to determine whether collateral, such as securities which do not trade through The Canadian Depository for Securities Limited, being hypothecated pursuant to the Annex is in a form which allows for a possessory security interest that would be recognized by Quebec courts for conflict of laws purposes or under the internal laws of the Province of Quebec. If the pledgor is located in the Province of Quebec, therefore, it would be prudent to take the Quebec equivalent of a non-possessory security interest in such collateral. The amendment proposed below should be considered in order that a valid movable hypothec without delivery be constituted.

**All of the following clauses are added to paragraph 13(m).**

**Amendment 1: Paragraph 2**

*Amendment to Security Interest Provision.* Paragraph 2 is amended by adding the following clauses immediately after the first paragraph:

As security for its Obligations, Party A, as Pledgor, hereby hypothecates to Party B, as Secured Party, all present and future Posted Collateral Transferred to or received by such Secured Party or its Custodian from time to time pursuant hereto, to the extent of the sum of Cdn.\$\_\_\_\_\_, with interest thereon, from the date hereof, at the rate of per [25%] annum.

As security for its Obligations, Party B, as Pledgor, hereby hypothecates to Party A, as Secured Party, all present and future Posted Collateral Transferred to or received by such Secured Party or its Custodian from time to time pursuant hereto, to the extent of the sum of Cdn.\$\_\_\_\_\_, with interest thereon, from the date hereof, at the rate of [25%] per annum.

The immediately preceding two clauses shall be governed by and construed in accordance with the internal laws of the Province of Quebec.

A reference in this Annex to a "security interest", includes reference to a "hypothec".

## **Notes/Discussion**

### **1. Amount of the Hypothec and Interest**

The Civil Code provides that the document constituting a hypothec must indicate the specific sum for which it is granted. Such amount must be expressed in Canadian dollars in order to fulfill the requirement that the amount for which the hypothec is granted, including interest, must be determinate. If the amount is expressed in any other currency, the security is invalid. If the amount of the Obligations is expressed in the Agreement in United States Dollars, the general practice is to include a sum which is double such amount in Canadian Dollars in order to account for currency fluctuations. Parties should consider selecting an amount which is sufficient to cover the Obligations as they fluctuate from time to time. The general practice is to include a rate of interest of 20% or 25% on the amount for which the hypothec is granted.

In the event that the Secured Party wishes to increase the amount for which the hypothec is granted as a result of an increase to the Obligations or the credit exposure, a new document constituting a hypothec should be prepared containing the new amount and registered as set forth in paragraph 3 below. This new hypothec will rank from the date of its registration.

### **2. Obligations**

The additional language included in Paragraph 2 assumes that the Obligations refer to Obligations of the Pledgor and not of any third party.

### **3. Perfection (Publication)**

In order to perfect a hypothec without delivery, the rights of a Secured Party under a hypothec without delivery must be registered in the register of personal and movable real rights (Quebec) (the "**Register**"). Such registration can only be done once the hypothec without delivery has been granted, as the registration form requires a reference to the date of the document pursuant to which the hypothec was created. Registration of a movable hypothec preserves the rights for a period of ten years and may be renewed for successive ten year periods. Attached hereto as Schedule A is a sample of the registration form used for such purpose, in which we have included a proposed description of Posted Collateral. If the Pledgor has both an English and French name, both names should be noted in the registration form.

The form also requires a reference to the location of signature of the document constituting the hypothec. In the event that the document is signed in counterparts, reference to one of the locations of signature may be made. In addition, we recommend that the Secured Party register a notice of address, which may be referenced in item 3 of the form attached as Schedule A, for the purpose of receiving notices concerning the exercise of hypothecary recourses.

#### **4. Set-Off / Compensation**

Where the Posted Collateral consists of Cash only and there is a debtor/creditor relationship between the Pledgor and the Secured Party, we recommend the use of the Ontario Law amendments that deal with Cash as Credit Support instead of creating a movable hypothec without delivery in the Credit Support Annex.

#### **5. Searches**

Searches in the Register should be conducted against the Pledgor to verify whether there are any adverse entries. A Secured Party may also wish to consider repeating searches ten days following registration since, in accordance with Article 2699 of the Civil Code, there may be prior ranking security against the claims of the Pledgor which may only appear on the Register ten days following the registration by the Secured Party.

#### **6. Realization rights, notices, waiting periods**

In the event that Quebec law governs the enforcement of the rights under a hypothec, the exercise of hypothecary recourses is subject to the mandatory provisions of the Civil Code and the *Code of Civil Procedure* (Quebec). A notice of intention to exercise a hypothecary right must be sent by the Secured Party to the Pledgor and filed, along with evidence that such notice has been served on the Pledgor, at the Register. There is a 20 day waiting period which applies in the case of movable property (unless the intention is to take possession of the property, in which case the delay is ten days) prior to the exercise of any such right. The recourses available under the Civil Code where the hypothec is granted on assets used in an enterprise consist of (i) taking possession for the purposes of administration; (ii) taking in payment; (iii) sale by the creditor; and (iv) sale by judicial authority. Where the assets charged under the hypothec are not used in an enterprise, only the recourses of taking in payment and sale by judicial authority are available.

A dealer in securities who, as a creditor, has a hypothec on securities it holds may, pursuant to Article 2759 of the Civil Code, sell the securities or take them in payment without giving prior notice or observing any time limits prescribed in the Civil Code, (i) in the ordinary course of its duties and where permitted by regulations and usages observed where it trades and (ii) by such dealer's agreement with the Pledgor. For example, By-Law 27 of the Investment Dealers Association (the "IDA") provides for the dealer's right to pledge or sell the securities held by it on behalf of the Pledgor. Section 8(a)(iv) of the Annex, which allows the Secured Party to liquidate any Posted Collateral held by the Secured Party, is an example of an agreement between a dealer and the Pledgor which, together with compliance with By-Law 27 of the IDA, would permit a dealer to sell the securities or take them in payment pursuant to the Civil Code.

You may wish to consult the Ontario Collateral Opinion for an overview of the effects of bankruptcy or insolvency on the enforcement of rights under security generally.

## **7. Rehypothecation**

The right to rehypothecate the Posted Collateral contemplated in Paragraph 6(c) of the Credit Support Annex would most likely not be enforceable under Quebec law. Article 2741 of the Civil Code may be read as prohibiting disposing of, selling or rehypothecating the Posted Collateral other than in accordance with realization proceedings.

## **8. Distributions**

Pursuant to Articles 2743 and 2744 of the Civil Code, a creditor holding a hypothec on a claim collects the revenues it produces, together with the capital falling due. Unless specified otherwise, the creditor applies the amounts collected to payment of the obligation (whether or not then exigible). A creditor may, however, in the document constituting the hypothec, authorize the grantor to collect repayments of capital or the revenues from the hypothecated claims. Such provisions of the Civil Code are consistent with Paragraph 6(d) which provides that if the Secured Party receives or is deemed to receive Distributions, it will Transfer to the Pledgor any Distributions it receives or is deemed to receive.

## **9. Exercise of Voting Rights**

With respect to the exercise of voting rights which may be attached to the Posted Collateral, in the event that a creditor receives surrender of the Posted Collateral (the grantor abandons the property to the creditor in order to allow the creditor to take possession of it for purposes of realization), such creditor will have the simple administration of the property. Pursuant to Article 1302 of the Civil Code, a person having simple administration of certain property is bound to collect the fruits and revenues of the property being administered and exercise the rights pertaining to the property. Once the Posted Collateral is surrendered in favour of a Secured Creditor, such Secured Creditor will, therefore, have the right to vote the Posted Collateral.

## **10. French Language Clause**

In the event that the Schedule to the ISDA Master Agreement does not contain a French language clause, we recommend including such a clause in the Credit Support Annex in order to satisfy the provisions of the Charter of French Language (Quebec). The following is an example of such a clause:

« The parties confirm their express wish that this Agreement and all documents related thereto be drawn up in English. *Les parties confirment leur volonté expresse de voir le présent contrat et tous les documents s'y rattachant être rédigés en anglais.* »



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"Agreement" means the ISDA Master Agreement and its annex dated \*\*\*\* between \*\*\*\* and \*\*\*\*, as amended, restated, modified or supplemented from time to time.

"Annex" means the Credit Support Annex forming part of the Agreement.

"Cash" means the lawful currency of [Canada].

"Custodian" has the meaning specified in Paragraphs 6(b)(i) and 13 of the Annex.

"Distributions" means with respect to Posted Collateral other than Cash, all principal, interest and other payments and distributions of cash or other property with respect thereto, regardless of whether the Secured Party has disposed of that Posted Collateral under Paragraph 6(c) of the Annex. Distributions will not include any item of property acquired by the Secured Party upon any disposition or liquidation of Posted Collateral or, with respect to any Posted Collateral in the form of Cash, any distributions on that collateral, unless otherwise specified herein.

"Eligible Collateral" means, with respect to a party, the following items:

(A) Cash;

(B) negotiable debt obligations issued by the U.S. Treasury Department having an original maturity at issuance of not more than one year ("Treasury Bills");

(C) negotiable debt obligations issued by the U.S. Treasury Department having an original maturity at issuance of more than one year but not more than 10 years ("Treasury Notes");

(D) negotiable debt obligations issued by the U.S. Treasury Department having an original maturity at issuance of more than 10 years ("Treasury Bonds"); and

(E) other...

"Eligible Credit Support" means Eligible Collateral and Other Eligible Support.

"Interest Amount" means, with respect to an Interest Period, the aggregate sum of the amounts of interest calculated for each day in that Interest Period on the principal amount of Other Posted Support in the form of Cash held by the Secured Party on that day, determined by the Secured Party for each such day as follows:

- (x) the amount of that Cash on that day; multiplied by
- (y) the Interest Rate in effect for that day; divided by
- (z) 365, if the amount of interest is calculated in Canadian Dollars.

"Interest Period" means the period from (and including) the last Local Business Day on which an Interest Amount was Transferred (or, if no Interest Amount has yet been Transferred, the Local Business Day on which Other Posted Support in the form of Cash was Transferred to or

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received by the Secured Party) to (but excluding) the Local Business Day on which the current Interest Amount is to be Transferred.

"Interest Rate" means the rate specified in Paragraph 13 of the Annex.

"Local Business Day", unless otherwise specified in Paragraph 13 of the Annex, has the meaning specified in the Definitions Section of the Agreement, except that references to a payment in clause (b) thereof will be deemed to include a Transfer under the Annex.

"Other Eligible Support" means, with respect to a party, the items, if any, specified as such for that party in Paragraph 13 of the Annex.

"Other Posted Support" means all Other Eligible Support Transferred to the Secured Party that remains in effect for the benefit of the Secured Party.

"Party A" means \*\*\*\*\*.

"Party B" means \*\*\*\*\*.

"Pledgor" means only Party B.

"Posted Collateral" means all Eligible Collateral, other property, Distributions, and all proceeds thereof that have been Transferred to or received by the Secured Party under the Annex and not Transferred to the Pledgor pursuant to Paragraph 3(b), 4(d), (ii) or 6(d)(i) of the Annex or released by the Secured Party under Paragraph 8 of the Annex.

"Posted Credit Support" means Posted Collateral and Other Posted Support.

"Secured Party" means only Party A.

"Transfer" means, with respect to any Eligible Credit Support, Posted Credit Support or Interest Amount, and in accordance with the instructions of the Secured Party, Pledgor or Custodian, as applicable:

(i) in the case of Cash, payment or delivery by wire transfer into one or more bank accounts specified by the recipient including, in the case of Party A as the Secured Party, bank accounts held at Party A;

(ii) in the case of certificated securities that cannot be paid or delivered by book-entry, payment or delivery in appropriate physical form to the recipient or its account accompanied by any duly executed instruments of transfer, assignments in blank, transfer tax stamps and any other documents necessary to constitute a legally valid transfer to the recipient;

(iii) in the case of securities that can be paid or delivered by book-entry, the giving of written instructions to the relevant depository institution or other entity specified by the recipient, together with a written copy thereof to the recipient, sufficient if complied with to result in a legally effective transfer of the relevant interest to the recipient; and

(iv) in the case of Other Eligible Support or Other Posted Support, as

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specified in Paragraph 13 of the Annex.