Finance Fundamentals: CBA and LSTA Model Credit Agreement Provisions

by Practical Law Canada Finance and *Loan Syndications and Trading Association*

Practice notes | **Maintained** | Canada

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An explanation of the Canadian Bankers Association (CBA) Model Credit Agreement Provisions and the Loan Syndications and Trading Association (LSTA) Model Credit Agreement Provisions, both of which are commonly used in syndicated loan transactions in Canada and the United States respectively.

Concepts and terminology used in loan and finance matters can be perplexing. Practical Law Finance Fundamentals are reference guides designed to quickly explain commonly confused language and points of practice in finance transactions.

Both the CBA and the LSTA have published a set of model loan agreement provisions that are widely used in their respective markets. This note describes each of these sets of model provisions in detail, explaining what is, and what is not, included in these provisions.

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CBA and the LSTA

What Is the CBA?
Commonly referred to as the CBA, the Canadian Bankers Association is an association founded in Montreal in 1891 and currently has approximately 64 members made up of domestic banks (also known as Schedule I banks), foreign bank subsidiaries (Schedule II banks) and foreign bank branches (Schedule III Banks) operating in Canada. Its mandate is to provide governments and others with a centralized contact to all banks on matters relating to banking in Canada.

What Is the LSTA?
The LSTA, or the Loan Syndications and Trading Association, Inc., is a not-for-profit organization formed in 1995 and currently has about 420 members made up of banks, funds, law firms, broker-dealers, and other financial institutions. Its mission is to promote a fair, orderly, efficient, and growing corporate loan market that provides leadership in advancing and balancing the interests of all market participants. The LSTA seeks to achieve this by developing standard documentation and market practices, uniform settlement and operational procedures, best practices, and other mechanisms in the U.S. syndicated loan market to improve the liquidity of the primary and secondary markets for corporate loans.

Model Credit Agreement Provisions

What Are the CBA Model Credit Agreement Provisions?
Effective November 4, 2004, and after extensive consultation with its members, the CBA adopted model credit agreement provisions ("CBA Model Provisions") for syndicated loan transactions in Canada. The CBA Model Provisions were based on the then-current model provisions published by the LSTA ("LSTA Model Provisions").

The CBA Model Provisions attempt to standardize selected loan agreement provisions commonly used in syndicated loans to simplify secondary market trading. While the use of these provisions is not mandatory, they are commonly used in syndicated loan transactions where the administrative agent is a major Canadian bank, and where secondary market trading may be contemplated for the loan.

What Do the CBA Model Provisions Cover?
Some of the key provisions include standard language for the following:

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Appointment of Administrative Agent

The lenders appoint the agent to act on behalf of the lenders in accordance with the terms of the loan agreement (Section 7.1 of the CBA Model Provisions).

Rights of Agent as Lender

The agent has the same rights as the other lenders when it comes to providing banking services to the borrower (Section 7.2 of the CBA Model Provisions).

No Fiduciary Duty and Exculpatory Provisions

The agent has no duties (fiduciary or otherwise) except as expressly set out in the loan agreement. The agent is not liable for any action taken or not taken by the agent in the absence of gross negligence or willful misconduct (Section 7.3 of the CBA Model Provisions).

Reliance by Agent

The agent can rely on notices, certificates and other documents that it believes to be genuinely signed by the proper authorizing officer (for example, a borrowing request). This reliance also extends to oral communications to reflect the practical realities of banking (Section 7.4 of the CBA Model Provisions).

Lender Indemnification

Each lender is required to indemnify the agent, up to their proportionate share, for any claims against the agent (absent gross negligence or willful misconduct on the part of agent) (Section 7.5 of the CBA Model Provisions).

Delegation of Duties

The agent can delegate duties to a sub-agent (i.e. in foreign jurisdictions). The agent is not liable for the sub-agent's conduct or negligence (absent gross negligence or willful misconduct on the part of the agent in appointing the sub-agent) (Section 7.6 of the CBA Model Provisions).

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Replacement of Agent

Provisions relating to the procedure to replace an agent where the agent wishes to resign or the lenders wish to remove the agent (Section 7.7 of the CBA Model Provisions).

Non-Reliance on Agent or Other Lenders

Each lender acknowledges that its decision to become a lender in the syndicate was its own decision made without reliance on the administrative agent or any other lender (Section 7.8 of the CBA Model Provisions).

Collective Actions of the Lenders

Each lender acknowledges that it does not have an individual right to enforce any loan documents or realize on collateral and that such rights and remedies are exercised by the agent in accordance with the loan documents (Section 7.9 of the CBA Model Provisions).

Yield Protections

Standard credit agreement provisions ensuring that the agent and the lenders still receive expected margin on the loan notwithstanding a change in circumstances, including a change in law relating to capital resources or an increase in taxes. If any change in law increases the cost to a lender of making or maintaining any loan, then the borrower will, upon the lender's request, pay such additional amount. The benefits of this section extend to participants (Sections 3 and 10(d) of the CBA Model Provisions).

Replacement of Defaulting Lender

The borrower can replace a defaulting lender by assigning its applicable percentage of commitments to an existing lender or another lender in accordance with the eligible assignee provisions of the credit agreement. The borrower must not be in default under the credit agreement; it must repay all amounts owing to the defaulting lender and the applicable assignment fee (Section 3.3(b) of the CBA Model Provisions).

Set Off

Upon the occurrence and continuance of an event of default, each lender can set off and apply deposits held for the borrower's account against the borrower's obligations. This provision also extends to participants, so long as they comply with the sharing of payments section (Sections 4 and 10(d) of the CBA Model Provisions).

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Sharing of Payments

If a lender exercises a right of set off and, consequently, obtains payment in respect of any principal of, or interest on, any of its loans resulting in it receiving payment of a proportion of the aggregate amount of its loans and accrued interest greater than its pro rata share, then it is required to buy participations in the loans and other obligations of the other lenders so that the benefit of all such payments is shared by the lenders ratably in accordance with the aggregate amount of principal of, and accrued interest on, their respective loans (Section 5 of the CBA Model Provisions).

Expenses and Borrower Indemnity

Standard credit agreement provisions requiring the borrower to pay all expenses and indemnify the agent and lenders for liability (Section 9 of the CBA Model Provisions).

Assignments

Each lender has the ability to assign its loan and commitments post closing in accordance with certain standard provisions.

The suggested minimum amount of a revolver assignment is $5 million and for term loan assignment $1 million, or no minimum amount if it is the entire remaining amount of the assigning lender's commitment or loans. No assignment can be made to a natural person or an obligor or an affiliate of an obligor.

The borrower's consent is required (unless a default has occurred and is continuing or the assignment is to another lender in the syndicate) for assignments. The agent's consent is also required for assignments, and the consent of the issuing bank and swingline lender is required for an assignment in respect of a revolving facility.

The agent maintains the register of lenders which is conclusive absent manifest error. The agent is required to make the register available for inspection by the borrower and any lender at any reasonable time and upon prior notice.

(Section 10(a)-(c) of the CBA Model Provisions.)

Participations

Each lender has the ability to participate its loan and commitments post closing without borrower or agent consent. The lender/grantor of the participation retains the right to enforce the agreement and to approve any amendment, but the participant usually must consent to any amendments under the credit agreement requiring unanimous lender consent (Section 10(d) of the CBA Model Provisions).

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For a form of loan agreement which follows the CBA Model Provisions as updated by the LSTA Model Provisions, see *Standard Document, Loan Agreement (Syndicated)*.

What Don't the CBA Model Provisions Cover?

The CBA Model Provisions are not comprehensive. They relate primarily to the relationship between the agent and the lenders and do not address any terms relating to the loans themselves, representations, warranties or covenants. In addition, the following are not covered in the CBA Model Provisions:

- Defaulting lender provisions (see *Standard Document, Loan Agreement (Syndicated): Section 16.13*).
- Detailed duties and responsibilities of the administrative agent (see *Standard Document, Loan Agreement (Syndicated): Section 16.07(a)*).
- A list of actions requiring the unanimous consent of lenders (see *Standard Document, Loan Agreement (Syndicated): Section 16.07(b)* and *Practice Note, What's Market: Loan Agreement Amendment Provisions*).
- A list of actions requiring required lender consent (see *Standard Document, Loan Agreement (Syndicated): Section 16.07(c)* and *Practice Note, What's Market: Loan Agreement Amendment Provisions*).
- Provisions relating to bankruptcy and insolvency of a borrower (see *Standard Document, Loan Agreement (Syndicated): Section 16.14*).
- Disqualified lender provisions.
- Amend and extend provisions.
- Cashless rolls provisions.
- Borrower and sponsor buy-back provisions.

What Are the LSTA Model Credit Agreement Provisions?

The LSTA first published select credit agreement provisions in 1999. These first standardised provisions addressed assignments and related provisions which could impact a loan's liquidity. Gradually, the LSTA expanded their model language to cover more of the boilerplate provisions typically found in a credit agreement. The LSTA's first Model Credit Agreement Provisions were published in 2004 and, in addition to assignments, covered agency, pro rata sharing, set off, yield protection, tax, notices, participations, governing law & jurisdiction, and confidentiality.

The Model Credit Agreement Provisions were again published and expanded in 2014 and since that time LSTA Market Advisories have further expanded their scope. The LSTA may announce to its membership a revision to an LSTA publication, a method for addressing a loan market disruption, or a new market development by publishing a short memo on point. These memos are referred to as LSTA Market Advisories.

What Do the LSTA Model Credit Agreement Provisions Now Cover?

The 2014 LSTA Model Credit Agreement Provisions memorialise much of the new credit agreement technology that the U.S. loan market had adopted after the global financial crisis, including borrower buybacks, amend & extend transactions, and defaulting lender language.

Some of the key provisions include standard language for the following:

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Appointment of Administrative Agent

The lenders appoint the agent to act on their behalf; however, the agent is not a fiduciary, and its duties are merely administrative. The agent has no duty to take any discretionary action and is not liable for any action taken or not taken by it with the consent or at the request of lenders in the absence of its own gross negligence or wilful misconduct.

Resignation and Replacement of Agent

The agent may, at any time, give notice of its resignation. Upon receipt of that notice, the required lenders have the right, in consultation with the borrower, to appoint a successor agent. If the lenders fail to make that appointment within 30 days, then the agent may appoint a successor agent.

If the agent is a defaulting lender, the required lenders may remove the agent and, in consultation with the borrower, appoint a successor.

Reliance by Agent

The agent is entitled to rely on any notice, certificate, or other writing believed by it to be genuine and signed by the proper person. The agent may also rely on any oral statement believed by it to have been made by the proper person.

Delegation of Duties

The agent may appoint a sub-agent to perform its duties, and the agent is not responsible for the negligence or misconduct of any sub-agent, unless it acted with gross negligence or willful misconduct in the selection of the sub-agent.

Borrower Indemnity

The borrower is required to indemnify each lender, the agent, and each issuing bank against any losses incurred by them in connection with the agreement, provided that the indemnity is not available if such losses resulted from the gross negligence of the indemnitee.

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Defaulting Lender

A lender becomes a defaulting lender if it:

- Fails to fund a portion of its loans within two days.
- Notifies the agent or makes a public statement that it does not intend to comply with its loan funding obligations. or
- Becomes, or has a parent company that becomes, the subject of a bankruptcy proceeding.

If a lender becomes a defaulting lender because it has failed to fund all or any portion of its loans or to pay a required amount to the agent or has filed for bankruptcy, then any payment of principal, interest, fees or other amounts received by the agent for that lender’s account shall be applied to the payment of any amounts owing by it to the agent, the issuing bank, or swingline lender and to cash collateralise the issuing banks' fronting exposure before being applied to other amounts. Other than for certain key matters, a defaulting lender's vote will be disregarded for any required lender vote. The borrower may rely on the yank-a-bank provisions to replace a defaulting lender.

Yield Protection

If any change in law increases the cost to a lender of making or maintaining any loan, then the borrower will, upon that lender's request, pay such additional amount to compensate that lender; however, the borrower is not required to compensate a lender for increased costs incurred more than nine months before the date that the lender has notified the borrower of the change in law giving rise to the increased costs.

Taxes

Payments by the borrower under the agreement generally are to be made without withholding for any taxes, except as required by applicable law. If any applicable law requires the withholding of any tax from any such payment, then the applicable withholding agent is entitled to make that withholding. If that tax is an indemnified tax, then the sum payable by the borrower shall be increased as necessary so that after such withholding has been made the applicable recipient receives an amount equal to the sum it would have received had no withholding been made.

Set Off

Upon the occurrence and continuance of an event of default, each lender can set off and apply deposits held for the borrower's account against the borrower's obligations. If a defaulting lender exercises any right of set off, all amounts that are set off shall be paid over immediately to the agent for further application in accordance with the defaulting lender provision.

Each participant also shall be entitled to the benefits of the set off provision as if it were a lender, so long as the participant agrees to be subject to the sharing of payments section.

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Assignments

The suggested minimum amount of a revolver assignment is $5 million and for term loan assignment $1 million, or no minimum amount if it is the entire remaining amount of the assigning lender's commitment or loans. No assignment can be made to a natural person or a holding company, investment vehicle, or trust owned or operated for the primary benefit of such natural person.

The borrower's consent is required (unless a default has occurred and is continuing) for assignments. However, the borrower shall be deemed to have consented to an assignment unless it has objected to the agent within five business days after receiving notice of the proposed assignment. The agent's consent is also required for assignments, and the consent of the issuing bank and swingline lender is required for an assignment in respect of a revolving facility.

The agent maintains the register of lenders, which is conclusive absent manifest error. The agent is required to make the register available for inspection by the borrower and any lender at any reasonable time and upon prior notice.

Disqualified Institutions

A disqualified institution is any person designated by the borrower as a “disqualified institution” by written notice delivered to the agent on or before the date of the agreement and, after the agreement's effective date, any other person that is a competitor of the borrower and that has been designated by the borrower as a “disqualified institution” by written notice to the agent.

A disqualified institution may be neither a lender nor a participant. However, if a loan trade has been entered into before a competitor has been designated as a disqualified institutions, then that trade may be settled by the parties; however, the borrower then may yank that entity and pay them for the loans at the price set forth in the credit agreement which may be par, the price they paid for the loan, or the current market price. During the interim period, a disqualified institution is prohibited from receiving confidential borrower information, engaging in fundamental lender actions, and taking part in creditor decisions in connection with insolvency scenarios. The disqualified lender list still applies even if a default has occurred and is continuing.

Amend & Extend Transactions

The borrower may request, at any time, an extension of the maturity of any class of loans and commitments by written notice to the agent. The notice must specify the amount of the applicable loans and/or commitments to be extended, the date on which the extension shall be effective, and identify the relevant class of revolving credit commitments and/or term loans to which the extension relates. All lenders of a particular class must be given an equal opportunity to participate on a pro rata basis in any amend & extend transaction. If the amend & extend transaction is oversubscribed, then the applicable loans and/or commitments of lenders of the applicable class shall be extended ratably up to the maximum amount specified in the extension notice.

The terms of the extended commitments or loans, as applicable, shall be substantially identical to the terms set forth in the agreement. The final maturity date of any extended commitment and/or loan shall be no earlier than the

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respective existing maturity date. The extended loans and/or commitments will rank *pari passu* with the existing loans and commitments, and the borrower and guarantors shall be the same.

Cashless Rolls

Any lender may exchange, continue or rollover all or a portion of its loans in connection with any refinancing, extension, loan modification or similar transaction permitted by the terms of the agreement, pursuant to a cashless settlement mechanism approved by the borrower, the agent and such lender.

Sharing of Payments

If a lender exercises a right of set off and, consequently, obtains payment in respect of any principal of or interest on any of its loans resulting in it receiving payment of a proportion of the aggregate amount of its loans and accrued interest greater than its pro rata share, then it is required to buy participations in the loans and other obligations of the other lenders so that the benefit of all such payments is shared by the lenders ratably in accordance with the aggregate amount of principal of, and accrued interest on, their respective loans.

Participations

Lenders may sell participations without borrower or agent consent. The relevant participation agreement shall provide that the lender/grantor of the participation retains the right to enforce the agreement and to approve any amendment, but the participation agreement may provide that the lender/grantor will not, without the participant's consent, agree to any amendment with respect to those agreement terms requiring unanimous lender consent.

Borrower Buy-Backs

Any lender may assign its term loans on a non-pro rata basis to the borrower in accordance with reverse “Dutch Auction” procedures under an offer made available to all lenders on a pro rata basis subject to certain limitations. The borrower must represent that neither it, nor its affiliates, has any material non-public information relating to it that has not been disclosed to the term lenders. The purchased term loans will be extinguished immediately, and the borrower will have no rights as a term lender under the credit agreement by virtue of the assignment. No default or event of default shall have occurred and be continuing before or immediately after giving effect to such assignment.

Sponsor Buy-Backs

Sponsors are permitted to buyback loans through non-pro rata open market purchases; however, bona fide debt funds that are affiliated with the borrower (“debt fund affiliates”) are not subject to the same buyback restrictions

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as entities affiliated with the borrower that are not debt fund affiliates. On required lender votes, the portion of any loans held by debt fund affiliates in the aggregate in excess of 49.9% of the amount of loans required to be held by lenders for such lenders to constitute required lenders are disregarded in determining required lenders.

Confidentiality

Each lender and the agent agree to maintain the confidentiality of the borrower's confidential information, except that a lender may disclose that information to their affiliates, as required by law or by a regulator, and, subject to an agreement with confidentiality provisions substantially similar to those set forth in the agreement, to any assignee of or participant in, or any prospective assignee of or participant in any of its rights and obligations under the agreement, and to any actual or prospective party to any swap or derivative or other transaction under which payments are to be made by reference to the borrower, and on a confidential basis to any rating agency in connection with the borrower's rating or the CUSIP Service Bureau. In addition, the lenders and the agent may disclose the existence of the agreement and information about the agreement to market data collectors.

What Don't the LSTA Model Provisions Cover?

The LSTA Model Credit Agreement Provisions do not cover representations and warranties, covenants, and event of defaults. However, the LSTA is currently working on an Investment Grade Revolving Credit Facility Agreement which will be our first complete agreement and which will include all those types of provisions.

How Current Are the CBA and the LSTA Model Credit Agreement Provisions?

The CBA Model Provisions have not been updated since their adoption in 2004.

The LSTA Model Provisions were last updated in 2014, and the new LSTA Revolving Credit Facility Agreement will be published in 4Q17.

Who Uses the CBA and the LSTA Model Credit Agreement Provisions?

While the use of the CBA Model Provisions is not mandatory, they are commonly used in syndicated loan transactions where the administrative agent is a major Canadian bank, in addition to other non-standardized provisions. They are either incorporated (in whole or in part) throughout the body of the credit agreement or incorporated by reference in a schedule to the credit agreement.

The LSTA Model Provisions have generally been adopted by the large banks and incorporated in their forms. The boilerplate provisions generally have been accepted by all loan market participants.

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Where Do You Find the CBA and the LSTA Model Credit Agreement Provisions?

The CBA Model Provisions are often attached as a schedule to the loan agreement and publicly filed on SEDAR. For a copy of the CBA Model Provisions, see Schedule AA of the following loan agreement: *Centric Health Corporation Second Amended and Restated Credit Agreement*.

LSTA members may access the LSTA Model Provisions, and non-members may purchase them. For members, the LSTA Model Provisions are available on the LSTA website at *lsta.org*.

END OF DOCUMENT

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