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COMPLETION GUARANTEES AND
THE FINANCING OF
ENTERTAINMENT PROJECTS IN
THE PROVINCE OF QUEBEC

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ABSTRACT

Completion guarantees are well known in the entertainment industry as a form of guarantee issued to motion picture and television producers to satisfy the requirements of their financiers.

This thesis reviews and analyzes some of the business and legal issues that arise in connection with completion guarantees, as the completion guarantor assumes an increasingly pivotal role in entertainment financing transactions.

The author discusses the current nature of North American entertainment financing and provides a brief history of completion guarantees. An analysis of the major forms of documentation involved in completion guarantee transactions follows. The obligations undertaken by the completion guarantor and their discharge are discussed, as are claims and reinsurance matters.

A considerable portion of this thesis examines the position of the completion guarantor operating in Quebec and, in particular, the security rights enjoyed by the guarantor in this province.

This thesis concludes by exploring the direction in which the completion guarantee industry is evolving, some extraterritorial considerations and the interplay between business and law in this field of endeavour.

RÉSUMÉ

Les garanties de bonne fin sont reconnues dans l'industrie du divertissement comme étant une forme de garantie émise aux producteurs de films et d'émissions télévisées, pour satisfaire les besoins de leurs financiers.

Cette thèse analyse et passe en revue certaines questions légales et d'affaires qui surgissent à propos de garanties de bonne fin. Ainsi, le garant assume un rôle de plus en plus essentiel lors du financement des transactions dans cette industrie.

L'auteur discute de la nature actuelle du financement dans l'industrie Nord-Américaine du divertissement et fournit un bref historique des garanties de bonne fin. Une analyse des différents types de documentation impliquée dans la transaction des garanties de bonne fin suivra. Les obligations auxquelles le garant s'est engagé et la libération de celles-ci sont discutées, ainsi que les réclamations et la réassurance.

Une partie considérable de cette thèse examine la situation du garant opérant dans la province de Québec et, plus particulièrement, les sûretés que peut avoir ce dernier dans cette province.

Cette thèse se termine en examinant dans quelle direction l'industrie de garanties de bonne fin se développe et en étudiant des considérations extra territoriales et l'interaction entre les affaires et le droit dans ce domaine.

ACKNOWLEDGMENTS

The preparation of a Master's thesis is a difficult task, particularly for a student who has had little contact with the academic world for almost two decades. Many people have assisted me with this endeavour, directly or indirectly, and it is with great appreciation that I wish to acknowledge their individual contributions.

First, I would like to thank Professor John E.C. Brierley, former Dean of the Faculty of Law of McGill University, who so kindly and graciously supported my initial application to McGill's Faculty of Graduate Studies and Research. Similarly, I thank Me Danny Levinson, without whose encouragement and moral support I would not have seriously considered a sabbatical leave from the practice of law.

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My former colleagues, Me Michael Prupas and Norman Bacal, Esq., both deserve mention, each for his past and continuing support of my personal and professional goals. It is

through these two excellent lawyers that I was introduced to the demanding, yet exhilarating, world of entertainment law, and I fully appreciate the opportunities each has provided to me to explore the complexities of completion guarantees.

To Me Corrado De Stefano I extend my sincere gratitude, for his assistance in translating the "Abstract" of this thesis.

My husband, Danny Kaufer, my daughters, Emily and Rebecca Kaufer, my parents, Edith Glickman Lifshitz and Hyman Lifshitz, and my in-laws, Margrit Feldman Kaufer and Leslie Kaufer, warrant special mention and it is to them that I dedicate this work. I am aware that the past two years have not been easy and I appreciate the efforts each has made to help me see this thesis through to its completion.

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Of course, I take full and sole responsibility for any errors that may follow.

COMPLETION GUARANTEES AND THE FINANCING OF ENTERTAINMENT PROJECTS IN THE PROVINCE OF QUEBEC

I. INTRODUCTION

In a world of rapid change, it is not surprising that the methods employed in order to finance Canadian film and television productions are also changing rapidly. Although many factors influence this evolution, perhaps the most important are economic considerations, which have resulted in less money to spend on public funding of cultural development than was available in more prosperous decades.¹

¹In 1996, for example, the Canadian Film Development Corporation ("Telefilm Canada")'s \$CDN 80 million budget was cut by eleven per cent, the National Film Board's Budget of \$CDN 55 million was cut by seven per cent and a \$CDN 255 million cut was announced in the Canadian Broadcasting Corporation's \$CDN 728 million budget. See: M.S. Serrill, "Special Report: A Nation Blessed A Nation Stressed" Time (20 November 1995) 20 at 40. Provincially, direct government funding has been virtually eliminated in Ontario and Alberta, while other provinces such as Quebec, Nova Scotia, Saskatchewan, Manitoba and British Columbia are still trying to maintain a financial commitment to the Canadian entertainment industry. See: D. Barrett, "Barrett: changes on the financing front" Playback (7 October 1996) 45, A. Vale & J. Morgan, "The changing support environment" Playback (17 July 1995) 7, G. McLaughlin, "Too little, too late" The Financial Post (21 September 1996) 10, L. Rice-Barker, "Unprecedented competition ahead: Lampron" Playback (6 May 1996) 5, G. McLaughlin, "Content overcomes cutbacks for TV producers" The Financial Post (25 November 1995) 71 and I. Edwards, "The ever-present search for cash" Playback (25 September 1995) 31. Insofar as indirect government funding through limited partnership tax shelters and through refundable tax credits are concerned, see: L. Rice-Barker, "Shelter shut down" Playback (2 December 1996) 1, L. Rice-Barker, "Cutback causes turmoil" Playback (7 April 1995) 1 and B. Kelly, "Provincial tax-credit cuts anger local film-makers" The [Montreal]

As public sources of funding have diminished, a maturing Canadian entertainment industry has sought to redefine the manner in which it finances its film and television projects.²

In many instances, the industry has adopted the international (originally, American) model of financing most of a project's budget by pre-selling distribution rights in major territories.³ As will be discussed in further detail below,⁴ this model requires that on a project-by-project basis, there be some reliance by the industry upon interim

Gazette (5 April 1997) E1.

²Most recently, a number of production houses, such as Alliance Communications Corp., Paragon Entertainment Corp., Cinar Films Inc., Atlantis Communications Inc. and Malofilm Communications Inc. have "gone public" in order to raise capital. See: G. McLaughlin, "TV owners get green light to raise more U.S. money" The Financial Post (24 November 1995) 5, L. Kinross, "Canadian TV movies are big business" The Financial Post (12 September 1995) 16, S. Malcolm, "The pros and cons of going public" Playback (10 April 1995) 21 and L. Rice-Barker, "Live stocks" Playback (14 March 1994) 19. In order to compete internationally, there is also an increasing trend in the Canadian entertainment industry toward mergers, acquisitions and strategic partnerships. See: M. MacMillan, "MacMillan: it's a new world" Playback (7 October 1996) 43, M. Evans, "Hollywood North comes of age" The Financial Post (12 September 1996) 14 and T. Weber, "Film houses looking to merge" The Financial Post (6 November 1996) 5.

³See: G. McLaughlin, "Say goodbye to Hollywood" The Financial Post (7 September 1996) 10.

⁴See the section of this thesis, below, entitled "The Structure of Bank Financing Transactions".

bank financing. A number of Canadian banks appear prepared and willing to accommodate this need.⁵

It is beyond the scope of this thesis to provide a historical, social or economic analysis of the various dynamics associated with the interim financing of Canadian feature films, made-for-television movies and television series. Rather, the purpose of the present thesis is to examine and analyze the role and functions of one specific party, the completion guarantor, without whose involvement very little of this type of lending would take place. The focal point will be a particular form of entertainment financing: transactions in which an independent production

⁵While the Royal Bank of Canada is the leading Canadian bank that offers film/TV project financing, a number of other Canadian banks are also active in this area; see: J. Low, "Behind the screens; bank financing for motion picture and television production" (1995) 102:4 *Canadian Banker* 30 (QL), E. Pang, "Banks jumping on the bandwagon" *Playback* (5 December 1994) 21, M. Maddever, "New bank option for prods" *Playback* (16 December 1996) 2 and G. MacDonald, "Canada: bankers show reel support" *The Financial Post* (19 November 1994) 8 (QL). Discussions between this author and attorneys active in entertainment financing, including conversations with Elizabeth McGuinness, Esq. (Heenan Blaikie, Toronto) on November 12, 1996 and June 6, 1997, Me Étienne Massicotte (Stikeman Elliott, Montreal) on November 4, 1996 and June 12, 1997 and Me Sam Berliner (Heenan Blaikie, Montreal) on November 12 and 18, 1996 and June 5, 1997, confirm that Canadian "Schedule I" banks such as the Royal Bank of Canada, Bank of Nova Scotia, Toronto-Dominion Bank and Canadian Imperial Bank of Commerce, as well as "Schedule II banks" such as the Republic National Bank of New York (Canada) and Banque Nationale de Paris (Canada) are all involved, to varying degrees, in interim bank financing of film and television projects in Canada. The Royal Bank of Canada even has a World Wide Web page on the Internet that describes its activities in this area; see: <http://www.royalbank.com/english/kbi/media.dat.html>. A comprehensive, territory-by-territory survey of leading banks involved internationally in entertainment project financing may be found in "Bridging the gap" *Screen International* (12 May 1995) 16.

company with its principal establishment located in Quebec (hereinafter referred to as the "producer") will be seeking to finance a single entertainment project to be produced in Quebec, rather than a group of entertainment projects produced here or elsewhere.⁶

The emphasis in this thesis will be on one specific aspect of Canadian entertainment services, the Canadian motion picture (including television "movie-of-the-week") industry, rather than on the episodic television, radio or music recording industries, each of which faces its own particular set of problems.⁷ In addition, reference will be made

⁶For a brief discussion of completion guarantee issues that arise in the context of film financings through revolving credit facilities for independent production companies, as opposed to the more customary single-picture financings, see: L.H. Greaves, "Revolving Lines of Credit for Independent Production Companies" in J.D. Viera & R. Thorne, eds., Entertainment, Publishing and the Arts Handbook: 1994-95 Edition (Deerfield, Ill.: Clark Boardman Callaghan, 1994) 191 at 193-194 and S. Moore & S. Jeffrey, "Film Financing: The Completion Guaranty Aspect" (1992) 3 Entertainment Law Review 79 at 79. With respect to the role of completion guarantors in the financing of motion pictures by major Hollywood studios, see: C. Eller, "Its game is bond, completion bond" Los Angeles Times (26 May 1995) Business, D4 (LEXIS-NEXIS), N.G. Rudman, "The Finishing Touch: The Completion Guarantee" in J.E. Squire, ed., The Movie Business Book, 2nd. ed. (New York: Simon & Schuster, 1992) 216 at 217-218, M. Angeli, "My Name Is Bond. Completion Bond." The New York Times (11 August 1991) section 2, page 11, column 1 (LEXIS-NEXIS) and P. Apodaca, "Insurer guarantees that movies have an ending -- happy or otherwise" Los Angeles Times (10 April 1990) Business, D7, column 1 (LEXIS-NEXIS). As to issues arising in connection with completion guarantees issued in central and eastern Europe, see: "Completion bond problems in Eastern Europe" Screen Finance (3 June 1992) (LEXIS-NEXIS).

⁷Insofar as the Canadian television industry is concerned, see for example: J. Geddes, "Culture protection debate heats up" The Financial Post (29 January 1997) 5, T. Weber, "Selling Canada to the world" The Financial Post (11 February 1997) 10 and D. Morgan, "Cable, Computers,

primarily to Canadian (and especially Quebec) statutes, jurisprudence and doctrinal writings. However, given the undeniable influence of the American entertainment industry on its Canadian counterpart,⁸ extensive reference will also be made to American sources, as well as to other foreign experiences, where appropriate.

The focus will be on entertainment projects as they are currently known and understood today. New uses to which these projects may be put, and which may be widely accepted in the short or long term (for example, interactive films allowing spectators to choose various plot twists or endings), is itself worthy of an entirely separate study.

Copyright and Canadian Culture" (1986) 2 I.P.J. 69. With respect to the radio industry, see for example: B. Dalglisch, "Digital signals hailed as radio's future" The Financial Post (31 October 1995) 7; and concerning the music recording industry, see for example: The Canadian Press, "Radio stations to keep funding Canadian talent" The [Montreal] Gazette (18 November 1995) C13.

⁸See for example: M. Abley, "Nourishing a nation's soul" The [Montreal] Gazette (17 February 1997) B3, "Focus: Film Industry" The Financial Post (12 September 1995) 16ff and A. Fotheringham, "U.S. bullies Canadian film industry" ibid. 15. For a general review of Canadian-American relations in the Canadian feature film industry, see: M. Spencer, "US-Canada relations, 1920-1986" Cinema Canada (June 1986) 10. One must note, however, that Americans appear increasingly interested not only in the products produced by the Canadian entertainment industry, but also in its legal and regulatory framework; see: D. Saunders, "Exporting Canadian culture" The [Toronto] Globe and Mail (25 January 1997) C1, T. Weber, "Canadian product a winner" The Financial Post (4 January 1997) 24 and D.B. Zitzerman & M.A. Levine, "Producing a Film in Canada: The Legal and Regulatory Framework" (1991) 8 Entertainment and Sports Lawyer 15.

The underlying perspective is that of a Canadian completion guarantor company, operating in the Province of Quebec, that wishes to become involved in providing a completion guarantee for the production of a project destined for movie theatres or television screens (hereinafter referred to as the "film/TV project").

Experience suggests that the conduct of completion guarantors in Quebec differs little from the conduct of completion guarantors in other jurisdictions. In other words, completion guarantees are issued, maintained and terminated in Quebec much as they are elsewhere. Perhaps this is because so many completion guarantors operate on a global scale.⁹ Perhaps, in addition, it is because the field of completion guarantees is driven primarily by business considerations, like so many other aspects of the entertainment industry, rather than by considerations of

⁹See: P. Noglows, "Newcomers turn completion game into risky business" Daily Variety (8 August 1990) 1 and the detailed advertisements from various completion guarantors that accompany this article.

law.¹⁰ The first part of this thesis will thus be devoted to an examination of the business of completion guarantees.

Still, the legal framework within which business is conducted by the completion guarantor operating in Quebec is surely unusual. For the Quebec legal system is one of the few in the world that is characterized by a mixture of both common law and civil law principles.¹¹ This thesis will attempt to demonstrate that, notwithstanding this distinctiveness, the laws applicable in the mixed jurisdiction of Quebec serve well the interests of completion guarantors. Accordingly, the second part of this thesis will examine how, in particular, the Civil Code of Québec¹² offers a vast panoply of devices that protect the security rights of completion guarantors operating in the Province of Quebec.

¹⁰As American entertainment attorney Melvin Simensky has written:

...the subject matter of entertainment law is "the deal," i.e., the exploitation of an entertainment project. Such a view, in turn, supports an analogy wherein business is perceived to be the skeleton to which legal principles, in part, bestow flesh. Therefore, in the world of entertainment law, business, not law, dominates.

See: M. Simensky, "Defining Entertainment Law" (1986) 4:3 Entertainment and Sports Lawyer 13 at 13.

¹¹See: R. David & J.E.C. Brierley, Major Legal Systems in the World Today, 3rd. ed. (London: Stevens & Sons, 1985) at 25-26 and 91, as well as the bibliographical information on "mixed jurisdictions" provided at 594-595.

¹²S.Q. 1991, c. 64 (in its French version, the Code civil du Québec, L.Q. 1991, c. 64); hereinafter referred to as "CCQ".

II. THE BUSINESS OF ENTERTAINMENT PROJECT-BASED FINANCING

A. THE STRUCTURE OF BANK FINANCING TRANSACTIONS

It is rare for the budget of a film/TV project produced in Quebec to be financed from a single basis. Most typically, a variety of financing sources are combined. These sources would include: advances against anticipated profits from domestic and foreign distributors; where eligible, public subsidies, loans and equity investment provided by such agencies as (at the federal level) Telefilm Canada, the National Film Board, and/or (at the provincial level) la Société de développement des entreprises culturelles ("SODEC"); also, where eligible, government-industry partnerships such as the Canada Television and Cable Production Fund; national private sources such as the Foundation to Underwrite New Drama for Pay Television and Rogers Telefund; federal and provincial refundable production tax credit schemes; and producer and supplier deferrals.¹³

¹³See: "National sources of investment, funding" Playback (5 May 1997) 33 and S. Greenberg, "Canadian Film and Entertainment Industry Update" (Notes presented at The Canadian Institute conference on the Canadian Film and Television Industry, Montreal, Quebec, April 28, 1995) [unpublished] at 1.

Although the producer may in theory obtain enough sources of financing to cover the entire budget of its film/TV project, the producer may, nonetheless, not have sufficient cash to meet production cash flow requirements. For example, only a small percentage of the monies due from a distributor might be payable on the signature of the distribution agreement, with the balance due on delivery of the completed film. Or, funding from Telefilm Canada and SODEC may be available only in instalments, each payable upon the occurrence of a specific event (commencement or completion of principal photography, availability of a rough cut, delivery, submission of an audited production statement, etcetera). It is the role of the interim financing bank in these circumstances to "bridge the gap" between anticipated funding and actual cash on hand.¹⁴

¹⁴There appears to be virtually nothing written to date specifically on the subject of interim bank financing for the entertainment industry in Quebec. See, however, in the broader Canadian context: A. Evrensel, "Legal Considerations for Banks Lending to Motion Picture Productions" in The Continuing Legal Education Society of British Columbia, ed., Entertainment, Media and Communications Law - Issues '94: Part 2 - Entertainment (Materials prepared for the Continuing Legal Education Seminar entitled Convergence, Implications of the Multimedia Revolution, Vancouver, British Columbia, November 4, 1994 [Vancouver: The Continuing Legal Education Society of British Columbia, 1994]), MacDonald, supra note 5 and Low, supra note 5. With respect to the American perspective on entertainment bank financing transactions, see: J. Mazirow Eshman, "Bank Financing of a Motion Picture Production" (1992) 12 Loyola of Los Angeles Entertainment Law Journal 87, J. Foy, "The Recondite Discountable-Contract Finance: An Elucidation of Negative-Pickup and Presale Financing Arrangements" in Viera & Thorne, eds., supra note 6, 221, R.K. Rosenberg, "Bank Financing Strategies For Independent Films" (1995) 10:12 Entertainment Law & Finance 1, L.J. Ulman, "Negative Pick-Up Film Financing" (Notes from the American Law Institute - American Bar Association Continuing Legal Education ALI-ABA Course of Study on Secured Financing and Equipment

In a "negative pick-up" interim financing transaction, one of the most commonly-encountered forms of entertainment project financing, a large component of the film/TV project's production budget funds are derived from sums payable to the producer pursuant to executed distribution agreements.

Typically, in such an agreement, the distributor agrees to pay a substantial portion of the price negotiated for its distribution rights only when the project is completed, thereby allowing the distributor to "pick up" the original "negative" of the project from which release prints may be made. If a bank intends to lend against the security of receivables due pursuant to such an agreement, it will structure the loan transaction so that upon delivery of the completed project to the distributor, payment by the distributor will be made directly to the bank.¹⁵

Leasing, March 16, 1995) C133 ALI-ABA 509 (WESTLAW), J.S. Kenoff, "'Negative Pick-Up' Deals For Film Production Projects" (1994) 10:7 Entertainment Law & Finance 1, S. Soocher, "Independents' Financing: Checklist for Obtaining Bank Loans for Films" (1993) 8:11 Entertainment Law & Finance 1, R.G. Weiss & A.G. Benjamin, "Feature Film Secured Financing: A Transactional Approach" (1983) 15 Uniform Commercial Code Law Journal 195 at 197-199 and G. Goodell, Independent Feature Film Production: A Complete Guide from Concept to Distribution (New York: St. Martin's Press, 1982) at 8-11.

¹⁵How this may be accomplished will be discussed in further detail below, in the section of this thesis entitled "Distribution Receivables".

The bank will also wish to structure its loan transaction so that it is positioned as the producer's first-ranking secured creditor. This may be accomplished by, first, insisting upon a requirement that the bank's loan be made to a company newly-formed for the single purpose of producing the film/TV project for which the loan is intended, to minimize the risk of existing prior claims, hypothecs or other outstanding charges. If the producer itself does not currently meet this requirement, the bank will oblige it to proceed with the incorporation of a new production company-borrower.

Alternatively, the bank could require its interim financing transaction to be structured by means of the creation of a security trust, as is frequently done in the realm of construction project financing.¹⁶ However, this option is not one that has received much attention to date within the entertainment industry.¹⁷

In addition, the bank will insist that comprehensive search procedures be performed, in order to confirm that there are

¹⁶For a discussion of the trust as a security device in the Province of Quebec, see: J.B. Claxton, Security on Property and the Rights of Secured Creditors under the Civil Code of Québec (Cowansville, Que.: Yvon Blais, 1994) at 217ff and especially at 239-242 respecting project financing.

¹⁷The subject of the trust, as a security device for the completion guarantor, shall be treated in greater detail below, in the section of this thesis entitled "Trust Mechanisms".

no outstanding encumbrances on the property to be charged that would outrank the bank's proposed security. The producer may then represent and warrant that this is indeed the case and, further, covenant not to encumber any secured property, except as the bank may permit. In order to perfect the bank's rank, there must be timely registration, in the appropriate registry(ies), of all registrable documentation concluded in connection with the loan transaction.¹⁸ In most interim bank financings of film/TV projects, the bank will negotiate and conclude a variety of documents specifically intended to establish the bank's first priority position. However, there may be circumstances in which, for commercial reasons related to the particular transaction, the bank may be prepared to accept a subordinated position as regards some of the producer's secured property.¹⁹

The bank must not only ensure the creditworthiness of the distributor, but must also ensure that the contemplated film/TV project is indeed completed and delivered. Without a project that has been duly completed and delivered, the

¹⁸Articles 2934, 2945-2956, 2969-2987 CCQ.

¹⁹For example, where the interim financing is provided by more than one bank, an intercreditor agreement and related documentation executed by the syndicate of lenders may provide for one bank to have a first priority position vis-à-vis certain elements of the producer's property, while other banks have a first priority position vis-à-vis other elements. See: Evrensel, supra note 14 at 5.1.08.

distribution receivables intended as the source of repayment of the project's initial financing will not be forthcoming. For this reason, the bank will almost always require that before it will advance any funds itself, an acceptable completion guarantee will have been issued in respect of the project by an approved completion guarantor.²⁰

²⁰As shall be discussed more fully below, in the section of this thesis entitled "The Completion Guarantee", in a standard completion guarantee the completion guarantor undertakes either to complete and deliver the contemplated film/TV project in accordance with the delivery requirements of specified distribution and/or license agreements, or to pay the producer's indebtedness to the bank (and other project financiers), upon the completion guarantor's election to abandon the project, or in the event that the completion guarantor fails to complete or deliver the project. The entire subject of completion guarantees has received little scholarly attention. However, for a brief discussion of the role of the completion guarantor specifically in relation to the interim bank financings of film/TV projects, see: Evrensel, supra note 14 at 5.1.03-5.1.04, Rosenberg, supra note 14 at 6, Kenoff, supra note 14 at 4 and Weiss & Benjamin, supra note 14 at 205-208. More generally, as regards the completion guarantor, see: Rudman, supra note 6 at 216-229.

B. THE ROLE OF COMPLETION GUARANTEES

1. An Introduction to Completion Guarantees

For those who have had little or no contact with the entertainment industry in general, and with entertainment law in particular, there exists some mystery surrounding the entire notion of a completion guarantee. A simple definition is that a completion guarantee (also known as a "completion bond") is a form of guarantee that the financiers require the producer of a film or television programme to obtain from a company which specializes in the issuance of these guarantees. For a fee,²¹ based upon a percentage of the project's budget, the guarantor agrees to do three things:

- i. to provide the funds required to pay any costs which are in excess of the budgeted cost of the project, so that the project will be completed and delivered;

²¹The calculation of the completion guarantor's fee will be discussed further, below, in the section of this thesis entitled "Completion Guarantee Fees".

- ii. to complete the project itself, if the project's producer is unable or unwilling to do so; and
- iii. in the worst case scenario, to repay the project's financiers all the monies which they have already advanced, where the guarantor decides, for one reason or another, that it wishes to abandon the completion of the project.

It is common within the entertainment industry to refer to the completion guarantee as a form of insurance.²² However, as shall be discussed more fully elsewhere in this thesis,²³ there is a major difference between this guarantee and the usual insurance policy: Contrary to ordinary insurers, if

²²For example, in his 1990 article on the then-current state of the completion guarantee industry, Paul Noglows (supra note 9 at 41) stated:

"[c]ompletion guarantors insure that financial backers of films that the projects in which they have invested will be finished at within budget and on time. If they aren't, any significant cost over-runs come out of the guarantor's pocket.

[emphasis added]

Similarly, in her 1993 article, Anne Thompson defined completion bonds as "the insurance policies that independent movie makers must get as a prerequisite for bank loans". See: A. Thompson, "At a Movie-Making Lifeline, It's a Wrap" The New York Times (15 August 1993) F8 at F8.

²³See the section of this thesis, below, entitled "The Legal Nature of Completion Guarantees".

a guarantor pays on a claim, it will seek to recoup its own advances from the worldwide receipts of the production after the financiers have recouped the cost of the project.²⁴ Obviously, there are a variety of conditions and exclusions that refine the concept of the completion guarantee, and these shall be dealt with at length, below.²⁵

2. A Brief History of Completion Guarantees

The first completion bond company, then known as Film Finances Services Limited (and currently known as Film Finances, Inc.), was incorporated in England in 1950. It was created to meet the needs of investors who sought assurance that low budget, independently-financed films would be successfully completed. For the first thirty years of its existence, Film Finances operated primarily in Europe, where film/TV projects were more likely to be financed by independent production than by major Hollywood-type studios.²⁶

²⁴See: Foy, supra note 14 at his note 31.

²⁵See the section of this thesis, below, entitled "The Completion Guarantee".

²⁶See: B.L. Smith, "The Role of Completion Guaranty Bonds in Independent Motion Picture Production Financing" (1986) 8:7 Entertainment Law Reporter 3 (LEXIS-NEXIS).

The utilization of completion guarantees in North America as an integral part of any entertainment financing transaction, as well as the proliferation of companies specializing in the issuance of completion guarantees, has occurred only since the early 1980's:

...increasingly diverse methods of financing films -- substantial foreign presales, videocassette presales, network tv prebuys, foreign coproductions and the use of privately and publicly sold limited partnerships -- has created the need for completion guarantees to protect investors, financiers and lenders who might otherwise have no means of controlling the use of funds they have advanced for a particular production.

In recent years, major studios have had to rely increasingly on outside product to supplement their in-house productions. They, too, are depending on completion guarantees to minimize their risk from large cost overruns.²⁷

Accordingly, completion guarantees developed as an increasingly common and important feature in the North American entertainment industry. As production budgets became tighter and as financing arrangements became more and more imaginative, the issuance and administration of completion guarantees evolved into a booming business.²⁸

²⁷Noglow, supra note 9 at 41.

²⁸According to Fred Milstein, a former vice-president at Completion Bond Co. Inc., as a result of the increasing globalization and complexity of independent movie financing, "the completion bond became the spine of the movie deal". For these and additional comments by Mr. Milstein regarding the evolution of the completion bond business, see: Thompson, supra note 22 at F8.

The early 1990's saw a fierce price war conducted between leading completion guarantors. The net fees collected on completion guarantees dropped to as low as one, or one and one-half, per cent per project bonded. Driven by their continuing obligations toward their reinsurers, a number of guarantors took risks on, and decided to guarantee, a variety of projects that might otherwise have been refused. A series of serious claims ensued, as these doubtful projects went over budget. One leading completion guarantor, the Completion Bond Co. Inc., was even forced to shut its doors permanently.²⁹

Those companies that survived this difficult period "are taking a conservative approach to bonding films and taking a more serious approach than they have in the past".³⁰

²⁹Just prior to its demise, the Completion Bond Co. Inc. paid more than \$US 1 million in overruns on the Barbra Streisand film "Yentl", was forced to take over the completion of Spike Lee's "Malcolm X" as well as the animated film "The Thief and the Cobbler", and also suffered claims on the Danny DeVito - Jack Nicholson film "Hoffa" and the Sylvester Stallone film "Cliffhanger"; see: Eller, supra note 6, J. Greene, "Battered, but still standing" Daily Variety (25 February 1994) Special Section, 1 (LEXIS-NEXIS) and P. Apodaca, "Insurance risky in the film business" Los Angeles Times (23 June 1992) Business, 4 (LEXIS-NEXIS).

³⁰This is the case, according to Michael H. Mendelsohn, Vice-President of the media-entertainment finance group of Banque Paribas, as cited in Greene, ibid. Similarly, according to Mike Segal, Chicago-based head of International Film Guarantors,

There's a trend toward more vigorous underwriting to protect against losses, and that's created a safer environment for the banks and the distributors.... There's a higher degree of expertise than before and people are relying more on completion bond companies to do research they don't have

Recent newspaper reports indicate that the business of completion guarantors is thriving, fees have risen and it is unlikely that activity in this sector of the entertainment industry will diminish in the foreseeable future.³¹

Today, for all the parties to a production financing transaction, the completion guarantee serves to ensure that their respective investments, whether it be of money or of effort, are not in vain:

i. The producer wishes to protect itself against cost overruns;

ii. Each of the distributors wants to know that it isn't paying distribution advances for a production that will never be finished or capable of being distributed;

iii. Any bank which provides interim financing against the security of the

time for.

See: A. Dawes, "Banks like film" Daily Variety (24 February 1995) 1 [correction appended dated 27 February 1995] (LEXIS-NEXIS).

³¹See: S. Collins, "Movies; red light, green light" Los Angeles Times (20 October 1996) Calendar, 7 (LEXIS-NEXIS), A. Darrow, "Film Completion Bonds: Controlling Production Expenses" (1995) 11:6 Entertainment Law & Finance 1 at 6 (WESTLAW) and Greene, supra note 29.

executed distribution agreements wants to be repaid if the project is never completed, and the distributors refuse to pay their advances;

- iv. A local producer may wish to provide a means to exercise indirect controls on foreign co-producers;³² and
- v. All the investors, including government agencies such as Telefilm and SODEC, wish to closely supervise a producer who has little experience, who works in a remote location, or who may be associating with a conceivably difficult cast or crew.

From the point of view of every party involved in a film/TV project financing transaction, the completion guarantee exists to cover situations where the project's budget, or production schedule, or both, are endangered. This may be due to events of "cas fortuit" or "force majeure" (bad weather, an avalanche, strikes) or other situations not covered by ordinary insurance, such as the incompetence, bad

³²N. Sinclair, "Handling the U.S./Internal'l Film Deal" (1991) 7:1 Entertainment Law & Finance 3 (LEXIS-NEXIS).

judgment or even negligence of an individual producer, director or performer.

As an example, one may refer to the production of the 1988 Quebec film entitled "La Grenouille et la baleine", in which the entire production team (director, performers, technicians) was only supposed to be temporarily installed on the banks of the Saint Lawrence River, while waiting to commence principal photography. Even though all production elements had been in place for a week, not one centimetre of film stock had been shot, due to the fact that a thick fog totally masked the scene of the action. In this case, the completion guarantor covered all costs associated with the week-long delay precipitated by bad weather.³³

Accordingly, the completion guarantee ensures that the happening of any unforeseeable or unpredictable event does not prevent the production of a film or television project. However, depending upon one's particular role in the actual production of an entertainment project, one's appreciation of the completion guarantor may vary considerably:

To producers, the bond company can represent anything from a contract-wielding savior to the second half of the good cop-bad cop hyphenate. To directors and actors who are characterized as

³³Sylvie Gourde, "Silence: on finance" Commerce (février 1989) 105 at 105.

difficult, the bond company is what hunting season is to deer.³⁴

3. The Legal Nature of Completion Guarantees

The legal nature of the completion guarantee has been the object of some, but generally infrequent, scholarly debate.

At least one English author has addressed the issue of whether, under English law, a completion guarantee is actually a "guarantee" or an "indemnity".³⁵ The implications for characterizing the completion guarantee one way or the other under English law are many: 1) a guarantee requires a writing, while an indemnity may be merely implied; 2) if a completion guarantee is viewed as a form of indemnity, it may be classified as a contract of insurance; and 3) unauthorized and substantial modifications to the principal agreement (such as the bank's loan agreement) will terminate the completion guarantee automatically, if considered a guarantee, but "will go only as far as to constitute a repudiatory breach of contract of indemnity with the consequent onus on the party (the bondor in this case) to

³⁴Angeli, supra note 6.

³⁵See: K. Northrup, "The Completion Guarantee: Is It or Isn't It, and If Not, So What?" (1993) 5 Entertainment Law Review 142.

accept the repudiation".³⁶ However, no definitive conclusion is reached.

In the United States, a completion guarantee has frequently been compared to a performance bond in construction financing transactions.³⁷ The debate there has focused primarily on whether the completion guarantee is really perhaps a type of insurance. Most authors believe it is not.³⁸ American entertainment law attorneys Schuyler Moore and Sheri Jeffrey³⁹ point to the following factors, in support of their argument that a completion guarantee is neither insurance nor an indemnity bond:

- i. Whereas an insured has no obligation to repay its insurer for any proceeds of insurance disbursed on a given loss, the producer is contractually bound under the completion agreement to repay any completion sums advanced by the completion guarantor;

³⁶Ibid. at 144.

³⁷See, for example: Weiss & Benjamin, supra note 14 at 205 and 206 and Foy, supra note 14 at 236, note 4.

³⁸See: M.C. Phillips, "The Role of Completion Bonding Companies in Independent Productions" (1992) 12 Loyola of Los Angeles Entertainment Law Journal 97 at 110-111, Foy, supra note 14 at 227, 238 (his note 27) and Moore & Jeffrey, supra note 6 at 84-85.

³⁹Moore & Jeffrey, supra note 6 at 84.

ii. The state does not regulate the business of completion guarantees as a form of insurance, since the state has not defined insurance to cover completion guarantees; and

iii. The completion guarantee is more rightly viewed as a service contract than a form of insurance, since "completion guarantors typically play an active oversight role instead of being passive insurers".⁴⁰

In Canada, it does not appear that any court has addressed specifically this issue of the legal nature of a completion guarantee. Reference may be made, however, to Union générale cinématographique S.A. et al. v. Motion Picture Guarantors Inc. et al.⁴¹ In that case, the plaintiff investor brought a motion for an interlocutory and mandatory injunction requiring the defendant completion guarantor to complete and deliver a film entitled "Liberté, Égalité,

⁴⁰Ibid. Although these authors believe that a completion guarantee is not a type of insurance or indemnity bond, they do express concern that the American Internal Revenue Service could conceivably hold otherwise. A Quebec or other foreign completion guarantor might consequently suffer a variety of adverse tax consequences, in these circumstances; see: Moore & Jeffrey, supra note 6 at 84-85.

⁴¹[1985] O.J. No. 284 (QL).

Choucroute" and to make all payments requisite to that end. The motion was granted. In responding to the defendant's arguments that a guarantee for a debt has never been enforceable by mandatory injunction, Mr. Justice Smith, speaking for the Ontario Supreme Court's Court of High Justice, did appear to reject the view that a completion guarantee is but a mere indemnity:

In this case however, the breach is not in a failure to pay simpliciter but rather and perhaps primarily to finish and deliver a film. It is a guarantee but one entirely within the control of the guarantor. There is a series of agreements that in effect make the guarantor a partner in the enterprise. There is only one contract with [the investor], the guarantee, but that is part of a scheme or a package that brings the guarantor into a close relationship with the producer....

This is not an ordinary bonding situation. It is but one link in a chain.⁴²

Although there does not seem to be any Canadian doctrine relating to the specific legal nature of the completion guarantee, much has been written about the general realm of commercial suretyship.⁴³ A review of this material leads one

⁴²Ibid. at pages 16-17 and 19 of the report.

⁴³See, for example: K.P. McGuinness, The Law of Guarantee: A Treatise on Guarantee, Indemnity and the Standby Letter of Credit, 2nd. ed. (Scarborough, Ont.: Carswell, 1996), O. Chukwumerije, "The Discharge of Guarantors: Pax Management v. Canadian Imperial Bank of Commerce" (1994) 9 Banking & Finance Law Review 237, O. Chukwumerije, "Unenforceability of Principal Debtors' Obligation as a Ground for Invalidating a Guarantee" (1991) 6 Banking & Finance Law Review 221, L.-P. de Grandpré, "Cautionnements d'exécution - Performance Bonds" (1985) 3 Can. J. Ins. L. 5, W.L. Dimitroff, "Commercial Sureties: An Overview (Part I)" (1991) 8 Bus. & L. 22, W.L. Dimitroff, "Commercial Sureties: An Overview (Part II)" (1991) 8 Bus. & L. 29, S. Guillemard,

to believe that there is indeed good reason to compare the completion guarantee to one particular class of commercial surety bonding," the performance bond, which has been described in general terms as follows:

A performance bond may be issued with respect to any contract where one of the parties seeks a surety for the other's performance.... Thus, in the construction industry, performance bonds are usually issued when the owner seeks a surety for the contractor's obligations under the main construction contract.⁴⁵

"L'interprétation des contrats de cautionnement: Strictissimi juris vs Contra proferentem" (1993) 53 R. du B. 153, E.L. Hayes, "Guarantees: Contracting Out of Negligent Realization" (1992) 14 Canadian Bankruptcy Reports (3d) 219, M.L. Heins, "Insurance and Bonding Considerations" (1985) 7 Construction Law Reports 223, R.P. Hutchinson, "Release of Guarantee: Breach of the Principal Contract by the Creditor" (1990) 5 Banking & Finance Law Review 223, V. Karim, "Les garanties ou les cautionnements dans les contrats internationaux: pratique canadienne et internationale" in Ernest Caparros, ed., Mélanges Germain Brières (Montreal: Wilson & Lafleur, 1993) 715, D.A. Keith, "Performance Bonds" in Law Society of Upper Canada, ed., Special Lectures of the Law Society of Upper Canada - 1962: Claims Under Insurance Policies (Toronto: Richard De Boo, 1962) 311, S.D. Ness, "Performance Bonding as a Means of Contract Security" (1987) 4 National Insolvency Review 42, G.O. Jewers, "Legal Aspects of Surety Bonds" in Manitoba Law School, The Law Society of Manitoba & Manitoba Bar Association, eds., Isaac Pitblado Lectures on Continuing Legal Education - 1996: Commercial Insurance (Toronto: Carswell, 1966) 41, W.C. Riley, Jr., "Surety Bonds" in *ibid.*, 28, K.W. Scott, "Bonding and Insurance" (1986) 19 Construction Law Reports 207, M. Turcotte, "The Bonding Business" (1984) 2 Can. J. Ins. L. 2 and L.A. Westersund & B.E. Cotton, "Construction Bonds" (1993) 8 Construction Law Reports (2d) 109.

⁴⁴Business law attorney and professor Kevin Patrick McGuinness has written that there are seven basic types of commercial surety bonds: "Namely, tender or bid bonds, performance and maintenance bonds, labour and material payment bonds, repayment bonds, tax, and revenue-related bonds, court security bonds and fidelity bonds". He cautions, however, that performance bonds are not to be confused with "performance guarantees", since the latter are not really a form of guarantee, but are actually a form of standby letter of credit; see: McGuinness, *ibid.* at 778, note 30 and 779, note 33.

⁴⁵Westersund & Cotton, supra note 43 at 113.

In his discussion of the many forms of surety, standby or other forms of relationships which development project financing may engender, William L. Dimitroff has written of "Completion Agreements and other 'Performance' Guarantees":

Where the primary obligation involves something other than the mere repayment of monies, the guarantee of such obligations is by nature a "performance" or "completion" guarantee. These can be difficult to draft, in some circumstances, because the parties must agree on what constitutes "performance" or "completion" in light of the principal agreement. The obligation of the performance guarantor usually is to provide or arrange for funding of substantial completion of the principal's project.⁴⁶

When one considers the legal nature of the completion guarantee within the Province of Quebec, one cannot overlook the seminal work of Professor Louise Poudrier-LeBel entitled Le cautionnement par compagnie de garantie.⁴⁷ The entire second part of this treatise is devoted to an examination of whether a guarantee issued by a commercial guarantee company is in the legal nature of insurance or suretyship.⁴⁸ As Professor Poudrier-LeBel points out, the implications for

⁴⁶Dimitroff, supra note 43 at 24.

⁴⁷(Cowansville, Que.: Yvon Blais, 1986). Professor Poudrier-LeBel's treatise examines in painstaking detail numerous types of contractual and extra-contractual bonds, including fidelity bonds, permit-holder bonds, construction bonds, special contract bonds (for salespersons, buyers and transporters), liability bonds (for car owners, builders and others), fiscal bonds and judicial bonds. However, the one type of bond that is never considered, in either this or her subsequent publications, is the entertainment industry "completion bond" that is the subject-matter of this thesis.

⁴⁸Ibid. at 131-217.

making such a distinction are many and substantive; they relate to the form of the contract, its interpretation, its execution and even the prescriptive delays within which it may be litigated.⁴⁹

After providing a detailed analysis of the differences between suretyship and insurance, Professor Poudrier-LeBel concludes that the undertaking of a guarantee company is better characterized as a suretyship:

L'engagement par compagnie de garantie ne présente pas les caractéristiques d'un contrat d'assurance mais plutôt celles d'un cautionnement. Il présente en effet un caractère accessoire et subsidiaire qui découle de l'existence d'une obligation principale, de la nature de la prestation promise, du recours en remboursement et de l'intention des parties.⁵⁰

⁴⁹Although Professor Poudrier-LeBel's treatise was published in 1986 and the provisions of the new Civil Code of Québec came into force on January 1, 1994 (except for articles 717 and 718 CCQ, relating to notarial wills), the principles that she enunciated are still generally true under the new law. However, the new CCQ has modified substantially the earlier law relating to prescription. Today, both an action relating to the enforcement of a suretyship and an action deriving from an insurance contract would generally be prescribed by ten years: article 2921 CCQ. (With respect to the new provisions on suretyship, see generally: articles 2333-2366 CCQ; as to those relating to insurance, see generally: 2389-2628 CCQ.)

⁵⁰Poudrier-LeBel, supra note 47 at 217. Professor Poudrier-LeBel's conclusion has been briefly analyzed and supported by Rémi Moreau, in his article "Cautionnement et assurance: caractéristiques et distinctions" (1991) 59 Assurances 361 at 371-376. She has also been cited with approval in F. Fradette, "Le cautionnement: difficultés actuelles et appréhendées" (1988) 91 R. du N. 3 at 5, note 2 and in C. Dubreuil, "Les assurances et les cautionnements comme protection contre les malfaçons dans la construction" (1992) 22 R.D.U.S 343 at 364. Since the appearance of her treatise, Professor Poudrier-LeBel has written extensively on the subject of suretyship; see, for example: "Les tendances jurisprudentielles dans le droit du cautionnement" (1987) C.P. du N. 439, "La libération de la caution par la faute du créancier"

A similar conclusion is reached by Me Thérèse Rousseau-Houle, in relation specifically to performance bonds issued in the construction industry. She notes the distinction between performance bonds and ordinary insurance policies:

La distinction entre le contrat de cautionnement et le contrat d'assurance doit être bien perçue dans le domaine du droit de la construction, tant de la part de l'entrepreneur, appelé à juste titre le débiteur dans le contrat de cautionnement et qui devra rembourser à la caution les paiements qu'elle pourrait éventuellement verser au créancier, que de la part du maître d'oeuvre qui ne pourra tenir la caution responsable que dans la mesure de son engagement.⁵¹

While authorities in England, the United States and Canada have debated the characterization of performance bonds as either insurance or suretyship, authors in France have expressed little concern over this matter. With respect to performance and other bonds in the construction industry, leading scholars Michel Cabrillac and Christian Mouly have

(1987) 28 C. de D. 939, "L'exécution, la transmission, l'extinction, les modalités et le cautionnement: commentaires" (1988) 29 C. de D. 915, "Les dispositions du nouveau Code civil du Québec relatives au cautionnement" in le Barreau du Québec & la Chambre des notaires du Québec, eds., La réforme du Code civil, vol. II (Québec: Presses de l'Université Laval, 1993) 1031, "L'influence du cautionnement sur le contrat d'entreprise: l'accessoire peut-il commander le principal?" in Ernest Caparros, ed., supra note 43 at 468 and "La libération de la caution" in Barreau du Québec, ed. Développements récents en droit commercial (1996) (Cowansville, Que.: Yvon Blais, 1996) 71.

⁵¹See: T. Rousseau-Houle, Les contrats de construction en droit public et privé (Montreal: Wilson & Lafleur/Sorej, 1982) at 128-129 and the authorities cited therein.

noted that "[c]es garanties sont communément assimilées au cautionnement".⁵²

Professor Philippe Simler similarly notes that performance bonds and, in particular, completion guarantees for films, are customarily characterized as a form of suretyship:

La garantie de bonne fin des travaux que les banques consentent aux promoteurs ou entreprises, garantie dite extrinsèque, est constitutive, non d'un transfert d'une obligation, ni d'une assurance, mais bien d'une sûreté personnelle. En l'absence d'autre précision, elle est habituellement qualifiée de cautionnement....

Il en va de même, en matière cinématographique, pour la garantie de bonne fin des films.⁵³

One must note, however, that Professor Simler is not entirely satisfied with this historical depiction of performance bonds. He reflects that perhaps a performance bond would be better characterized under French civil law principles as a form of "promesse de porte-fort" (promise for another).⁵⁴ But if this suggestion were accepted, it

⁵²M. Cabrillac & C. Mouly, Droit des sûretés, 3rd. ed. (Paris: Litec, 1995) at 304. Professors Cabrillac and Mouly provide a very comprehensive list of the "ten principal characteristics of suretyship", at 63-72, that serve as the basis for their pronouncement.

⁵³See: P. Simler, Cautionnement et garanties autonomes, 2nd. ed. (Paris: Litec, 1991) at 38 and the authorities cited therein.

⁵⁴Ibid. at 39, 34-35. The notion of the "promise de porte-fort" is similarly found in Quebec civil law principles, as expressed in article 1443 CCQ:

1443. No person may bind anyone but himself and his heirs

would have the effect of rendering the completion guarantor sole obligee to complete and deliver a bonded film/TV project. This would completely contradict the customary understanding (and preference) in the entertainment industry that it is the producer which is the party chiefly responsible for such obligation, and that the completion guarantor's responsibility is only secondary and accessory to the producer's.

There is no direct legislative support in Quebec for the proposition that a completion guarantee is a form of insurance and ought to be regulated as such. The Guarantee Companies Act⁵⁵, which was silent on this point, applied only to judicial suretyships and, in any event, was repealed in 1988, effective from July 1, 1989.⁵⁶

by a contract made in his own name, but he may promise in his own name that a third person will undertake to perform an obligation, and in that case he is liable to reparation for injury to the other contracting party if the third person does not undertake to perform the obligation as promised.

For a discussion of the distinction between "promise for another" and suretyship, see: J.-L. Baudouin, Les obligations, 4th. ed. (Cowansville, Que.: Yvon Blais, 1993) at 271-272.

⁵⁵R.S.Q. c. C-43 (in its French version, Loi sur les compagnies de garantie, L.R.Q. c. C-43).

⁵⁶See: An Act to repeal certain statutory provisions, S.Q. 1988, c. 27 (in its French version, Loi portant abrogation de certaines dispositions législatives, L.Q. 1988, c. 27), ss. 1 and 5.

However, one may wish to consider whether completion guarantors are caught by section 13 of the Regulation respecting the application of the Act respecting insurance⁵⁷, which states:

13. Guarantee insurance means surety insurance and fidelity insurance.

Surety insurance guarantees against failure to discharge or the unfaithful discharge of an obligation, or failure to pay a penalty or an indemnity upon such default, but does not include credit insurance of [*sic*] mortgage insurance....

[emphasis added]

Were a completion guarantee to be viewed as a form of "surety insurance", within the meaning of the Regulation, completion guarantors would be compelled by law to meet all the administrative and other requirements of insurance companies operating in the Province of Quebec.⁵⁸ However, as Professor Poudrier-LeBel has remarked, "[n]ous croyons qu'on ne saurait fonder la nature juridique d'une opération uniquement sur des critères formels. La forme n'emporte pas le fond".⁵⁹

⁵⁷R.R.Q. 1981, c. A-32, r. 1 (in its French version, Règlement d'application de la Loi sur les assurances, R.R.Q. 1981, c. A-32, r. 1).

⁵⁸See: An Act respecting insurance, R.S.Q. c. A-32 (in its French version, Loi sur les assurances, L.R.Q. c. A-32) and, in particular, ss. 201ff (insurer's licence), 224ff (deposits required of insurers), 243ff (investments, assets and reserves) and 406ff (penal provisions).

⁵⁹Poudrier-LeBel, supra note 47 at 201.

For a variety of reasons, a completion guarantee may be seen as far more than a mere guarantee "against failure to discharge or the unfaithful discharge of an obligation". As noted by American attorneys Schuyler Moore and Sheri Jeffrey, "the financier will often look to the completion guarantor to undertake various other items, including production management and monitoring the status of the production".⁶⁰ Completion guarantors are themselves more apt to view their function as that of a management support organization, rather than an insurer.⁶¹

In examining the legal nature of a completion guarantee, perhaps one ought to consider not only jurisprudential, doctrinal and legislative sources, but also any other sources that might reveal the intent of the party responsible for the issuance of the guarantee. At least one completion guarantor has indicated clearly that the completion guarantees it issues ought not to be considered as a form of insurance, but rather, as some other form of legal device:

Nous ne sommes pas vraiment une compagnie d'assurance,... D'autres sociétés se spécialisent dans la couverture de dommages comme les pellicules endommagées, la perte de scripts ou les accidents et blessures sur le plateau de tournage. Notre mandat à nous est de conduire une production

⁶⁰See: Moore & Jeffrey, supra note 6 at 80.

⁶¹See: Phillips, supra note 38 at 108 and Angeli, supra note 6.

à terme, dans les limites imposées par le budget et le temps.⁶²

Perhaps the solution to this entire debate lies outside any attempt to conform the completion guarantee to any existing legal categorization presently known in Quebec, such as either insurance or suretyship. Perhaps the better view is that the completion guarantee is truly a hybrid device, exceptional to the entertainment industry. It ought not to be analyzed separately, but ought to be understood as part of a greater whole: When combined with other customary features of a typical completion guarantee transaction, especially the completion agreement and the interparty agreement,⁶³ the presence of a completion guarantee serves to permit the guarantor to take an active and involved role in the bonded project, to the extent that the guarantor deems warranted. However, only upon the happening of a well-defined event (for example, the producer's default under the completion agreement), are any "surety insurance" obligations assumed by the completion guarantor. Certainly, these conditional obligations are a primary consideration for the financier that requires its producer to obtain a

⁶²Michael Spencer, President of Film Finances Canada (1984) Ltd. and Chairman of FFC Completion Guarantees Inc., as cited in Gourde, supra note 33 at 109.

⁶³Each of these two forms of legal documentation will be treated at greater length below, in the sections of this thesis entitled "The Completion Agreement" and "The Interparty Agreement", respectively.

completion guarantee. Yet when examined from the wider perspective of all the rights and obligations of a completion guarantor in any entertainment financing transaction, the completion guarantee and related documentation may surely be characterized as a singular legal instrument.

C. THE BUSINESS OF COMPLETION GUARANTEES

1. Obtaining a Completion Guarantee

a) Initial Steps

The completion guarantor begins, generally at the pre-production stage of the project, by reviewing and analyzing the script, the shooting schedule and the budget. It is always preferable if all three of these elements have already been approved by the financiers and distributors of the project.⁶⁴ In conducting an in-depth analysis of the project, the guarantor studies the type of shots called for, the time reserved for the shoot, the nature of exterior scenes, the stunt work and even the interior set design.

The purpose of this type of analysis is to determine if the special effects are too expensive or if the shooting location is too remote (and therefore uncontrollable).⁶⁵ The guarantor's major concern, according to a former president of a leading completion guarantee company,

⁶⁴See: L.J. Ames, "Completion Guarantees" in Continuing Legal Education Society of British Columbia, The Film Industry: Practice and Procedure (Vancouver: Continuing Legal Education Society of British Columbia, 1991) 3.3.01 at 3.3.02.

⁶⁵Accordingly, "the guarantor may insist that certain shots be performed on studio lots, rather than on location, to reduce facility costs or avoid unanticipated occurrences, such as inclement weather"; see: Darrow, supra note 31 at 7.

...is to determine whether or not the film can be contained within the budget without substantial invasion of the contingency and whether or not the film can, in fact, be completed and delivered by the earliest contractually required delivery date, if any.⁶⁶

After its analysis, the guarantor may request that the producer raise certain specific categories of the budget, including (most commonly) the contingency.⁶⁷ If the producer refuses to do this, the guarantor may exclude from its completion guarantee certain budget categories. Or, the completion guarantor may require script changes or the hiring of less expensive personnel, to bring down budget costs.⁶⁸

In the case of the first (1987) "Robocop" film, the completion guarantor refused to guarantee the special effects budgeted at \$US 2 million, arguing that these effects were underbudgeted. It was right to do so, as the effects quickly mounted to a cost of over \$US 4 million. It

⁶⁶Smith, supra note 26.

⁶⁷The contingency category of a project's budget usually represents seven to ten per cent of the overall production budget; see: R. Bennett, "Firing up a movie and not getting burned" Daily Variety (3 March 1993) Special Section, 1 (LEXIS-NEXIS).

⁶⁸See: J. Merians, "The Impact of a Completion Guaranty on the Producer and Others" in Viera & Thorne, eds., supra note 6, 199 at 200-201.

was the film's distributor that finally agreed to pay the difference.⁶⁹

Next, the completion guarantor may meet with the individual producer and his or her production team (including the director, production supervisor and production accountant) to determine if everyone is capable of working within the prescribed budgetary and scheduling parameters. Certain individuals may be required to acknowledge and confirm in writing these budgetary and scheduling restrictions:

The producer, director and production manager will be asked to sign off on the production schedule, budget and screenplay so that all the parties are in agreement that their intention is to produce the film in accordance with the elements.⁷⁰

Is the director "good"? (Is he or she fast? Can he or she come in under budget?) Are any of the stars "trouble"? (That is, is any performer an alcoholic, or drug-addicted, or particularly temperamental?)⁷¹ The completion guarantor

⁶⁹Gourde, supra note 33 at 109. The effect of the additional special effects was to increase Robocop's budget from \$US 12 million to almost \$US 14 million; see: R. Grover, "Lights! Camera! Completion Bond!" Business Week (24 August 1987) Entertainment, Movies, 50 (LEXIS-NEXIS).

⁷⁰Smith, supra note 26.

⁷¹Orson Welles was reputed to have regularly greeted potential movie investors with the words, "I'm bondable, I'm bondable"; see: Angeli, supra note 6. As to why Mr. Welles may have had a reputation as a difficult performer and director, see: O. Friedrich, City of Nets: A Portrait of Hollywood in the 1940's (New York: Harper & Row, 1986) at 89-94, 269-270, 386-389.

may refuse to issue a guarantee altogether, or may simply demand a higher fee, if it thinks that the risk involved in the project is more than is usually anticipated. Alternatively, the completion guarantor may insist on withholding partial payment for a performer with a difficult reputation or a director who is habitually slow:

We'll say, "Half of your salary has been held back till you render service, and then you can go out and party,"... It's amazing what \$1 million in withheld paychecks will do to get people to speed it up.⁷²

Other options may even be available: For example, when underwriters for the 1996 film "The People vs. Larry Flynt" expressed concern that Courtney Love's reputed drug problems might cause production delays, completion guarantor Entertainment Coalition persuaded this lead performer to undergo weekly drug testing as a condition of her employment.⁷³

⁷²According to Tekla Morgan, an executive at bonder Cinema Completions International, this is one of the many creative strategies available to completion guarantors; see: Collins, supra note 31.

⁷³For a discussion of the role of Entertainment Coalition, an enterprise that coordinates completion guarantee and insurance coverage for a variety of entertainment projects, see: "Close-up: Film insurance agent" Variety (18 November-24 November 1996) Special Report, 18 (LEXIS-NEXIS) and Collins, supra note 31. Mr. Collins further notes therein that, similarly, actor Gary Busey submitted to drug testing every other day as a condition of his employment as star of the 1995 film "The Chain".

b) The Letter of Intent

(i) Standard Terms

Once the initial review and analysis of the project has been completed, if the completion guarantor is fairly comfortable with the project, a letter of intent is sent to the producer. It is generally understood within the entertainment industry that the letter of intent merely reflects the completion guarantor's understanding of the project it has been asked to guarantee, but is not legally binding upon the guarantor.⁷⁴

The letter of intent provides that the guarantor will issue a completion guarantee if the producer meets certain conditions. The producer is asked to provide the documentation necessary to establish:

- i. that all the financing exists to pay the budgeted cost of production;
- ii. that all the artistic and technical personnel are available and capable of producing the project;

⁷⁴Phillips, supra note 38 at 111.

- iii. that insurance, studio and location arrangements are satisfactory;
- iv. that the chain-of-title for the rights to make and exploit the production are not defective;
- v. that a sufficient amount has been put aside to comprise the contingency of the project's budget; and
- vi. that all the contracts for the services of the director, the principal performers and other key elements have been concluded, and are in no way prejudicial to the rights of the guarantor.⁷⁵

(ii) Completion Guarantee Fees

It is in its letter of intent that the completion guarantor first specifies in writing the fee it will charge for

⁷⁵The standard conditions of the completion guarantor's letter of intent are described in Ames, supra note 64 at 3.3.02-3.3.03.

providing a completion guarantee. Generally, depending upon the nature of the project to be bonded and the guarantor's assessment of risk, one of two different options will be stipulated: either a gross fee, with the possibility of a rebate; or, a split fee.

Gross Fee With Rebate. The most common option is to stipulate a fee which is calculated as a percentage of the project's total approved budget, minus such items as the contingency fund and the guarantor's fee category. In the event that no claim is made on the guarantee prior to the time that the completion guarantor has been fully released from its obligations, the guarantor may offer to return a portion of the fee charged. This returned portion is generally referred to as a "no-claims rebate", and it may range from ten per cent to fifty per cent of the original bond fee.⁷⁶

Split Fee. The second option is for the completion guarantor to charge an initial fee for the issuance of the completion guarantee, with a second amount becoming due and

⁷⁶As indicated above, in the section of this thesis entitled "A Brief History of Completion Guarantees", the fees charged by completion guarantors have fluctuated significantly in the last decade. Today, gross fees up to a maximum six per cent of a project's budget are still possible, although the more common fee charged is somewhat lower; see: Darrow, supra note 31 at 6. This has been confirmed to be the case in Canada as well, through a conversation between this author and Mr. Michael Spencer, President of Film Finances Canada (1984) Ltd. and Chairman of FFC Completion Guarantees Inc., on June 5, 1997.

payable only in the event that a claim is made on the guarantor by any party in whose favour the guarantee was issued.⁷⁷ However, in practice, in order to ensure that an interim financing bank will not be precluded from making a claim due to non-payment of the additional fee when due, a portion (representing the second instalment) of the funds to be provided may be put aside and held by the bank in a reserve account, to cover this potential fee.⁷⁸

c) Document Review

(i) Financing and Distribution Agreements

Once the letter of intent has been sent to the producer, the completion guarantor and its legal representative will expend considerable time and effort, in order to confirm the project's elements and review the required documentation. All of the financing and distribution agreements are verified, to see whether the total amount of financing

⁷⁷For example, it was reported in mid-1995 that Los-Angeles based International Film Guarantors charges two to three per cent of the total production budget "upfront" and another two per cent if the bond is "invaded"; see: Eller, supra note 6.

⁷⁸See: Foy, supra note 14 at 233 and Mazirow Eshman, supra note 14 at 212.

provided is sufficient, whether the approval rights are reasonable and whether the delivery dates and required elements are also reasonable.⁷⁹

(ii) Insurance

The certificates for production, comprehensive liability and errors and omissions insurance are reviewed for sufficiency of coverage and for confirmation that the guarantor has been named as an additional insured. If any distribution agreement requires that the project be delivered with a specific actor or director in the final version, as a condition precedent to the distributor's obligation to pay for delivery, the completion guarantor (like the interim financing bank) will also insist on "essential element" insurance coverage.⁸⁰

⁷⁹See: Smith, supra note 26.

⁸⁰Ordinary cast insurance will cover the cost of replacing a performer or director who, due to illness, incapacity or death, is unable to perform his or her duties. For an additional premium, essential element insurance will cover all costs of abandoning a project in which the insured element dies or is disabled. However, since essential element insurance does not cover breach of contract, a completion guarantor always prefers there to be as few "essential elements" associated with the bonded project as possible. For it is the completion guarantor that would bear financial responsibility if it has agreed to bond a particular performer or director as "essential" and such element deserts the project; see: Merians, supra note 68 at 203, Rosenberg, supra note 14 at 6 and J. Coupe & J. Stigliano, "Crafting Completion Bonds" (1991) 7:4 Entertainment Law & Finance 1 (LEXIS-

**(iii) Production Bank Accounts and
Laboratories**

Arrangements with the producer's production account bank and post-production facilities are also verified, and short documents are signed with each of these parties to establish the relationship that the guarantor may have, in certain circumstances, with the bank and the laboratory.⁸¹

**(iv) Modification of Existing
Agreements**

From time to time, the completion guarantor will request that the producer have modified certain agreements which the producer is in the process of concluding, or which the producer has already concluded.

For example, the guarantor may find that a particular lead performer of some repute has approval rights over the choice of a director, or his or her replacement, or over any

NEXIS).

⁸¹The relationship between the completion guarantor and the film processing laboratory will be discussed further, below, in the section of this thesis entitled "Film or Tape Processing". As to the documentation to be signed in relation to production bank accounts, see the section of this thesis, below, entitled "Cash Deposits".

changes to the script. In these circumstances, the guarantor will require the performer to acknowledge that such rights cannot be exercised in any way that would prejudice the guarantor, and that in case of a dispute, the guarantor's decision is final.

Essentially, the goal of the document review by the completion guarantor and its legal representative is to determine the overall soundness of the project and the manner in which the completion guarantor's risk may be minimized. The guarantor also wants to know that if it has to advance its own funds (commonly known as "completion sums" or "completion funds"), it will be able to recoup them at a later date.

d) The Completion Agreement

Once the completion guarantor is satisfied with the document review, the completion guarantor proceeds to execute an agreement (generally called the "completion agreement," but also known as the "producer agreement") with the project's producer.

**(i) Producer Representations and
Warranties**

The completion agreement sets out the relationship between the producer and the guarantor. In the completion agreement, the producer makes a series of representations and warranties regarding the approved budget; the fee for the guarantee; the key personnel; the rights that the producer owns to produce and exploit the project; and the insurance that the producer has obtained and how any insurance proceeds will be allocated among the various parties involved in the project financing. Additional representations and warranties are also common:

Standard representations and warranties of the producer include a promise to produce the picture in accordance with the approved elements and licensing contracts, and a promise not to make material changes respecting those elements, without the guarantor's approvals.⁸²

(ii) Exclusions and Limitations

The parties agree on certain items for which the guarantor will not be expected to advance any completion funds, and other items for which the guarantor will advance sums, but

⁸²Foy, supra note 14 at 228.

only to a maximum of the specific budget allocations for each of these items.⁸³

(iii) Producer Reporting Obligations

The guarantor and the producer further agree on the reporting obligations of the producer and the rights of the guarantor during the course of production. The producer is required to transmit daily progress reports to the guarantor by fax or by telephone and is also obligated to send to the guarantor, once a week, a detailed statement of production costs.⁸⁴

⁸³For details as to the types of items so specified in the completion agreement, see paragraph 4 of the precedent completion agreement used by Canadian completion guarantor Film Finances Canada (1984) Ltd., reproduced in M. Prupas, ed., Entertainment Law (Montreal: McGill University, 1996) 450-461 at 453. (As mentioned in infra note 88, a companion precedent completion guarantee is reproduced in ibid. at 442-449.)

⁸⁴Ibid. at 453 (paragraph 5c) of the precedent completion agreement). See, also: Ames, supra note 64 at 3.3.03.

(iv) Guarantor Monitoring Rights

The completion agreement acknowledges that the guarantor is entitled to visit the studio or on-site location, to meet any and all personnel in order to discuss problems occurring in the course of the production. The guarantor is entitled to make suggestions and demands relating to such problems and, in the worst cases, to take control of the production.⁸⁵

(v) Guarantor Security Rights

Lastly, the completion agreement deals with the security rights of the guarantor. These rights are granted by the producer to the guarantor to ensure the guarantor's ability to recoup (after the financiers) any completion sums which it may advance in order to complete and deliver the project.⁸⁶

⁸⁵See: Merians, supra note 68 at 206. The takeover of the production of a film/TV project is considered more fully below, in the section of this thesis entitled "From the Issuance of the Completion Guarantee to the Delivery of the Project".

⁸⁶See: Merians, supra note 68 at 207. The second part of this thesis, below, entitled "COMPLETION GUARANTOR SECURITY DEVICES", will discuss these rights at length.

**(vi) Interpretation of the Completion
Agreement**

In his discussion of why completion agreements and related documentation ought to be drafted in an unambiguous manner, American attorney Mark C. Phillips summarized how such an agreement is to be interpreted:

Like other contracts, a guarantee agreement is interpreted according to traditional rules of contract formation. It is read according to the plain meaning of its terms, except where it uses terms of art readily familiar to people in the industry. If a guarantor alone drafts the guarantee agreement and the resulting document is ambiguous, the ambiguity will be construed according to how the guarantor believed the independent [producer] understood the provision. The ambiguous term will be interpreted in favor of the independent [producer] and against the guarantor-drafter.⁸⁷

⁸⁷See: Phillips, supra note 38 at 119 and his notes 117-121. Although these remarks were made in the context of completion agreements executed in the United States and, more particularly, in California, the underlying principles expressed apply equally to completion agreements governed by the laws of Quebec. See: Articles 1425-1432 CCQ and, with respect further to the interpretation of contracts in Quebec, see generally: Baudouin, supra note 54 at 255-259 (with his comments on adhesion contracts at 257), J. Pineau, D. Burman & S. Gaudet, Théorie des obligations, 3rd. ed. (Montreal: Thémis, 1996) at 329-353 (with their comments on adhesion contracts at 348ff), J. Pineau, "Théorie des obligations" in le Barreau du Québec & la Chambre des notaires du Québec, eds., La réforme du Code civil, vol. II (Québec: Presses de l'Université Laval, 1993) 9 at 94-95 and M. Tancelin, Source des obligations: l'acte juridique légitime (Montreal: Wilson & Lafleur, 1993) at 139-153.

2. The Completion Guarantee

Once the completion agreement and all ancillary documents (relating to the producer, director, budget, laboratory and bank) are signed, the guarantor issues its completion guarantee to the project's financiers.⁸⁸ These guaranteed parties are often called "beneficiaries" of the guarantee.⁸⁹

The completion guarantee recites the pertinent facts of the transaction (including the names of the project, the producer, the director and the principal performers), identifies the key elements (including the approved screenplay, budget, production schedule, laboratory, and all of the financing and distribution agreements) and then sets forth all of the rights and the obligations of the parties. Some of the more noteworthy aspects of these rights and obligations will be treated, in turn, below:

⁸⁸A precedent completion guarantee, used by Canadian completion guarantor Film Finances Canada (1984) Ltd., is reproduced in Prupas, ed., supra note 83 at 442-449.

⁸⁹While the focus of this thesis is upon the interim lending bank as beneficiary of the completion guarantee, other parties, including investors such as Telefilm Canada and SODEC, as well as distributors making pre-distribution advances toward the financing of the project, may appear as beneficiaries of the guarantee. For reasons specific to a particular entertainment financing transaction, the bank may require that it appear as sole beneficiary of a guarantee, while other financiers involved in the same transaction may agree to appear as joint and several beneficiaries on a multi-party guarantee. Consequently, more than one completion guarantee may be issued for one project. Or, the bank may agree to join other financiers in a single, multi-party completion guarantee.

a) Conditions Precedent to the Guarantee

There are generally two conditions that must be met before the completion guarantor will become obliged under its guarantee: 1) the payment in full of the guarantor's fee and 2) the advance in full of the financing required to meet the approved budget.

With respect to the first condition, as has been indicated above,⁹⁰ various arrangements are possible regarding the payment of the completion guarantor's fee. The fulfilment of this condition frequently takes place contemporaneously with the closing of the interim bank loan transaction for which the completion guarantee has been acquired, since it is only with the first advance from this loan that the producer has sufficient funds on hand to pay the guarantor.⁹¹

Insofar as the second condition is concerned, one must note that the role of the completion guarantor is to provide not a financial guarantee (that is, a guarantee that the initial budget financing will be available), but rather, a guarantee of completion and delivery. As a result, the risk of

⁹⁰See the section of this thesis, above, entitled "Completion Guarantee Fees" and, in particular, the remarks relating to the "split fee" arrangement.

⁹¹See: Moore & Jeffrey, supra note 6 at 82.

nonpayment of budget financing is borne by others than the completion guarantor:

It is important to remember that the guarantor is not in any way guaranteeing the availability of financing and, accordingly, it is incumbent upon each of the financiers to satisfy itself that the other financiers are going to advance their respective shares of the cost of production as and when required.

...this often results in the need for an inter-party agreement among the financiers, confirming this fact, and may also require individual financiers to satisfy themselves as to the credit worthiness of their co-financiers.⁹²

The amount of budget financing that must be made available to the production before the liability of the completion guarantor may be engaged under the guarantee is commonly referred to as the "strike price". Generally, the strike price is an amount equal to one hundred per cent of the approved budget total. Occasionally, however, the strike price may be a lesser sum.⁹³

⁹²Smith, supra note 26.

⁹³For example, where part of the budget total is to be financed by fee deferments by key personnel (such as an individual producer, the director or a performer), the strike price would be the budget total, minus the amount of such deferments. Or, the strike price may represent simply the amount of the loan to be made by an interim financing bank, with the bank as the sole beneficiary of the completion guarantee. In this latter case, the completion guarantor would take a variety of precautions to ensure that all other sources of budget financing were in place and available to the production, before proceeding with the issuance of its completion guarantee.

In addition to fee payment and strike price availability, the completion guarantor will predicate its liability under the guarantee upon an array of other conditions, including: "...pre-approval of certain production related documents, the commencement of principal photography and certain key insurance being in place, with the completion guarantor listed as an additional insured".⁹⁴

b) The Guarantee of Delivery

The completion guarantor's delivery obligation consists of three components: 1) delivery to a specified location, 2) delivery of specified materials and 3) delivery by a specified date.

Delivery Location. The completion guarantee may require the guarantor to make delivery to a particular laboratory or other post-production facility, from which the project's distributors and licensees will obtain the materials each requires. Alternatively, the guarantor may be bound to deliver directly to one or more of the bonded project's distributors or licensees.

⁹⁴Moore & Jeffrey, supra note 6 at 82.

Delivery Items. The various materials that the completion guarantor is required to deliver are commonly referred to as the "delivery items" or "delivery materials". The list of delivery items for which the guarantor is responsible in any given project may be very short (for example, simply access to the negative and one videotape copy), or extremely long (in excess of a dozen pages). The interim lending bank would prefer, in most cases, that the list of guaranteed delivery items resemble as closely as possible the lists of required delivery materials under the distribution agreements executed between the producer and the distributors. This would help to lessen the risk of non-payment by the distributor that fails to receive the materials for which it bargained. However, it is not unusual for the completion guarantor to negotiate with all the parties concerned a reduced list of delivery items for which it will be responsible under the completion guarantee.⁹⁵

⁹⁵See: Moore & Jeffrey, supra note 6 at 82. American entertainment law attorney Judith Merians has noted (supra note 68 at 208) a recent trend with respect to particular types of delivery items:

...some guarantors have taken the position that they will not guaranty delivery of "paper items", such as contracts, music cue sheets, continuity scripts and credit statements. The current changes dictate the need for a distributor to work more carefully with a producer to make certain that everything that the distributor needs to assume and exercise all the distribution and ancillary rights it is purchasing will be delivered, even if they fall outside the purview of the completion guaranty.

Delivery Date. The "delivery date" is the date set forth in the completion guarantee by which delivery of the guaranteed delivery items must take place. It is common for the completion guarantee to provide that should an event of "force majeure" occur, the delivery date will be automatically extended for an additional specified period.⁹⁶

c) Failure to Deliver Under the Guarantee

The completion guarantor may fail to deliver the bonded project in conformity with the completion guarantee due to a late delivery, contrary to the approved production schedule. Or, non-delivery may be occasioned by the producer's abandonment of the project and the guarantor's decision not to complete the project by itself.⁹⁷ In either case, the completion guarantor would be obliged to repay to the guarantee's beneficiaries "an amount that in most instances equals the amount of the producer's outstanding indebtedness".⁹⁸ At least in Canada, it is customary to

⁹⁶See: Prupas, ed., supra note 83 at 446 (the definition of "Delivery Date", in Schedule I of the precedent completion guarantee).

⁹⁷Note, however, that "[a]bandonment is rarely invoked because it is simply too expensive": Rudman, supra note 6 at 225.

⁹⁸Merians, supra note 68 at 212. The amount payable to the guarantee's beneficiaries, upon abandonment of the project, would usually include at least a portion of the outstanding interest and

require the completion guarantor to consult with its beneficiaries before any decision to abandon the bonded project is taken.⁹⁹

d) Exclusions from Liability

It has recently been stated that the types of exclusions currently found in film/TV project completion guarantees are no longer as standardized as they once were. In addition, "[w]ith the increasingly complex methods for financing the costs of a motion picture, investors are insisting that the completion guarantor cover more risks".¹⁰⁰

Still, the completion guarantee generally provides for a wide variety of exclusions for which the guarantor will bear no liability. These would include:

financing charges. See generally: article 2344 CCQ ("Suretyship extends to all the accessories of the principal obligation,...") and M. Boudreault, "Le cautionnement" in *Chambre des notaires du Québec*, ed., Répertoire de droit / Nouvelle série: Sûretés - Doctrine, Document 8 (Montreal: SOQUIJ, 1993) at 45 and the authorities cited therein. However, the aggregate amount may be reduced by sums recoverable as insurance proceeds; see: Foy, supra note 14 at 228.

⁹⁹This is the case according to Canadian entertainment law attorney Douglas Barrett, as indicated in his summary notes, "The Nuts and Bolts of Completion Guarantees", appearing as Appendix A in Ames, supra note 64, 3.03.07 at 3.03.11.

¹⁰⁰Moore & Jeffrey, supra note 6 at 81.

- i. no obligation to obtain a particular certificate or rating from any third party, including the Motion Picture Association of America, Inc.;¹⁰¹
- ii. no obligation for the artistic content or quality of the project, or for its commercial success;¹⁰²
- iii. no obligation for any defects in the copyrights of the project's screenplay, of any underlying rights or of the project itself; or for any defects in the project's title or in its music;¹⁰³

¹⁰¹See: Merians, supra note 68 at 207 and Moore & Jeffrey, supra note 6 at 81.

¹⁰²See: Darrow, supra note 31 at 6, Merians, supra note 68 at 207, Smith, supra note 26, Moore & Jeffrey, supra note 6 at 82 and Ulman, supra note 14 at 514.

¹⁰³See: Moore & Jeffrey, supra note 6 at 81 and Merians, supra note 68 at 207. Defects in any of these items would ordinarily be covered by the errors and omissions insurance policy to which both the completion guarantor and the project's financiers would insist that the producer subscribe. Such insurance would be intended to cover actions for, among other things, copyright infringement, publicity rights violation and invasion of privacy. However, according to Smith (supra note 26), it must be noted that "such insurance does not cover what are essentially contract claims in the rights area, nor does the normal E&O policy cover injunction claims". Since the completion guarantor refuses to cover the risk of such contract and injunction claims, this risk will be borne by the project's financiers, including the interim lending bank; see: Weiss & Benjamin, supra note 14 at 208-209.

iv. no obligation for any claims arising from any torts, delicts or contractual breaches committed by the producer or others;¹⁰⁴

v. no obligation for certain events of "force majeure" that would ordinarily be covered by war risk, political risk or nuclear risk insurance;¹⁰⁵ and

¹⁰⁴See: Moore & Jeffrey, supra note 6 at 82. In those circumstances, however, in which this exclusion states, "except to the extent necessary to [c]omplete and [d]eliver the [f]ilm" (see, for example: Prupas, ed., supra note 83 at 443 [paragraph 5(f) of the precedent completion guarantee]), the guarantee will cover such claims, but the guarantor will be entitled to pursue its various compensatory recourses against the party(ies) at fault.

¹⁰⁵See: Coupe & Stigliano, supra note 80, T. Morgan, "Exclusions in Completion Guaranties" (1992) 8:3 Entertainment Law & Finance 1 (LEXIS-NEXIS), Smith, supra note 26, "Completion bond problems in Eastern Europe", supra note 6 and Merians, supra note 68 at 207. Some debate did arise as to the allocation of responsibility for damages resulting from the riots that took place in south-central Los Angeles, in 1993. On the one hand, many of the completion guarantors had, in their documentation, excluded coverage for any damage caused by riot, civil disturbance and the like. However, this did not preclude coverage for the costs associated with the production delays that occurred when, for example, police who would normally be available to patrol shooting locations were otherwise occupied quelling the disturbances. See: M. Mehler, "Completion bonders feel the heat rise" Daily Variety (18 May 1992) Special Report, 51 at 58, J. Daniels, "Completion firms brace for filming fallout" The Hollywood Reporter (4 May 1992) (LEXIS-NEXIS), J. Daniels, "Riots costing film, TV companies millions" BPI Entertainment News Wire (4 May 1992) (LEXIS-NEXIS) and "Who Pays for Cost Overruns After Riot?" (1992) 8:2 Entertainment Law & Finance 7 (LEXIS-NEXIS).

- vi. no obligation for the project meeting Canadian federal or provincial content requirements.¹⁰⁶

e) Limitations on Payment of Costs

The completion guarantor's primary obligation is to complete and deliver the bonded film/TV project by a specified date. One would think that, vis-à-vis the beneficiary of its guarantee, the guarantor is thus liable to pay whatever over-budget costs are incurred in order to ensure that such completion and delivery take place.

However, no completion guarantee is absolutely unconditional in this respect. For example, it is common for the guarantor operating in Quebec to exclude altogether payment for over-budget costs arising from fluctuations in currency exchange rates.¹⁰⁷

¹⁰⁶This exclusion is not absolute: The completion guarantor may agree not to take any measure that would prevent the producer from meeting its content requirements, if the producer were already in compliance with these requirements at the time the guarantor acted; see: Prupas, ed., supra note 83 at 443 (paragraph 5(h) of the precedent completion guarantee).

¹⁰⁷See: Prupas, ed., supra note 83 at 443 (paragraph 5(i) of the precedent completion guarantee). In cases where the guarantor has agreed not to exclude for costs associated with currency fluctuations, it will generally require the producer to "buy forward" (that is, to

For other so-called "excluded costs", the completion guarantor will not agree to pay completion sums,

...except to the extent such costs are (i) specified in the Budget, (ii) required to correct technical defects in the Film, or (iii) conform the Film to any contractual specifications for which we are responsible under this Completion Guarantee:...¹⁰⁸

Such excluded costs may include the price of any items that the completion guarantor is not contractually bound under its guarantee to deliver;¹⁰⁹ certain legal, interest and finance fees and expenses;¹¹⁰ various distribution expenses, such as versioning, advertising and publicity costs;¹¹¹ and any costs incurred after the bonded project has been completed and delivered.¹¹²

The completion guarantor will refuse to pay for any changes to the approved script of the bonded project that would increase the project's cost beyond the approved budget, or that would jeopardize the approved production schedule.

purchase the required foreign currency in advance, at fixed rates), in order to minimize the guarantor's risk; see: Merians, supra note 68 at 205, Darrow, supra note 31 at 7 and Coupe & Stigliano, supra note 80.

¹⁰⁸See: Prupas, ed., supra note 83 at 443 (paragraph 6 of the precedent completion guarantee).

¹⁰⁹See: Merians, supra note 68 at 208.

¹¹⁰See: Weiss & Benjamin, supra note 14 at 207.

¹¹¹See: Darrow, supra note 31 at 7.

¹¹²See: Merians, supra note 68 at 208.

Such changes, commonly known as "enhancements", are frequently paid for by the distributor that may have requested them, primarily for its own commercial reasons.¹¹³

f) Other Notable Provisions

In addition to provisions respecting the ambit of the guarantee, as well as exclusions from coverage and limitations on costs payable by the guarantor, the completion guarantee generally contains a number of other notable provisions. These would concern: allocation of insurance proceeds;¹¹⁴ general rights of the project's

¹¹³In this regard, reference may be made to the "Robocop" example cited in the section of this thesis entitled "Initial Steps", above; see, supra note 69 and the accompanying text. However, as noted by Andrew Darrow (supra note 31 at 7), it is common for any dispute over an alleged enhancement to be a struggle between the guarantor and the producer:

If the guarantor has failed to satisfactorily monitor production and the producer has already exceeded the budget through enhancement, the guarantor is usually liable to the lender for the overages. The guarantor must then file suit against the producer to recoup these additional expenses. Alternatively, if the guarantor refuses to cover the costs of enhancements, the producer may file suit to classify the expense as contemplated and force the guarantor to cover the expense.

As to the entire issue of enhancements, see more generally: Rudman, supra note 6 at 228-229, Coupe & Stigliano, supra note 80, Smith, supra note 26 and Merians, supra note 68 at 207.

¹¹⁴Insurance recoveries are usually paid to cover production costs, unless the guarantor has already advanced completion sums or taken over

financiers;¹¹⁵ subordination of the guarantor's rights and claims to the financiers'; and assignment, notice, jurisdiction, remedies and miscellaneous matters.¹¹⁶

g) Interpretation of the Completion Guarantee

The manner in which a completion guarantee is to be interpreted is similar to that discussed above, in relation to the interpretation of the completion agreement.¹¹⁷ That is, in Quebec, the completion guarantee will be construed according to the ordinary rules of contract, pursuant to articles 1425-1432 CCQ.

production, in which case the guarantee provides that the guarantor is to be reimbursed before any production costs are covered. However, if the insured event triggers abandonment of the project, the insurance proceeds are used to repay the project's financiers before any other parties are permitted to recover; see: Prupas, ed., supra note 83 at 444 (paragraph 8 of the precedent completion guarantee).

¹¹⁵Wide latitude is given to the financiers to provide financing, so long as no action prejudices the rights of the completion guarantor. Accordingly, no amendment of any financing or related agreement may be made without the guarantor's consent; see: Prupas, ed., supra note 83 at 444 (paragraph 9 of the precedent completion guarantee).

¹¹⁶See: Prupas, ed., supra note 83 at 444-445 (paragraphs 11 through 19 of the precedent completion guarantee).

¹¹⁷See the section of this thesis, above, entitled "Interpretation of the Completion Agreement" and, especially, supra note 87.

Two competing principles are to be noted, in relation to the interpretation of a completion guarantee. On the one hand, there has been a tendency to view contracts in the nature of a suretyship, to which a completion guarantee may be assimilated,¹¹⁸ as requiring an interpretation "strictissimi juris":¹¹⁹ Since the completion guarantor is essentially assuming the obligations of another (the producer) under third-party agreements (the financing and distribution agreements), one cannot expect it to be obliged beyond the strict terms of the guarantee. This principle is supported by articles 2335 and 2343 CCQ.¹²⁰

The guarantees provided by completion guarantors are not gratuitous and the companies that provide them are not unsophisticated in business matters. For these reasons, a second principle must be considered: Where doubt arises as to its meaning, the completion guarantee must be interpreted

¹¹⁸See the section of this thesis, above, entitled "The Legal Nature of Completion Guarantees".

¹¹⁹This may be literally translated from the Latin to mean "of the strictest right or law"; see H.C. Black, Black's Law Dictionary, 4th. ed. rev. (St. Paul, Minn.: West Publishing, 1968) at 1591. For a summary of this position, as well as a list of jurisprudence that upholds it, see: Boudreault, supra note 98 at 43-44 and the authorities cited therein. See also: Tancelin, supra note 87 at 144.

¹²⁰Articles 2335 and 2343 CCQ state:

2335. Suretyship is not presumed; it is effected only if it is express.

2343. A suretyship may not be extended beyond the limits for which it was contracted.

"contra proferentem"; that is, against the completion guarantor that drafted it.¹²¹ This second principle is supported by article 1432 CCQ.¹²²

How are these two conflicting principles of interpretation "strictissimi juris" and "contra proferentem" to be reconciled? Sylvette Guillemard, in her article entitled "L'interprétation des contrats de cautionnement: Strictissimi juris vs Contra proferentem", has conducted a

¹²¹The Latin maxim "verba chartarum fortius accipiuntur contra proferentem" (or alternatively, "omnia proesumuntur contra proferentem") literally means that "the words of characters are to be received more strongly against the grantor (or the person offering them)": Black, supra note 119 at 1728. See: Pineau, Burman & Gaudet, supra note 87 at 336-337, M. Tancelin & D. Gardner, Jurisprudence commentée sur les obligations, 6th. ed. (Montreal: Wilson & Lafleur, 1996) at 143-144 and Guillemard, supra note 43 at her note 7 and the accompanying text.

¹²²Article 1432 CCQ states:

1432. In case of doubt, a contract is interpreted in favour of the person who contracted the obligation and against the person who stipulated it. In all cases, it is interpreted in favour of the adhering party or the consumer.

A contract of suretyship, such as a completion guarantee, may be viewed as an adhesion contract, pursuant to article 1379 CCQ; see: Poudrier-LeBel in le Barreau du Québec & la Chambre des notaires, supra note 50 at 1038-1039. However, according to John Claxton (supra note 16 at 318), "[a]n adhesion contract involves two elements: (i) the essential stipulations were drawn up by one party; and (ii) they were not negotiable. Both tests must be met". See also: Tancelin & Gardner, ibid. at 151 and Baudouin, supra note 54 at 257. Consequently, to the extent that negotiation of the terms of the completion guarantee is permitted, the guarantee is less likely to be viewed as an adhesion contract and the "contra proferentem" rule is less likely applicable. As to the negotiability of a suretyship agreement, with particular reference to construction performance bonds, see: Rousseau-Houle, supra note 51 at 242-243.

substantial review of the jurisprudence in this area and has arrived at the following conclusion:

Malheureusement, il n'y a pas beaucoup de cohérence dans tout cela et il est bien difficile de déceler un fil conducteur dans la jurisprudence!¹²³

It has been suggested that the solution lies in utilizing both principles, but for different purposes: The content of the completion guarantor's obligations ought to be interpreted strictly in the guarantor's favour. However, the "contra proferentem" principle should apply to interpret the conditions that govern the recourses to which the beneficiary of the guarantee may be entitled.¹²⁴ Although this approach has received some cautious support, it is acknowledged that the distinction may not be easy to apply and may even lead to greater confusion.¹²⁵

In any event, in most cases it is not the terms of the completion guarantee that are ambiguous. Doubt, in practice, arises not from the meaning of the guarantee's provisions, but from how these provisions are to be applied in any given case. In these situations, the principles of contractual interpretation discussed above must be applied

¹²³Guillemard, supra note 43 at 165-166.

¹²⁴See: Poudrier LeBel, supra note 47 at 260-277 and Guillemard, supra note 43 at her note 1 and the accompanying text.

¹²⁵See: Guillemard, supra note 43 at 166.

carefully, particularly if one is of the view that the completion guarantee is a sui generis legal instrument.¹²⁶ Only in this manner may one expect to obtain any resolution of a particular dispute between the completion guarantor and its beneficiaries:

Les opérations décrites ici sont celles qui permettent l'application de la règle abstraite aux faits concrets. Leur importance est donc primordiale car c'est de leur compréhension et de leur utilisation correcte que dépend la valeur pratique d'un droit comme le droit mixte québécois, qui emprunte au droit civil ses catégories et son mode d'exposition. La synthèse des solutions réalisée par le Code civil n'est pas faite pour procurer des satisfactions intellectuelles aux théoriciens du droit mais pour être appliquée à des cas concrets par les praticiens au bénéfice des personnes juridiques.¹²⁷

3. The Interparty Agreement

In any entertainment financing transaction, there is a wealth of interrelated agreements that depend one upon another; most notably, the interim financing bank's loan and security documentation, the various distribution and licensing agreements and the completion guarantor's completion agreement and completion guarantee. At least

¹²⁶See the section of this thesis, above, entitled "The Legal Nature of Completion Guarantees".

¹²⁷Tancelin, supra note 87 at 152.

since the late 1980's, entertainment financing transactions have been structured with the intent that there be one governing document, commonly known as the "interparty agreement":

Lastly, the parties are advised to draft a reciprocal inter-party agreement that addresses the needs of the guarantor, the independent [producer], and all the backers. The guarantor probably will advocate the need for a single, inclusive document that defines all potential conflicts of interest.¹²⁸

Although the interparty agreement has been described as "the controlling document that allocates the risks of the transaction to each party involved",¹²⁹ it is probably more accurate to state that the interparty agreement serves to "shift risks contained in the other documents to protect the [l]ender, and in some cases, the [c]ompletion [g]uarantor".¹³⁰ A number of key features of the typical interparty agreement, which are discussed below, illustrates how various risks may be shifted:

¹²⁸Phillips, supra note 38 at 113. It is to be further noted that "[i]f more than one distributor is involved in a transaction, each distributor may have a separate inter-party agreement"; see: Mazirow Eshman, supra note 14 at 215.

¹²⁹Merians, supra note 68 at 215.

¹³⁰S. Zuckerman Williams, "Checklist of Required Loan Documentation for Motion Picture Financing" (Notes presented at The Canadian Institute conference on the Canadian Film and Television Industry, Montreal, Quebec, April 28, 1995) [unpublished] at 2-3.

a) Assignment and Vesting of Rights

In order to ensure its repayment, and until such repayment has occurred, the bank will require the assignment of the producer's rights under the distribution agreement to the bank. The distributor contemporaneously subordinates all of its rights until it has paid the advance stipulated in the distribution agreement. The distributor further agrees to pay such advance provided that delivery, as defined in the interparty agreement, is made by the producer or the completion guarantor. All other claims, defences, rights of set-off and the like are waived as against the bank and the completion guarantor, although the distributor will maintain such rights as against the producer.¹³¹

b) Approvals and Waivers

In the interparty agreement, the bank and the completion guarantor will require the distributor to acknowledge that it has exercised all of its approval rights (for example, with respect to the budget, script, cast or director) under the distribution agreement, or that such rights have been

¹³¹See: Ulman, supra note 14 at 512-513, Mazirow Eshman, supra note 14 at 215 and Foy, supra note 14 at 230-231.

waived, in whole or in part.¹³² The distributor further waives any defenses it may have respecting defects in the project's chain-of-title, so that it will be required to pay its advance to the bank even if the completion guarantor delivers a project that contains any such defects.¹³³

c) Mandatory or Effective Delivery

A key provision concerns exactly which delivery items must be delivered to the distributor, and when such delivery must take place, in order to trigger the distributor's obligation to pay its advance to the interim financing bank. Notwithstanding the producer's delivery obligations as stipulated in the distribution agreement, and the completion guarantor's delivery obligations as stipulated in the completion guarantee, this provision respecting "mandatory delivery" or "effective delivery" will govern.¹³⁴ Additional

¹³²See: Mazirow Eshman, supra note 14 at 217. It is also common for additional provisions of the interparty agreement to set out a mechanism by which any pre-approved elements may be replaced, where required, and by which any such replacement elements may be deemed by the parties to have also been approved; see: Moore & Jeffrey: supra note 6 at 82.

¹³³See: Ulman, supra note 14 at 513 and Mazirow Eshman, supra note 14 at 217.

¹³⁴See: Foy, supra note 14 at 230, Mazirow Eshman, supra note 14 at 216 and Ulman, supra note 14 at 513.

provisions of the interparty agreement deal with the consequences of failure by the completion guarantor to effect mandatory delivery.¹³⁵

d) Ranking of Rights and Obligations

A number of provisions of the interparty agreement will serve to lexically rank the competing rights and obligations of the producer, the bank, the distributor and the completion guarantor, in relation to: security rights in the bonded project and related property;¹³⁶ insurance proceeds;¹³⁷ excess budget costs;¹³⁸ and takeover rights.¹³⁹

¹³⁵If the project is abandoned, or mandatory delivery is not effected for any reason, and neither the producer nor the completion guarantor repays the interim financing bank, the bank will execute on the film/TV project collateral; see: Foy, supra note 14 at 231. However, "the bank is obligated in most instances to first give the distributor a right to negotiate with the bank for the purchase of the distribution rights": Mazirow Eshman, supra note 14 at 217.

¹³⁶See: Moore & Jeffrey, supra note 6 at 84, Phillips, supra note 38 at 113 and Foy, supra note 14 at 231. As Jill Mazirow Eshman (supra note 14 at 216) has stated:

Until the bank is repaid the outstanding indebtedness, it is always in first position with respect to its collateral. The completion guarantor and the distributor are generally in second and third position, respectively.

¹³⁷See: Moore & Jeffrey, supra note 6 at 84 and Phillips, supra note 38 at 113. American attorney Jeff Foy's discussion of interparty agreement provisions respecting the priority of insurance proceeds disbursement indicates that such provisions are very similar to the provisions on insurance proceeds found in the completion guarantee; compare: Foy, supra note 14 at 230-231 with this author's comments at

e) Acknowledgements and Confirmations

The parties to the interparty agreement acknowledge and confirm (except to the extent amended by the interparty agreement) the existing distribution agreement and completion guarantee. They agree that neither the bank, nor the completion guarantor, have any obligations under the distribution agreement; and, conversely, that the distributor has no obligations under the loan agreement. They further agree that, until the bank has been repaid and the completion guarantor has been released from its obligations, no modifications may be made to such agreements

supra note 114 and the accompanying text.

¹³⁸The interparty agreement affirms that it is the producer that is primarily responsible for production cost overruns, while the completion guarantor is only secondarily liable, "subject to the terms and conditions of the completion bond and to the extent not paid by the producer and to the extent the completion guarantor is made aware of these costs": Mazirow Eshman, supra note 14 at 216.

¹³⁹The interparty agreement will provide that should the bank or the distributor exercise any takeover rights to which either may be entitled, then the completion guarantor will be relieved from its obligations under the completion guarantee and the interparty agreement. As has been explained by Schuyler Moore and Sheri Jeffrey (supra note 6 at 84),

The completion guarantor should never be in a position where it is still on the hook for liability to complete and deliver the motion picture where control has shifted from the producer to either the financier or the distributor for completion.

without the prior written consent of the bank and the guarantor.¹⁴⁰

f) Arbitration Mechanisms

A number of terms of the interparty agreement address the resolution, by means of arbitration,¹⁴¹ of disputes arising under the agreement, particularly disputes relating to the fulfilment of delivery obligations. These terms will generally be preceded by a series of lengthy and complex provisions that deal with mandatory notices and cure periods, that the parties are required to observe upon the tendering of delivery of the bonded project.¹⁴² The arbitration provisions of the interparty agreement may also

¹⁴⁰See: Foy, supra note 14 at 229-231 and Mazirow Eshman, supra note 14 at 216.

¹⁴¹As to the role of arbitration more generally in the entertainment industry, see: R.L. Feller, "Let Me Count the Ways - Dispute Resolution in the Entertainment Industry" (1985) 4:2 Entertainment and Sports Lawyer 1 at 13ff and V. Bardach, "A Proposal for the Entertainment Industry: The Use of Mediation as an Alternative to More Common Forms of Dispute Resolution" (1993) 13 Loyola of Los Angeles Entertainment Law Journal 477 at 479-483. For a more detailed discussion of the arbitration process, addressing both domestic and international considerations, see: W.C. Graham, "Performance and Bid Bonds, Choice of Law Clause, Arbitration" in J.S. Ziegel & W.C. Graham, eds., New Dimensions in International Trade Law: A Canadian Perspective (Toronto: Butterworths, 1982) 104 at 109-124.

¹⁴²See: Kenoff, supra note 14 at 4 and Mazirow Eshman, supra note 14 at 217.

specify in some detail the manner in which arbitration is to be carried out; it is common to include terms that consider "appointment of arbitrators; discovery and the arbitration schedule; and costs of arbitration"¹⁴³.

As to the frequency with which the arbitration mechanism set forth in the interparty agreement will be employed, one may note the observation of American lawyer and author Jay S. Kenoff:

Notwithstanding the availability of a dispute resolution procedure, the parties will do their best to avoid resorting to it, because the distributor and the completion bond company monitor the progress of the production through their separate representatives, and the potential effect on the relationship of the distributor and the financier of the distributor's refusal to accept delivery is so deleterious that there is severe pressure to achieve an amicable resolution.¹⁴⁴

4. From the Issuance of the Completion

Guarantee to the Delivery of the Project

Even if the completion guarantor rarely acts as a "big brother", and prefers to work (as a guarantor of some repute

¹⁴³Foy, supra note 14 at 232.

¹⁴⁴Kenoff, supra note 14 at 4.

has stated) "in the camera's shadow",¹⁴⁵ it does need to be satisfied that the project is progressing within budget, and that it is on schedule.

Ideally, the guarantor strives for a close and harmonious relationship with the producer, director and key production personnel. It receives daily progress reports by telephone or by fax. It reviews the detailed weekly cost reports that the producer is obliged to send to the guarantor from commencement of principal photography until the project is delivered to the distributors.¹⁴⁶

The guarantor is constantly in contact with the producer and, from time to time, may make visits to the shooting site (in studio or on location), to see for itself what is happening. It is generally believed that successful completion bonding depends on forging a trusting and positive relationship with the producer.¹⁴⁷

¹⁴⁵Michael Spencer, President of Film Finances Canada (1984) Ltd. and Chairman of FFC Completion Guarantees Inc., stated in 1989: "Nous avons un rôle essentiel à jouer, ...mais nous travaillons toujours dans l'ombre de la caméra"; see: Gourde, supra note 33 at 110.

¹⁴⁶See: supra note 84 and the accompanying text, as well as Gourde, supra note 33 at 109-110.

¹⁴⁷As Robert Minz, head of the Robert Minz Group completion bonders stated: "If the producer has a hidden agenda, if all his cards aren't on the table, it is very difficult for the bond company to effectively monitor the project. You've got to know the producer". See: Mehler, supra note 105 at 58.

The guarantor will require explanations and demand meetings with production personnel if the project appears to be heading for trouble. The guarantor may then issue whatever instructions it deems to be advisable in the particular circumstances.¹⁴⁸ Its advice or instructions may be very imaginative, and are not necessarily limited to the financial arena.¹⁴⁹

For example, when Natalie Wood died in 1981, she was in the midst of shooting what would be her last film, "Brainstorm". The financiers had already invested \$US 15 million, and they called on the completion guarantor to intervene. The guarantor hired a double for the late Ms. Wood, and it supervised the completion and successful delivery of an otherwise forgettable film.¹⁵⁰

¹⁴⁸The completion guarantor's instructions are not always adhered to without objection. For example, when the completion guarantor of the motion picture "Mortal Thoughts" took over the production and fired the director, various parties (including a former rights holder, the line producer and his loan-out company) filed suit against the completion guarantor and others, alleging intentional interference with contractual relations, breach of contract and other causes of action. See: Polar Entertainment Corp. et al. v. Avalanche Pictures, Inc. et al., Super. Ct., Los Angeles Cty., CA, No. BC020213 (unreported), as cited in "Polar Entertainment sues Avalanche over 'Mortal Thoughts'" The Entertainment Litigation Reporter (8 April 1991) (LEXIS-NEXIS).

¹⁴⁹According to Lindsley Parsons Jr., President of International Film Guarantors, every effort is made by the completion guarantor to avoid a production takeover: "We try to be very subtle and try to help a producer who has a tricky situation". See: P. Saperstein, "Fickle fates of finance" Daily Variety (16 November 1995) Special Section (LEXIS-NEXIS).

¹⁵⁰Gourde, supra note 33 at 109. "No one ever said we were artists," commented the completion guarantor's representative, when

A further example is found in the case of the film "Prancer", in which the lead performer was a reindeer. Unfortunately, a mild winter caused problems with the snow, and this caused a delay in production. Meanwhile, the reindeer shed its antlers, as reindeer generally do as winter progresses. The producer tried to build a mechanical reindeer, but without success. So the producer consulted with the completion guarantor, which discovered that a pregnant reindeer keeps her antlers until she gives birth. The producer somehow found and cast a pregnant reindeer, the film was finished, and it was in the theatres for Christmas of 1990.¹⁵¹

In cases of very serious problems (and this is in less than five per cent of all bonded productions¹⁵²), the guarantor may take over control of the project.¹⁵³ Under these circumstances, the guarantor may fire certain personnel, hire its own, or work with the existing personnel, in order

Brainstorm failed as a commercial success; see Grover, supra note 69 at 50.

¹⁵¹See: Angeli, supra note 6.

¹⁵²See: Angeli, supra note 6 and Coupe & Stigliano, supra note 80.

¹⁵³In their discussion relating to the "reality of takeovers", Schuyler Moore and Sheri Jeffrey note that, in practice, the full takeover is generally avoided and completion guarantors may instead implement a less draconian "soft takeover"; see: Moore & Jeffrey, supra note 6 at 83 and Phillips, supra note 38 at 118.

to get the project completed.¹⁵⁴ It pays whatever is required in order to fulfil its obligations to the beneficiaries of the completion guarantee, to complete and deliver the project.¹⁵⁵

In this context, one may refer to the notorious case of "The Adventures of Baron Munchausen". This 1989 film went over its original \$US 23 million budget by an additional \$US 20

¹⁵⁴See: P. Apodaca, supra note 29 and Merians, supra note 68 at 206-207. The firing of the film's director is one of the first steps that the completion guarantor may seek to take, but this may be a very difficult and complicated endeavour. See: Moore & Jeffrey, supra note 6 at 83 and Smith, supra note 26. For a detailed discussion of the rights of the film director generally, see: J.J. Dellaverson, "The Director's Right of Final Cut - How Final is Final?" (1988) 7:3 Entertainment and Sports Lawyer 7 (WESTLAW). It is not unusual for a terminated director to question the completion guarantor's ability to make a dismissal order and to sue the producer and/or completion guarantor for termination without cause. However, a director who was dismissed in 1987 from directing the television project entitled "Murder One", and who was also the author of the underlying work, failed in his application for an interim injunction to restrain the selling or distribution of the project, when he could not provide the court with the requisite financial undertaking as to damages: Fuller v. SC Entertainment Corp. et al. (1987), 18 C.P.R. 3d 555, 18 C.I.P.R. 200, 7 A.C.W.S. (3d) 405 (F.C.T.D.).

¹⁵⁵The powers of the completion guarantor, in a true takeover situation, are fully described in Phillips, supra note 38 at 117-118. On the rarest of occasions, a completion guarantor may take over the control of a project for reasons other than the fact that the project is running over budget or is failing to meet its production schedule. For example, the 1993 film "Deadfall", starring Michael Biehn and Nicolas Cage, was the object of an extremely atypical dispute between its producer and its completion guarantor: Although the producer itself had managed to complete and deliver the film on time and below budget, its distributor had requested that the remaining budget funds be used to re-shoot certain scenes with which the distributor was dissatisfied. When the producer refused, the completion guarantor was called in, took over control of the project and supervised some re-shooting. See: J. Brennan, "That's an un-wrap!" Daily Variety (22 March 1993) News, 5 (LEXIS-NEXIS) and "'Deadfall' flap settled" Daily Variety (28 June 1994) News, 5 (LEXIS-NEXIS).

million. When the film's financiers demanded the intervention of the completion guarantor, it hired a new producer, advanced the \$US 20 million required, reduced the number of special effects and completed the film.¹⁵⁶

But it must be emphasized that before arriving at such a takeover situation, the completion guarantor carefully watches how the production is unfolding on a daily basis, and tries to control damaging events to the extent possible.

In practice,

regardless of the right that the guarantor may have to take over the film in the event it gets into difficulties, very few films are actually taken over by completion guarantors. To the extent that overages and delays in production result from forces beyond the control of the producer, in many events a completion guarantor would not be able to do much better.¹⁵⁷

¹⁵⁶See: "Gilliam and Schuhly face legal threat over Baron Munchausen cost" Screen Finance (22 March 1989) (LEXIS-NEXIS) and L. Gubernick, "Miss Jones, get me Film Finances" Forbes (26 December 1988) 74 (LEXIS-NEXIS). An entire book has been devoted to the art and politics involved in this cinematographic debacle; see: A. Yule, Losing the Light: Terry Gilliam & The Munchausen Saga (New York: Applause Books, 1991). It is interesting that in his thorough review of Mr. Yule's book, Daniel Selznick (an independent film and television producer and a journalist) noted that "Mr. Yule is particularly good at giving details about the completion bond industry, a little-known facet of motion picture production...". See: D. Selznick, "Burning Money II" The New York Times (24 November 1991) section 7, page 15, column 1 (LEXIS-NEXIS).

¹⁵⁷Smith, supra note 26.

5. The Release of the Completion Guarantor

Ordinarily, the completion guarantor is released from its guarantee, without excessive formality, upon the completion and delivery of the subject film/TV project in accordance with the terms and conditions of the guarantee or the governing interparty agreement.¹⁵⁸ If no claim has been made upon the completion guarantee, any no-claims rebate that the producer has negotiated is then remitted by the guarantor to the producer.¹⁵⁹

Where a claim has been made upon the completion guarantee, the guarantor will not be released until the claim has been formally adjudicated or until there has been an extra-judicial negotiated settlement.¹⁶⁰

¹⁵⁸Pursuant to article 1687(1) CCQ, "[r]elease takes place where the creditor releases his debtor from his obligation". Where completion and delivery of the bonded film/TV project has been accomplished by the producer, without any intervention by the completion guarantor, the guarantor may rely upon article 1698 CCQ:

1698. Release of the principal debtor entails release of his sureties and other warrantors, who may exercise the same rights as the principal debtor, even independently of him.

¹⁵⁹It is common for the completion guarantor to circulate among the beneficiaries of the completion guarantee, for signature, a short "receipt and release"-type document. As provided by article 1697(1) CCQ, "[a] debtor, on being released, is entitled to an acquittance from his creditor". Any no-claims rebate available to the producer will not be paid until such document will have been executed by all the beneficiaries of the completion guarantee.

¹⁶⁰There is very little jurisprudence relating to the area of completion guarantees. As indicated above, arbitration appears to be the preferred mode of formal dispute resolution and many decisions

6. Claims Made on Completion Guarantees

As discussed earlier in this thesis,¹⁶¹ the producer is always free to negotiate with the completion guarantor an agreement that if the producer completes and delivers the project to the distributors without a claim having been made on the guarantee, the guarantor will return a portion of the fee already paid for the guarantee. However, it may be noted that the payment of a no-claims rebate may itself be the object of some dispute.¹⁶²

In addition, as previously mentioned, from time to time the producer cannot complete and deliver its project without the intervention of the completion guarantor. Where a claim is made on the bond by its beneficiaries, the guarantor will use its own funds, or those of its reinsurer (such as Lloyd's of London or Transamerica Insurance Company), to

consequently go unreported. On a daily basis, however, recourse is had neither to the courts, nor to arbitration mechanisms. For the settlement of most claims made upon completion parties is negotiated strictly by and among the parties to any given dispute.

¹⁶¹See the section of this thesis, above, entitled "Completion Guarantee Fees" and, in particular, the remarks relating to the "gross fee with rebate" arrangement.

¹⁶²For example, in Manhattan Film, Inc. v. Entertainment Guarantees, Ltd., 548 N.Y.S.2d 200, 156 A.D.2d 152 (N.Y.App. 1989), the producer actually had to resort to litigation to obtain its rebate. A New York appellate court affirmed the trial court's decision to award \$US 185,000 in damages to the producer, when the completion guarantor breached its contractual obligations and refused to remit the agreed-upon rebate. See also: "Completion Bond" (1990) 12:2 Entertainment Law Reporter 15 (LEXIS-NEXIS).

finish the project, or in the worst cases, to repay the financiers.¹⁶³

As might be expected, most claims made on completion guarantees concern the issue of whether the completion guarantor's obligation to deliver the project -- however such obligation is defined in the guarantee, an interparty agreement, or elsewhere -- has been fulfilled.

For example, in Cinégarantie Ltée et al. v. Habitat Distribution, Inc. et al.,¹⁶⁴ at issue was the interpretation and application of the mandatory delivery and cure provisions of the interparty agreement, which had been signed in 1994 by the producer, the interim financing bank, the major distributor and the completion guarantor of a film bonded in Quebec entitled "Habitat". In discussing the

¹⁶³In Union générale cinématographique S.A. et al. v. Motion Picture Guarantors Inc. et al., supra note 41, Mr. Justice Smith of the Court of High Justice of Ontario's Supreme Court spoke (at pages 17-18 of the report) of the nature of the obligation undertaken by the completion guarantor:

The obligation is simple and in all the circumstances, it is clear: it is to complete and deliver the film. That will involve payment of money as a necessary incidental feature if the guarantor decides to complete the film as opposed to simply making good his promise to pay the excess monies. He may decide to do either or more aptly I suppose to do both.

¹⁶⁴Arbitration before Richard M. Mosk, Los Angeles, California, April 30, 1996. A copy of the Arbitrator's decision is reproduced in full in Prupas, ed., supra note 83 at 405-413.

obligations of the completion guarantor under the interparty agreement, the arbitrator, Richard Mosk, Esq., held that

the operative agreement should be interpreted so that the Guarantor is required to deliver all specified materials for a completed picture by the Outside Delivery Date, and the cure period should just be for minor or inadvertent defects of such a nature that the Guarantor had no reasonable reason to know that the picture would not be accepted by the Distributor. This interpretation appears to comport with the realities of the process and therefore the likely intent of the parties.¹⁶⁵

Mr. Mosk acknowledged that there were no legal authorities (jurisprudence) directly on point. Accordingly, he allowed such factors as custom and usage, the subsequent conduct of the parties and the notion of "reasonableness", among others, to each play a role in the formulation of his decision against the completion guarantor.¹⁶⁶

In Mayfair Entertainment International Limited v. Film Finances Canada (1984) Limited [sic],¹⁶⁷ the claimant film distributors had refused to take delivery from the completion guarantor of "Mesmer", a film bonded in Quebec in 1993, on the basis that the film did not comply with the

¹⁶⁵Ibid. at 410 (page 11 of the report).

¹⁶⁶Ibid. at 407 and 409 (pages 6 and 10 of the report).

¹⁶⁷Arbitration before Michael J. Brown (Chairman), William Cartlidge and Colin Leventhal, London, England, November 29, 1994. The decision of the Arbitrators is reproduced in full in Prupas, ed., supra note 83 at 428-441.

contractual requirements for which the distributor had negotiated. Unfortunately, the nature of these requirements was unclear, since they were specified in a variety of ways, in a series of conflicting documents that included a distribution agreement, a completion guarantee, an interparty agreement and a certificate attaching to a letter of credit. Eventually, however, the arbitrators found that the certificate governed and that, consequently, the completion guarantor was obliged to deliver a film that

substantially conforms to the screenplay ...except for changes thereto approved by [the distributor] and/or minor changes necessitated by the exigencies of production and other minor changes that do not substantially alter the story or principal characters of the Film.¹⁶⁸

On the critical issue of whether the film substantially accorded with the approved screenplay, the arbitrators ultimately concluded and decided that there was no substantial conformity: "We do not think it necessary nor do we think (having considered the matter most carefully) that it would be helpful to set out a detailed analysis or to give reasons in support of that finding of fact".¹⁶⁹

As a result of this decision, the completion guarantor was required to repay to Berliner Bank, the interim financier,

¹⁶⁸Ibid. at 433-434 (pages 11-12 of the report).

¹⁶⁹Ibid. at 438 (page 20 of the report).

the \$US 4 million which the distributor Mayfair had promised to pay for international distribution rights. The completion guarantor was moreover required to arrange for the international sale of the film.

The Mesmer decision attracted quite a lot attention from the entertainment press. It was thought to be of great significance in the entertainment industry: Since so few finished films do in fact "substantially conform" to the approved screenplay, and since "substantial conformity" was the contractual norm, it was believed that the decision in the distributor's favour would encourage an enormous amount of litigation by unhappy distributors.¹⁷⁰

Such a flood of litigation never did materialize. Instead, completion guarantors reviewed their policies and documentation and modified the guarantee they would make with regard to the relationship between an approved screenplay and the film they were required to deliver. Rather than guarantee that a film would "substantially conform to", or would be "in substantial compliance with", the approved screenplay, the completion guarantor would

¹⁷⁰See: "Mayfair and Film Finances go to arbitration in row over Mesmer finance" Screen Finance (19 October 1994) (LEXIS-NEXIS), A. Dawtrey, "'Mesmer's' distrib'n future with Mayfair nears resolution" Variety (5 December - 11 December 1994) Film, 22 (LEXIS-NEXIS), A. Dawtrey, "Bonders bound by 'Mesmer'" Daily Variety (7 December 1994) News, 42 (LEXIS-NEXIS) and A. Dawtrey, "Mayfair not 'Mesmer'ized" Variety (12 December - 18 December 1994) Film, 24 (LEXIS-NEXIS).

henceforth agree only to deliver a film that was "based upon" the approved screenplay.¹⁷¹

As the decisions discussed above would appear to indicate, even where the completion guarantor has attempted delivery of a bonded project, such delivery may be held on arbitration to be insufficient. Accordingly, the completion guarantor may find that it has been compelled to expend large sums, in order to meet its obligations under its guarantee. As a general rule, recoupment of these sums by the completion guarantor will follow only after the financiers of the project have been repaid the original cost of the project.¹⁷²

7. The Reinsurance of Completion Guarantees

Reinsurers may be viewed as "the insurers that stand behind bond issuers as the ultimate guarantors".¹⁷³ The completion

¹⁷¹It is understood within the entertainment industry that the directives prompting this change in policy, emanating from the underwriters for the completion guarantor's reinsurers, are highly confidential and, therefore, not publishable for attribution.

¹⁷²A detailed discussion of the recoupment rights and corresponding security rights of the completion guarantor follows, below, in the second part of this thesis, entitled "COMPLETION GUARANTOR SECURITY DEVICES".

¹⁷³Thompson, supra note 22 at F8.

guarantor may take out insurance with a reinsurer (such as Lloyd's of London) on each project guaranteed. Or, it may have a more intimate relationship with its reinsurer: For example, the Completion Bond Co. Inc. (which ceased doing business in 1993) was directly owned by Transamerica Insurance Company, while insurance companies Fireman's Fund and Near North Insurance Agency established International Film Guarantors as a fifty-fifty co-venture in February 1990.¹⁷⁴ In Canada, The Motion Picture Bond Company, a subsidiary of the London Guarantee Insurance Company, recently announced that it has become a member of the London Insurance Group.¹⁷⁵ It has been estimated that from 1990 to 1995, \$US 120 million of claims from various completion guarantors have been paid through the London reinsurance market.¹⁷⁶

In any entertainment interim financing transaction, the bank will customarily require that the completion guarantor's reinsurer provide written evidence that the reinsurer has named the bank as an additional insured on the reinsurance policy. This assurance, commonly known as a "cut-through endorsement", permits the bank to claim directly against the

¹⁷⁴Noglows, supra note 9 at 41, 42.

¹⁷⁵See: The Motion Picture Bond Company, "Advertisement" Playback (5 May 1997) 35.

¹⁷⁶See: Eller, supra note 6.

reinsurer, in the event that the completion guarantor is unwilling or unable to honour a claim made on the completion guarantee. As has been noted by American entertainment law attorney Jill Mazirow Eshman:

Therefore, the reinsurer must be an acceptable insurance risk for the bank. When the bank accepts the completion guarantor, it has also evaluated and accepted the credit risk of the reinsurer.¹⁷⁷

One may note, however, that liability under a completion guarantee does not mean that the guarantor's reinsurer will automatically assume responsibility under the corresponding reinsurance policy. One may refer, for example, to the English Court of Appeal's recent decision in Crystal Eye Management v. Entertainment Guarantees Inc.¹⁷⁸. In that case, the plaintiff-producer had obtained a default judgment against the defendant-completion guarantor, for budget overruns. When the defendant went bankrupt, the plaintiff sought recovery from the defendant's reinsurers. However, reinsurers for the completion guarantor denied coverage, alleging a breach of warranty and non-disclosure on the guarantor's part. The reinsurers also argued that the reinsurance policy did not cover the plaintiff's claim. The

¹⁷⁷Mazirow Eshman, supra note 14 at 212. As concerns the entire issue of cut-through endorsements, see: Foy, supra note 14 at 22, Moore & Jeffrey, supra note 6 at 79-80, Ulman, supra note 14 at 514 and Smith, supra note 26.

¹⁷⁸[1997] NLOR No. 8 (C.A. Civ. Div.) (QL).

plaintiff brought a motion to set aside the default judgment, in the hope that it could then pursue a different claim that would more likely fall within the reinsurance policy. When this motion was granted, the reinsurers, acting as appellants-interveners, appealed to have the decision at first instance overturned and the default judgment against the defendant reinstated.

The appeal was allowed, on the basis that the plaintiff had delayed too long in making its original application. However, in the course of his decision, Lord Justice Leggatt made the following pronouncement (in obiter dictum), with respect to the reinsurers' responsibility:

...liability of the Insurers had nothing directly to do with the liability of [the completion guarantor]. It did not follow that if [the completion guarantor] were liable their insurers would be as well.¹⁷⁹

It would thus seem that merely obtaining a cut-through endorsement on a completion guarantor's reinsurance policy may not suffice to assure payment of a claim made on a completion guarantee that, for whatever reason, is not honoured. One must also review and analyze the terms of the reinsurance policy itself, to confirm that coverage will be available to the claimant.¹⁸⁰

¹⁷⁹Ibid. at paragraph 13 of the report.

¹⁸⁰For a detailed explanation of the circumstances surrounding a series of costly disputes between various interim financing banks

The interim financing bank may further require the completion guarantor to furnish a separate insurance policy or letter of credit evidencing sufficient solvency to meet any obligation that the guarantor may have to pay a deductible, before recourse may be had to its reinsurer.¹⁸¹

The importance of reinsurance to the completion guarantee business was underscored by the effect of rumors, in 1992, that Lloyd's of London, the business' largest reinsurer, was planning to withdraw altogether from reinsuring completion guarantee companies. Lloyd's had recently covered bonder Performance Guarantees on a \$US 7.7 million overrun for the uncompleted film "Barrsinister". In addition, Lloyd's was at the same time experiencing a number of non-entertainment related financial difficulties, which lent credence to the rumours of a change in Lloyd's willingness to involve itself in entertainment transactions.¹⁸²

(including Barclays Bank, The Mercantile National Bank and Imperial Bank) and Lloyd's insurance syndicates, with six bonded films at issue, see: "Barclays takes Lloyds [*sic*] syndicates to court over completion bond row" Screen Finance (21 October 1992) (LEXIS-NEXIS). As to the principles of reinsurance litigation, see generally: M. Mendelowitz, "Reinsurance Policy Wordings" (1995) 6 Canadian Insurance Law Review 9.

¹⁸¹The deductible may be a substantial amount, averaging \$US 500,000 per project bonded; see: Darrow, supra note 31 at 6.

¹⁸²Rumours that Lloyd's of London would be getting out of the completion bond business were reported in P. Noglows, "Will Lloyd's leave a void?" Daily Variety (25 May 1992) 1. For a detailed description of non-entertainment industry factors associated with the crisis experienced by Lloyd's in the late 1980's and early 1990's, see: J. Barnes, "Letter from London: The Deficit Millionaires" The New Yorker (20 September 1993) 74 at 78ff. As to Lloyd's current financial

For at least for one completion guarantor, the effect of these rumours was to constrain its bonding efforts: Some banks would not accept its completion guarantees because it was difficult to gauge the worthiness of the cut-through endorsements issued by the reinsurer Lloyd's.¹⁸³ However, at least since 1994, the reinsurance market appears to have stabilized for those completion guarantors that have managed to continue their operations and for those bonders that have appeared on the scene since that time.¹⁸⁴

situation, see: Bloomberg Business News, "Lloyd's of London in a race to save itself from ruin" The [Montreal] Gazette (27 August 1996) F2.

¹⁸³See: P. Noglows, "Is the bond biz coming unglued?" Daily Variety (12 April 1993) 1 at 94 and P. Noglows, "Belly-up bonder binds biz" Daily Variety (7 June 1993) 1 at 60. The "belly-up bonder" referred to in this latter article was Completion Bond Co. Inc. ("CBC"). As was previously mentioned herein (supra note 29 and the accompanying text), CBC ceased doing business in June of 1993 after incurring huge losses on films "Malcolm X", "The Thief and the Cobbler", "Hoffa", "Cliffhanger" and others. Many blamed CBC, which was known for severely undercutting its competition, for driving down the typical completion bond fee from six per cent of the production budget (with a fifty per cent no-claims rebate) to as low as one per cent in many instances. As a result, bonders such as Film Finances, which were reinsured with Lloyd's, found themselves with lower profit margins that made their business increasingly unattractive to their reinsurer. However, with the demise of CBC, the remaining bonding companies were able to allow their fee rates to rise, thereby ensuring their continuing attractiveness to their reinsurers.

¹⁸⁴ In the United States, the veteran Film Finances, Inc. remains an industry mainstay, with newer completion guarantors such as International Film Guarantors offering competition; see: Greene, supra note 29. In Canada, Film Finances Canada (1984) Ltd., The Motion Picture Bond Company (formerly known as "Motion Picture Guarantors", which operated in Quebec as "Cinégarantie Ltée") and FFC Completion Guarantees Inc. are the best known completion guarantee companies; see: S. St-Onge, "Canada: Raising money always a task for Canadian film producers" The Financial Post (7 September 1994) 16 (QL), "Bonder set to increase UK activity after takeover" Screen Finance (6 March 1996) (LEXIS-NEXIS), R. Weiner, "Pic guarantors stake sold" Daily Variety (27 February 1996) News, 32 (LEXIS-NEXIS), S. Yellin, "Canada: London

II. COMPLETION GUARANTOR SECURITY DEVICES

In addition to being known as the "completion agreement" or the "producer agreement", the contract that is traditionally executed between the producer and the completion guarantor prior to the issuance of any completion guarantee is also known in the entertainment industry as a "security agreement". This is because, as a review of the typical form of this agreement reveals, so much of the document is devoted to creating and maintaining in favour of the completion guarantor a security right in the bonded project and related property.¹⁸⁵

These provisions of the standard completion agreement indicate that a wide variety of security devices is available to the completion guarantor operating in Quebec, in order to secure repayment of any funds advanced for the purpose of financing the completion and delivery of a particular film/TV project. With the exception of security taken pursuant to section 427 of the Bank Act,¹⁸⁶ which would

Insurance arm takes new direction" The Financial Post (29 February 1996) 22 (QL), The Canadian Press, "Insurer gains control" Entertainment - Notes Roundup (29 February 1996) (QL) and C. Binning, "Michael Spencer: Film icon" Playback (16 June 1997) 39.

¹⁸⁵See, for example: paragraphs 8 and 9 of the precedent completion agreement reproduced in Prupas, supra note 83 at 456-458.

¹⁸⁶S.C. 1991, c. 46.

not generally be accessible to a completion guarantor,¹⁸⁷ these devices are analogous to devices relied upon by an interim financing bank to secure repayment of an interim loan made to a producer in order to finance the creation of a particular film/TV project. However, while the bank will ordinarily seek to ensure repayment of its financing by taking security over all or most of the producer's assets, it is accepted that

[t]he recoupment position of the completion guarantor is generally non-recourse in that it permits the completion guarantor only to proceed against revenues derived from the motion picture for recovery of its loans and not against any other assets of the producer.¹⁸⁸

Still, for both the completion guarantor and the bank, common devices would include: (a) hypothecs¹⁸⁹ (including immoveable hypothecs,¹⁹⁰ moveable hypothecs without

¹⁸⁷A completion guarantor may not be characterized as an eligible "bank" that would be entitled to take section 427 Bank Act security. However, a completion guarantor could enjoy all the rights of a bank possessing section 427 security if the bank were to assign its security to the completion guarantor, pursuant to section 428(14) of the Bank Act: R.A. Macdonald, Teaching/Learning Materials on the Law of Security on Property, 4th. prov. ed. (Montreal: McGill University, 1996) at XI-17. Such an assignment would be possible where, for example, the completion guarantor has been required to repay some or all of the producer's indebtedness to the bank and has been subrogated to the rights of the bank: articles 1651ff CCQ.

¹⁸⁸Moore & Jeffrey, supra note 6 at 81.

¹⁸⁹Articles 2647, 2660-2802 CCQ.

¹⁹⁰Articles 2693-2695 CCQ.

delivery,¹⁹¹ moveable hypothecs with delivery,¹⁹² hypothecs on universalities,¹⁹³ floating hypothecs¹⁹⁴ and hypothecs on claims,¹⁹⁵ which could be employed concurrently); and (b) non-hypothecary security devices (including security under assignments and perhaps even a trust mechanism). Each of these devices will be considered in turn, below. A consideration of the ranking of the completion guarantor's and the bank's respective security rights will follow.

A. HYPOTHECARY SECURITY DEVICES

The completion guarantor will find that the security device upon which it will rely to the greatest extent will be the "hypothec", a real right which the completion guarantor may charge on any type of the producer's property -- moveable or immoveable, corporeal or incorporeal.¹⁹⁶ The producer may hypothecate the property of another, or even future property, and the hypothec is valid, attaching when the

¹⁹¹Articles 2665(2), 2696-2701 CCQ.

¹⁹²Articles 2665(2), 2702-2709 CCQ.

¹⁹³Articles 2665, 2666, 2674-2676, 2684, 2697, 2711 CCQ.

¹⁹⁴Articles 2715-2723 CCQ.

¹⁹⁵Articles 2710-2714 CCQ.

¹⁹⁶Article 2666 CCQ.

producer acquires title to the property it hypothecates.¹⁹⁷ As a hypothecary creditor, the completion guarantor would be entitled generally to follow into third-party hands any property hypothecated in the completion guarantor's favour.¹⁹⁸ Should the producer fail to fulfil any of the producer's obligations secured by hypothec, the completion guarantor would be permitted to take possession of the hypothecated property, or take it in payment, or sell or have sold such property and to rank as a preferred creditor on the proceeds.¹⁹⁹

Any hypothec granted by the producer in the completion guarantor's favour must be for a stated amount.²⁰⁰ In addition to capital and certain expenses, interest charged may be secured by hypothec, at least for the current year and the three preceding years, provided that the interest rate(s) are specified or, at least, determinable.²⁰¹ To

¹⁹⁷Article 2670 CCQ.

¹⁹⁸Articles 2660, 2751 CCQ.

¹⁹⁹Article 2660 CCQ. Although these are the four types of hypothecary recourses to which the bank would in theory be entitled, in practice the bank is more likely to rely upon the completion guarantor to ensure that the contemplated film/TV project is completed and delivered. Accordingly, only when the completion guarantor is unable or unwilling to fulfil its obligations, or when a project has not been bonded from the outset, will the bank find itself required to realize upon its security pursuant to articles 2748-2796 CCQ.

²⁰⁰Article 2689(1) CCQ.

²⁰¹Articles 2667, 2959(1), 2690 CCQ.

ensure that the completion guarantor recovers all sums due (including permitted expenses) in the event of the producer's default on its repayment of secured sums, the completion guarantor will in practice require the producer to hypothecate its property for an amount at least double the actual total budget amount stipulated in the completion agreement.²⁰²

1. Immoveable Hypothecs

It is unlikely that the producer will enjoy any title to immoveable property, whether corporeal or incorporeal, that might be considered as revenues from the bonded film/TV project and that, accordingly, would serve as the basis for a hypothec on an immoveable.²⁰³

²⁰²When quantifying the amount of a hypothec in the completion guarantor's documentation, it is this author's experience that the completion guarantor's legal representative is likely to bear in mind the lesson taught by the "The Adventures of Baron Munchausen" case (*supra* note 156 and the accompanying text); namely, that a completion guarantor may ultimately be responsible for advancing completion sums equal to as much as double a project's approved budget, or even more. This approach contrasts with that of the interim financing bank, which will likely require the producer to hypothecate its property for an amount closer to fifteen per cent greater than the actual credit commitment stipulated in its loan agreement. See: L. Payette, *Les Sûretés dans le Code civil du Québec*, (Cowansville, Que.: Yvon Blais, 1994) at 180-181 and D. Pratte, *Priorités et hypothèques* (Sherbrooke, Que.: Éditions de la Revue de Droit Université Sherbrooke, 1995) at 82-83.

²⁰³Articles 900, 904, 2660, 2665(1) CCQ.

2. Moveable Hypothecs

As leading Quebec commercial lawyer and author John B. Claxton points out, "[a]ll moveable property, corporeal, incorporeal, intellectual, documentary, contractual rights, present and future, may be hypothecated".²⁰⁴ A hypothec on moveable property is a moveable hypothec.²⁰⁵ Since most of the property owned or to be owned by the producer is moveable in nature, the hypothecs that the producer will grant in the completion guarantor's favour will be primarily moveable hypothecs.

a) Hypothecs on Moveables Without Delivery

The producer most likely operates as a federally- or provincially-incorporated company which was, as stated earlier,²⁰⁶ created for the specific purpose of producing a particular film or TV project. It will therefore be permitted to grant a moveable hypothec without delivery, unlike a natural person who does not operate an enterprise

²⁰⁴Claxton, supra note 16 at 30.

²⁰⁵Article 2665(1) CCQ.

²⁰⁶See the section of this thesis, above, entitled "The Structure of Bank Financing Transactions".

or a natural person who operates an enterprise but seeks to hypothecate non-enterprise property.²⁰⁷

(i) Corporeal Property

The completion guarantor will specifically charge all of the producer's corporeal property related to the film/TV project for which the producer seeks financing. This property would include the visual elements (exposed or developed film, positives, negatives, pre-print materials, prints, visual effects, videotapes), as well as the audio elements (dialogue, music and audio effects). The charge would be drafted to extend to all improvements, accessories and replacements of the specified corporeal property, and the charged property must be sufficiently described to meet the requirements of article 2697 CCQ.

Other moveable corporeal property of which the producer is presently owner or may become owner may be charged with a hypothec on a universality or by means of a floating

²⁰⁷Article 2683 CCQ.

hypothec (both of which will be dealt with in greater detail, below²⁰⁸).

(ii) Incorporeal Property

The producer will grant to the completion guarantor a moveable hypothec without delivery on numerous and varied forms of incorporeal property, including the producer's rights in: 1) any existing or future agreements relating to the film/TV project, 2) the film/TV project itself and 3) miscellaneous incorporeal property related to the bonded film/TV project.

Hypothecs Over Contracts. The completion guarantor will wish to specifically charge all of the film/TV project's "chain-of-title" agreements, including present and future contracts executed or to be executed by the producer respecting the project's screenplay and any underlying property on which the project is based. The completion guarantor will also insist on having the producer hypothecate in the completion guarantor's favour all existing or future agreements that the producer executes for

²⁰⁸See the sections of this thesis, below, entitled "Hypothecs on Universalities" and "Floating Hypothecs", respectively.

the distribution, broadcast, exhibition and exploitation of the project.

The Project Itself. Insofar as hypothecating the film/TV project itself is concerned, the completion guarantor will be limited only by the extent of its legal counsel's imagination in describing the numerous forms of incorporeal property involved in the creation and exploitation of a film/TV project. This property might include: rights to all the literary property (scripts, treatments, outlines) related to the project; and all ancillary rights related to the project or to the literary property (development, production, delivery, distribution, remake, sequel, prequel, novelization, music publishing, multimedia, merchandising).

The copyrights of the film/TV project and the underlying literary property are of particular importance as a source of hypothecable incorporeal moveable property. The completion guarantor will certainly charge such copyrights (domestic and foreign), as well as renewals and extensions of copyright. Security taken on copyright would extend to all of the producer's rights related to these copyrights.²⁰⁹

²⁰⁹Such rights would include registration rights under section 54(2) of the Copyright Act, R.S.C. 1985, c. C-42, as well as the right to sue for copyright infringement, pursuant to section 34 of the Act.

Intellectual rights such as copyright are moveable property that may be the object of a moveable hypothec.²¹⁰ However, it is debatable whether the creation of a moveable hypothec over the project's various copyrights would necessarily give to the completion guarantor the most appropriate security device in relation to this form of intellectual property. On the one hand, the hypothecation of any property, including copyright, may be characterized as a matter of property and civil rights within Quebec's jurisdiction.²¹¹ On the other hand, matters relating to copyright are generally considered as coming within federal constitutional jurisdiction.²¹²

It may be argued that in lieu of a hypothec, the producer ought to register an assignment of copyright in the completion guarantor's favour.²¹³

²¹⁰Article 2665(1) CCQ; see: L. Carrière, "The New Civil Code of Québec and Intellectual Property: Preliminary Reflections and Comments" (1994) 11 Can. Intell. Prop. Rev. 153 at 177-179.

²¹¹Section 92(13) of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11; this schedule hereinafter referred to as "Constitution Act, 1982".

²¹²Section 91(23) of the Constitution Act, 1982.

²¹³Section 57(1) of the Copyright Act; see: Poolman v. Eiffel Productions S.A. (1991), 35 C.P.R. (3d) 385, 42 F.T.R. 201 (F.C.T.D.) and comments by G. Takach & M. Racicot, "Agaguk - Un nouveau conflit fédéral-provincial?" (1992) 4 Cahiers de propriété intellectuelle 401, R.H. El Sissi, "Security Interests in Copyright" (1995) 10 I.P.J. 35 at 50ff and C. Spring Zimmerman, L. Bertrand & L. Dunlop, "Intellectual Property in Secured Transactions" (1991) 8 Can. Intell. Prop. Rev. 74 at 92-93. Generally, as regards the interrelationship between copyright and the CCQ, see: Y. Gendreau, "La nature du droit d'auteur selon le

Although the better view is that federal and provincial laws respecting copyright are concurrent regimes, the completion guarantor will generally wish to avoid the possibility of its registered hypothec being displaced by another creditor's registered copyright assignment. This might be the result if Canadian courts were to find the federal jurisdiction to be exclusive.²¹⁴

Accordingly, to be prudent, the completion guarantor ought not only to register a moveable hypothec against the film/TV project's copyrights in the provincial register of personal and moveable real rights,²¹⁵ but also to have an assignment

nouveau Code civil" (1993) 27 R.J.T. 85 and N. Tamaro, "Le nouveau Code civil, droit commun des contrats en matière de droit d'auteur?" (1993) 96 R. du N. 3.

²¹⁴Such is the American experience; see the leading American case of Re Peregrine Entertainment Ltd., 116 B.R. 194, 59 USLW 2046, 1990 Copr.L.Dec. P 26,616, 16 U.S.P.Q.2d 1017, 11 UCC Rep. Serv. 2d 1025 (C.D. Cal., June 28, 1990) and comments by El Sissi, ibid. at 56-58 and M. Simensky, "Intangible Assets as Collateral: Security Interests in Intellectual Property Under U.S. Law" (Notes presented at the Law Society of Upper Canada Continuing Legal Education conference entitled Entertainment, Advertising and Media Law, Toronto, Ontario, April 2-3, 1993) [unpublished] at 3ff. For a detailed analysis of various paradigms for perfecting security interests in film copyrights, with a discussion of copyright laws in Canada, the United States, Japan, the United Kingdom, France, Singapore, the Philippines, Spain, India and Australia, see: J. Lam, "Banking on a Dream: Perfecting Security Interests in Copyrights - An International Survey" (1993) 13 Loyola of Los Angeles Entertainment Law Journal 319 and especially, as regards the unresolved Canadian situation, at 334-335.

²¹⁵Article 2969 CCQ.

of these copyrights registered in Ottawa's Copyright Office.²¹⁶

Other Incorporeal Property. The producer may grant to the completion guarantor a moveable hypothec without delivery over all moveable property controlled through documents of title (promissory notes, cheques, warehouse receipts and bills of lading), owned or to be owned by the producer.²¹⁷ In addition, negotiable documents of title could be hypothecated with delivery by the producer's endorsement and delivery of these documents to the completion guarantor.²¹⁸ In the course of its business of exploiting the film/TV project for which a completion guarantee with the completion guarantor had been arranged, documents of title (for example: a cheque for revenues, or a bill of lading for film prints) may represent a significant form of property utilized by the producer to secure the repayment of any funds advanced by the completion guarantor.

A moveable hypothec may also be granted to the completion guarantor over all the account ledgers and related documentation of the producer, so that if the completion guarantor were required to execute on its security rights,

²¹⁶Section 57(1) of the Copyright Act.

²¹⁷Article 2699 CCQ.

²¹⁸Articles 2708-2709 CCQ.

it could ascertain without too much difficulty which parties owed how much in revenues to the producer, and when such amounts were due.²¹⁹

While securities such as stocks, bonds, debentures, partnership units and other types of incorporeal property, which are currently owned by the producer or that it may in future own, may be hypothecated in the bank's favour to secure repayment of its financing, it is unlikely that such assets would be hypothecated in the completion guarantor's favour to secure recoupment of completion sums.²²⁰

²¹⁹Such information could also be confirmed by the completion guarantor's review of the relevant distributors' books and records. The interparty agreement customarily contains a provision that permits the secured parties, both the bank and the completion guarantor, to examine this documentation, "until the producer has discharged his obligations (of repayment, if any) to each": Foy, supra note 14 at 82.

²²⁰There is some support for the position that any bank possessing a hypothec over a producer's securities would, in theory, enjoy a distinct advantage over a completion guarantor that had been granted a similar form of secured interest. For where the bank is a "Schedule I" or "Schedule II" bank pursuant to the Bank Act, it may not be restricted merely to the codal remedies for enforcement of hypothecs, specified in article 2748 CCQ, to which the completion guarantor would be entitled. To the contrary, the bank may be permitted by section 431 of the Bank Act to sell the producer's hypothecated securities, other than in accordance with procedures set out in the Civil Code of Québec, upon default in the payment of the loan. See: Claxton, supra note 16 at 37; contra: R. Jukier & R.A. Macdonald, "The New Quebec Civil Code and Recent Federal Law Reform Proposals: Rehabilitating Commercial Law in Quebec?" (1992) 20 Can. Bus. L.J. 380 at 402-405.

b) Hypothecs on Moveables With Delivery

(i) Film or Tape Processing

From time to time, for the purposes of performing production or post-production work, it will be necessary for the audio and visual elements of the film/TV project to be held by post-production laboratories, special effect houses and other third parties. Provision ought to be made by the completion guarantor to additionally charge this material by a hypothec on moveable property with delivery, by "pledge".²²¹ Delivery by the producer of project elements to outside facilities constitutes delivery to the completion guarantor's (the creditor's) designated nominee, thereby both creating and publishing the hypothec.²²² A "pledgeholder agreement" ancillary to the deed of hypothec will be concluded among the completion guarantor, the bank, the producer and the third-party facility, to meet the requirement of a writing where property pledged is held by a third party.²²³

²²¹Articles 2665(2), 2702-2709 CCQ.

²²²Articles 2702, 2703 CCQ.

²²³Article 2705 CCQ. See: Foy, supra note 14 at his note 26 and the accompanying text. A precedent laboratory pledgeholder agreement for a film financing transaction is reproduced in Evrensel, supra note 14 at Schedule "E". In addition to this form of multiparty agreement, the completion guarantor customarily concludes with each production and post-production facility a separate document, commonly known as a "laboratory access letter", that (among other things) permits the

In Quebec, there exists no special lien specifically applicable to work performed on motion pictures by film processing laboratories, as exists in other jurisdictions such as New York and New Jersey.²²⁴ However, should the producer fail to pay its bills, these laboratories and analogous facilities would benefit under Quebec law from the prior claim accorded to those whose contribution of workmanship or processing accords them a right of retention.²²⁵ A pledgeholder agreement would serve to clarify the respective rights and obligations of the completion guarantor, the bank, the producer, the laboratory/effects house and any other party that has a claim on the pledged property (for example, a distributor).

guarantor access to all film and/or tape visual and audio elements necessary to fulfil its obligations under the completion guarantee; see: Foy, supra note 14 at his note 35 and the accompanying text.

²²⁴S.M. Martin & P.W. Smith, "The Unconstitutionality of State Motion Picture Film Lien Laws (Or How Spike Lee Almost Lost It)" (1989) 39 American University Law Review 59.

²²⁵According to Quebec lawyer and scholar John B. Claxton (supra note 16 at 130), "[u]nder the CCQ anyone to whom property (a corporeal moveable) is delivered will have a right of retention of the property, pending payment of a bona-fide claim... directly related to the property...". Film or tape processing facilities, special effect houses and similar third-party enterprises involved in the production or post-production of film/TV projects would thus enjoy the right to retain the visual and/or audio elements in their possession, pending payment for labour duly performed on such elements: articles 974, 1592, 2651(3) CCQ. If the retained elements were seized by a higher-ranking creditor (such as the bank or the completion guarantor), the facilities could at least claim a legal priority for payment: article 2770 CCQ and 604 CCP. As to the right of retention more generally, see: L. Payette, "Des priorités et des hypothèques" in le Barreau du Québec & la Chambre des notaires du Québec, eds., La réforme du Code civil, vol. III (Quebec: Presses de l'Université Laval, 1993) 9 at 74-77.

It may even be used as a means by which the laboratory or other facility could expressly renounce in the completion guarantor's favour, in whole or in part, the priority of its claim.²²⁶ In any event, by clearly establishing that a laboratory or other facility is acting as the completion guarantor's nominee, a pledgeholder agreement would permit the completion guarantor to more easily assert its priority and to rebuff any seizures by the creditors of a third-party facility in which the film/TV project elements may be located.²²⁷

(ii) Cash Deposits

The completion guarantor may insist that all monies to which the producer may be entitled (including project revenues and insurance proceeds) be deposited in a completion guarantor account or accounts located at a bank with which the completion guarantor has concluded a written agreement setting forth the respective rights of these parties to

²²⁶Article 1691 CCQ. See: P. Ciotola, "La réforme des sûretés sous le Code civil du Québec" in le Barreau du Québec & la Chambre des notaires du Québec, eds., La réforme du Code civil, vol. III (Quebec: Presses de l'Université Laval, 1993) 303 at 328-330.

²²⁷Article 597 of the Code of Civil Procedure of Québec, R.S.Q. c. C-25 (in its French version, the Code de procédure civile du Québec, L.R.Q. c. C-25); this statute hereinafter referred to as "CCP". See generally: Weiss & Benjamin, supra note 14 at 202-203.

these funds.²²⁸ Such monies may be held either as cash deposits or in the form of guaranteed investment certificates, treasury bills and similar securities -- until such time as any indebtedness incurred by the producer toward the completion guarantor has been discharged. Under Quebec civil law, the mere making of such deposits with the completion guarantor constitutes a "convention d'entièrement" (third-party holding agreement) and may be characterized as "delivering" this property to the completion guarantor, such that a moveable hypothec with delivery would be constituted and published on this property.²²⁹ For certainty, the completion guarantor could

²²⁸From the time that a completion guarantor has been engaged on a project, it will insist that all production funds, including any bank financing, be deposited into a sole purpose "production bank account" over which the guarantor may be a co-signatory. The completion guarantor will further require the producer and the bank to execute an "operation of account agreement" that will govern the respective rights of these parties over these deposited funds, particularly in the event of a takeover by the guarantor; see: Moore & Jeffrey, supra note 6 at 81 and Smith, supra note 26.

²²⁹Articles 2702, 2703 CCQ. With respect to the use of cash deposits as security, in general, see: Claxton, supra note 16 at 172ff. It is important to note that where cash deposits to which the producer is entitled are hypothecated directly in favour of the interim financing bank, rather than the completion guarantor, some debate may arise as to this form of security: For outside of Quebec, there is some doubt as to the validity of a bank's debtor charging its deposit back to the bank, by way of security. Under English law, for example, it has been held (arguably in obiter dictum) that such a charge on cash deposits, or "charge-back", is conceptually impossible, since it could not create and vest in the bank a proprietary interest in a debt which the bank owes to the debtor-depositor; see: Re Charge Card Services Ltd. [1986] 3 All E.R. 289, [1988] C.L.Y. 416 (Ch.), affirmed by Re Bank of Credit and Commerce International S.A. (No. 8) [1996] 2 All E.R. 121 (C.A.; appeal to the House of Lords pending) and comments by G. Yeowart, "Court of Appeal denies concept of charge-back under English law" (1996) 15:3 International Financial Law Review 17, P. Wood, "Charge Card, ten years

execute with the producer a deed of hypothec which sets out all the terms of this form of security.

In theory, such a hypothec is particularly attractive to the completion guarantor: It would permit the completion guarantor, first, to exercise against this hypothecated property the recourses of administrative possession, taking in payment, sale by creditor and sale by judicial authority reserved to hypothecary creditors by article 2748(2) CCQ. In addition, the completion guarantor would also benefit from the more general principle of compensation or set-off stipulated in article 1672 CCQ, should the completion guarantor fail to obtain repayment of any funds advanced for completion and delivery of the film/TV project.

However, in practice, it is unlikely that there will be significant amounts held at any one moment in the producer's bank accounts from which the completion guarantor may benefit, other than when large amounts of project revenues or other sums are from time to time deposited in the

on, and still the wrong answer", ibid. at 18, A. Berg, "Letter" (1996) 15:4 International Financial Law Review 10 and G. Woolf, "Letter" (1996) 15:6 International Financial Law Review 10. Still, according to Professor Roderick A. Macdonald of the Faculty of Law, McGill University (conversations between Professor Macdonald and this author on November 15, 1996 and June 3, 1997), there is no need in Quebec to question the validity of a hypothec on cash deposits. In Quebec, such a hypothec will be characterized under general civil law principles as a hypothec on a claim (articles 2710-2713 CCQ); that is, a hypothec on the right of the depositor to be reimbursed in due course the amount of its deposit.

producer's accounts. Rather than merely hypothecating all of producer's cash deposits, the more efficient and effective alternative may simply be for the completion guarantor to insist that, until it has recouped any completion sums advanced: 1) all funds related to the film/TV project be deposited in the designated bank account and 2) the producer be obliged to obtain the co-signature of the completion guarantor on all cheques (or on cheques over a certain minimum amount) drawn on that bank account.²³⁰

c) Hypothecs on Universalities

The completion guarantor may require that the producer grant hypothecs to the completion guarantor on universalities of

²³⁰It would appear, however, that having access to the producer's bank account does not always automatically permit the completion guarantor to withdraw production funds when the completion guarantor has effected a takeover of the project. In White Dragon Productions, Inc. v. Performance Guarantees, Inc., 196 Cal.App.3d 163, 241 Cal. Rptr. 745 (Cal.App. 2 Dist. 1987), the completion guarantor took over control of the production of the film entitled "White Dragon", and sought to withdraw \$US 44,000 from the producer's production bank account. The trial court decided to grant summary judgment and awarded the production funds to the completion guarantor. However, a California appellate court reversed this decision, holding that the producer had raised a triable issue of fact when it had argued that the governing completion agreement, executed between the producer and the completion guarantor, was void due to the latter's failure to pay state franchise taxes. See also: "Los Angeles trial court decision granting summary judgment to completion guarantor of a film in dispute over production funds is remanded by appellate court" (1988) 9:12 Entertainment Law Reporter 10 (LEXIS-NEXIS)].

certain classes of the producer's property.²³¹ So long as the writing evidencing each such hypothec sufficiently describes the class of property that covers the particular universality, both present and future property, including "replacement property", may be hypothecated.²³² Each hypothec constituted on a universality will be perfected by the registration of such hypothec,²³³ although presumably one document may suffice to cover all these hypothecs.

In the particular context of guaranteeing the completion and delivery of a film/TV project, claims or receivables come to mind as especially capable of hypothecation as universalities.²³⁴

There is some uncertainty as to the utility of a hypothec on a universality of the producer's immoveable property, since such a hypothec would not be opposable to third parties until registered against each immoveable.²³⁵ With registration, the charge becomes specific, rather than universal.²³⁶

²³¹Articles 2665, 2666 CCQ.

²³²Articles 2684(1), 2697, 2674 CCQ.

²³³Articles 2663, 2945, 2980 CCQ.

²³⁴The hypothecation of claims or receivables in the completion guarantor's favour shall be treated more fully below, in the section of this thesis entitled "Hypothecs on Claims or Receivables".

²³⁵Article 2949 CCQ.

²³⁶See: Pratte, supra note 202 at 49.

However, the completion guarantor is likely to have only minimal interest in any immoveables to which the producer has, or may acquire, title. Consequently, in practice, the completion guarantor has little need for security over a universality of immoveable property.

d) Floating Hypothecs

Although the Civil Code of Québec would now permit the completion guarantor to obtain a floating hypothec on any part or all of the producer's patrimony, this security device is not necessarily the most attractive available to a creditor, such as the completion guarantor, that seeks to be fairly senior ranking. A floating hypothec could only be perfected if the producer were to default and the completion guarantor then provoked "crystallization" of the hypothec, by serving on the producer the prescribed notice of default.²³⁷ Accordingly, the completion guarantor might find itself outranked by other creditors that had secured with fixed charges the same assets secured under the floating hypothec.

Still, there is some support for the notion that, as a safety mechanism, a floating hypothec on that portion of the

²³⁷Articles 2715, 2755 CCQ.

producer's patrimony related to revenues from a bonded film/TV project be created and perfected, in order to "catch" any of the producer's property insufficiently described in the hypothecs on universalities which the completion guarantor would in any event require.²³⁸ The more economical and, perhaps better, view is that the completion guarantor need not ordinarily take any floating hypothecs if the appropriate specific hypothecs and hypothecs on universalities of the producer's property are properly constituted and perfected.²³⁹

e) Hypothecs on Claims or Receivables

There are many types of claims to which the producer may be entitled and which may be hypothecated in the completion guarantor's favour. Of particular note are: 1) receivables due from the project's distributors, 2) receivables due from other sources and 3) claims in respect of the damage and other insurance policies that the completion guarantor will require be obtained in connection with the project.

²³⁸See: Claxton, supra note 16 at 50.

²³⁹See: Payette, supra note 225 at 180 and A. Grenon, "Major Differences Between PPSA Legislation and Security Over Movables in Quebec Under the New Civil Code" (1996) 26 Can. Bus. L.J. 391 at 398, note 30.

(i) Distribution Receivables

The completion guarantor will insist that the producer specifically hypothecate all receivables due pursuant to distribution agreements in place at the time of the execution of the completion agreement and the completion guarantee, and similar receivables due under contemplated future distribution agreements.²⁴⁰ These receivables comprise sums payable by a project's distributor, generally on or after delivery of the contemplated film/TV project.²⁴¹ Virtually any receivables from executed or contemplated distribution agreements signed by the producer prior to full recoupment by completion guarantor may be specifically hypothecated.

It is these receivables that will be the chief source of repayment of any sums advanced by the completion guarantor. Accordingly, the completion guarantor will want to collect them as soon as they become due in accordance with the terms of the relevant contracts, once the project's original financiers have been repaid, rather than permit collection

²⁴⁰Article 2670 CCQ.

²⁴¹See: Rudman, supra note 6 at 221.

by the producer.²⁴² The hypothecation of such specific claims with immediate collection need not be registered.²⁴³

However, the completion guarantor must ensure that this arrangement is effective against the third parties with which the producer contracts (in civil law, the "claim debtors"; in common law, the "account debtors"). The completion guarantor could do this by sending a copy of the deed of hypothec or a notice containing a pertinent extract of the deed to the each claim debtor, in accordance with articles 2710(2) and 1641(1) CCQ. Or, the completion guarantor could have each third party execute a separate document, similar to one which the bank would most likely have executed, by which the completion guarantor notifies the third party of the hypothecation and, further, directs it to pay to the completion guarantor (after the full repayment of any indebtedness owed to the bank) all sums owed to the producer. The third party could explicitly consent to this hypothecation and direction (the "acquiescence" of article 1641(1) CCQ) and, where possible, explicitly agree further not to assert against the

²⁴²Articles 2743, 2744 CCQ.

²⁴³Articles 1641, 2710 CCQ. However, were the producer to hypothecate a universality of distribution receivables, whether present or future, this hypothecation would require registration in the register of personal and moveable real rights: Articles 2711, 2970, 1642 CCQ; see: Claxton, supra note 16 at 53.

completion guarantor any claims or defences that it might have against the producer.²⁴⁴

The completion guarantor may even require that the producer covenant not to enter into any new agreement unless and until the new third-party debtor concurrently executes the requisite acknowledgment of hypothecation and direction of payment. In practice, the completion guarantor ensures third-party consent by having such third party acknowledge and agree to the completion guarantor's interest in the same document (typically known as the "notice of assignment and distributor's acceptance"), pursuant to which the third party acknowledges and accepts the prior right of the interim financing bank.

The completion guarantor may wish to be prudent by having the producer further hypothecate a universality of all present and future claims related to the bonded project's distribution receivables which may be due to the producer

²⁴⁴See: Weiss & Benjamin, supra note 14 at 203. As to the more general issue of which party ought to bear the risk of a project's failure, see: Kenoff, supra note 14 at 4. A clear advantage for the completion guarantor, in obtaining the distributor's unconditional acquiescence in the hypothecation of the producer's claim, arises from article 1680 CCQ: The distributor that has acquiesced unconditionally in the hypothecation of the claim by the producer to the completion guarantor "may not afterwards set up against the [completion guarantor] any compensation that [the distributor] could have set up against the [producer] before [the distributor] acquiesced". On the particular point of compensation, see: Claxton, supra note 16 at 54, 174.

from any source.²⁴⁵ Insofar as the hypothecation of a universality of claims is concerned, it would require registration in the register of personal and moveable real rights to be effective against any third-party debtor.²⁴⁶

The completion guarantor's hypothecs on these claims will rank from the date it "gives value" (presumably, from the date it advances any completion sums), so long as these hypothecs are published by possession or registration, as the case may be, within the following ten days.²⁴⁷

(ii) Other Receivables

The remarks made in the preceding section of this thesis, with respect to distribution receivables, apply similarly in relation to any other receivables that may be due from the exploitation of a bonded film/TV project. Various sums may become owing to the producer from television broadcasters, home video licensees, merchandising and multimedia rightsholders and others. These sums may be payable, in whole or in part, at different times prior to the full

²⁴⁵Article 2710(1) CCQ.

²⁴⁶Articles 2710(2), 2711, 1642 CCQ.

²⁴⁷Articles 2699, 2708 CCQ.

recoupment of completion sums by the completion guarantor. To the extent that the completion guarantor is relying upon these monies to repay any completion sums, the completion guarantor will wish to ensure that it is entitled to set up the hypothecation of these receivables against the third-party debtor, in order to collect the monies and avert any claims of compensation by such debtor.²⁴⁸

(iii) Insurance Proceeds

As noted earlier,²⁴⁹ the completion guarantor will insist that the producer subscribe to the standard forms of insurance available in the production of film/TV projects. These would include cast and other key personnel (life, sickness, accident) insurance; property (negative, props, sets, equipment) damage insurance; comprehensive general liability insurance; and errors and omissions insurance. Proceeds generated in the event of claims under these policies could be an important source of repayment of any funds advanced by the completion guarantor, should such an advance be precipitated by the occurrence of an insurable event.

²⁴⁸Articles 2710(2), 1641, 1680 CCQ.

²⁴⁹See the section of this thesis, above, entitled "Insurance".

The completion guarantor ought to also ensure that all insurers of the subject film/TV project receive the notices required to perfect the hypothecation of insurance policies.²⁵⁰

As a general rule regarding damage insurance, creditors with prior claims provided for in articles 2650-2659 CCQ and hypothecary creditors with hypothecs on damaged property receive insurance proceeds owed to their debtor in accordance with their rank, simply upon notice and proof of their respective interests.²⁵¹ In order for the completion guarantor to ensure that it will avoid competing with any other creditor for any available proceeds, it will insist that the producer's insurers name the completion guarantor as an additional insured (since, as a hypothecary creditor it has the insurable interest required by article 2475 CCQ) and a loss payee. In practice, the interparty agreement will clearly specify the order in which the completion guarantor, the interim financing bank and the producer will be entitled to collect insurance proceeds and how such proceeds are to be utilized.²⁵²

²⁵⁰Article 2461 CCQ.

²⁵¹Article 2497 CCQ.

²⁵²See: Moore & Jeffrey, supra note 6 at 84 and Phillips, supra note 38 at 113.

B. NON-HYPOTHECARY SECURITY DEVICES

1. Security Under the Bank Act

As stated earlier, the completion guarantor is not permitted to take the particular form of security over some of the producer's property to which the bank would be permitted pursuant to section 427 of the Bank Act. This section 427 security might operate against, for example, a large inventory of film stock, props, sets and other materials to be used in the creation (or "manufacture") of the film/TV project at issue.²⁵³ How this form of security, governed by federal law, integrates with security devices constituted under provincial law has been the source of some controversy.²⁵⁴ However, since in Quebec the bank is now able to acquire first-ranking moveable hypothecs over various universalities of the producer's present and future property, section 427 Bank Act security seems in any event to be largely unnecessary even for the interim financing

²⁵³Section 427(1)(b) of the Bank Act.

²⁵⁴See for example: J.S. Ziegel, "The Interaction of Section 178 Security Interests and Provincial PPSA Security Interest: Once More into the Black Hole" (1990) 6 Banking & Finance Law Review 343, B. Crawford, "Interaction Between the PPSA and Section 178 of the Bank Act" (1992) 8 Banking & Finance Law Review 1 and Jukier & Macdonald, supra note 220 at 402-405.

bank in the particular context of entertainment financing transactions.²⁵⁵

2. Assignments

Outright assignments to the completion guarantor, particularly of claims due to the producer,²⁵⁶ would appear to be an attractive means of securing the performance of the producer's obligation to repay any completion sums. An outright assignment would free the assignee-completion guarantor from any obligation to account to the producer for the completion guarantor's collection -- an obligation that must be fulfilled by a hypothecary creditor.²⁵⁷ An outright assignment of proceeds of insurance due under a damage insurance policy may also be extremely favourable to the completion guarantor, for such an assignment would remove

²⁵⁵Still, there would be some advantage to the interim financing bank (or, by assignment, the completion guarantor) holding section 427 Bank Act security over the patrimony of the producer: This form of security device outranks prior claims (articles 2650ff CCQ) and, more particularly, the "claims of the State for amounts due under fiscal laws" (article 2651(1) CCQ). Consequently, the bank's (or the completion guarantor's, as the case may be) claim for repayment would outrank the State's claim for tax liabilities, at least with regard to any secured property owned by the producer prior to the exigibility of the sums owed under the State's fiscal laws; see: Macdonald, supra note 187 at XI-24 - XI-25.

²⁵⁶Articles 1637ff CCQ.

²⁵⁷Article 2747 CCQ.

these proceeds from the producer's patrimony and would prevent their disbursement to any other hypothecary creditors of the producer.²⁵⁸

However, an outright assignment is not always possible, since the contract which the producer-assignor seeks to assign (for example, a distribution agreement for a particular foreign territory) may contain an express prohibition against its assignment. In any event, there is some authority to support the view that there may be little practical difference between a purportedly absolute assignment of claims and a hypothecation of claims, where the assignment serves as security for another obligation.²⁵⁹

²⁵⁸Without any outright assignment, these proceeds would be subject to article 2497(1) CCQ, which states:

2497. Notwithstanding any contrary provision, the indemnities due to the insured are apportioned among the prior creditors or creditors holding hypothecs on the damaged property, according to their rank and without express delegation, upon mere notice and proof by them.

[emphasis added]

²⁵⁹Claxton, supra note 16 at 57.

3. Trust Mechanisms

It is beyond the scope of the present thesis to debate the possible employment in Quebec of a trust,²⁶⁰ as a useful or effective security device for the completion guarantor of a film/TV production. Certainly, there appears to be no jurisprudence, doctrinal writings or other sources that address this specific issue. In addition, as stated earlier, it would appear that in practice, trusts are not used currently in the bank financing of entertainment products, nor are even seriously contemplated for such transactions.²⁶¹

However, as Me John B. Claxton points out, the use of a security trust offers many advantages.²⁶² In urging that it

²⁶⁰Articles 1260ff CCQ. In the mixed law jurisdiction of Quebec, the trust has often served as a focal point for the tension between the province's competing civil law and common law traditions. However, as the 1982 Supreme Court of Canada decision in Royal Trust Company v. Tucker et al. [1982] 1 S.C.R. 250, 40 N.R. 361, 12 E.T.R. 257 illustrates, various civil law and common law jurisprudential and doctrinal sources may be used to justify the existence of the trust, an essentially common-law institution, in a predominantly civil law jurisdiction. With respect to the trust in Quebec, see generally: J.E.C. Brierley, "The New Quebec Law of Trusts: The Adaptation of Common Law Thought to Civil Law Concepts" in H.P. Glenn, ed., Droit québécois et droit français: communauté, autonomie, concordance (Cowansville, Que.: Yvon Blais, 1993) 383.

²⁶¹This is the current situation in Quebec, as revealed in recent discussions between this author and each of Mes Étienne Massicotte and Sam Berliner (supra note 5).

²⁶²See: Claxton, supra note 16 at 239-242. Unfortunately, Me Claxton does not address the fiscal consequences of relying upon a trust mechanism. Yet such consequences may be disadvantageous, insofar as

be considered as available "generally for the application of funds to a specific purpose", he states that "[the trust concept] could greatly facilitate a lender... who desires... continuous assurance that the funds... committed are applied to the agreed purpose".²⁶³ To the extent that a completion guarantor may advance completion funds that it hopes to recoup from distribution and other receivables, it may be considered as a "lender" that could benefit from the creation of a security trust.²⁶⁴

The security trust would appear to be an appealing mechanism in circumstances where the producer's experience or integrity was an issue of concern to the completion guarantor. For the constitution of a trust implies the creation of a distinct trust patrimony over which the trustee may be permitted to grant security to the completion guarantor, while remaining immune from any charges of claims

capital gains tax and other potential tax liabilities are concerned. On this point, see: D.W.M. Waters, Law of Trusts in Canada, 2nd. ed. (Toronto: Carswell, 1984) at 460ff.

²⁶³Claxton, supra note 16 at 242.

²⁶⁴In the opinion of American attorneys Schuyler Moore and Sheri Jeffrey (supra note 6 at 84):

Any payments required by the completion guarantor are treated as non-recourse loans subject to repayment out of proceeds from the motion picture. Thus, economically, a completion guaranty is actually a contingent obligation to loan money.

by the producer-settlor's own creditors.²⁶⁵ There is no impediment in the fact that most of the property appropriated to the security trust would consist of incorporeals such as distribution receivables and other claims, as well as the copyrights in the bonded project, rather than inventory or other corporeal property.²⁶⁶

It thus remains to be seen whether the trust will in future be utilized as a security device for the type of financing required by the producer. It further remains to be seen what steps the completion guarantor would in practice take if it were to rely on a trust mechanism.²⁶⁷

²⁶⁵See: Payette, supra note 202 at 19-20.

²⁶⁶For a discussion of security trusts over receivables and other incorporeal property, see: R.A. Macdonald, "The Security Trust: Basic Principles" (Materials prepared for the McGill University, Faculty of Law, 1997 Meredith Lectures entitled Contemporary Utilisation of Non-Corporate Vehicles of Commerce, Montreal, Quebec, May 23 and 24, 1997) [unpublished] at 35.

²⁶⁷The completion guarantor and its legal counsel would be well advised to refer for general guidance to Professor Roderick A. Macdonald's advice on the creation, administration and enforcement of a security trust arrangement; see: ibid. at 43-51.

C. RANKING AND SUBORDINATION OF SECURITY RIGHTS

The order in which various parties to a film/TV project financing transaction are entitled to recoup whatever sums each has advanced is, of course, a matter which may be freely negotiated. However, in practice, it is generally assumed that the completion guarantor will rank in second position, the first position having been customarily allotted to the interim financing bank, followed by any investors or other financiers of the project.²⁶⁸ Accordingly, it is commonplace for the completion guarantor to acknowledge and confirm, in writing, that the security rights of the completion guarantor are subordinate to those of the project's financiers.²⁶⁹

To the extent that the contemplated film/TV project employs members of the Screen Actors Guild, the completion guarantor may further be required to execute a form of subordination agreement that addresses the competing security rights of

²⁶⁸See: Ames, supra note 64 at 3.03.05. There may be occasions where distributors that have advanced monies prior to the completion and delivery of the project, while not considered as "investors", are deemed to be financiers entitled to recoup these advances prior to the completion guarantor recouping any completion sums expended.

²⁶⁹See: Moore & Jeffrey, supra note 6 at 81. As indicated above, in the section of this thesis entitled "The Interparty Agreement", where the beneficiary of the completion guarantee is an interim financing bank, it is customary for the completion guarantor to confirm in the interparty agreement the subordination of its security rights to those of the bank.

the Guild members, the financiers and the completion guarantor.²⁷⁰

²⁷⁰See: Smith, supra note 26.

III. FINAL COMMENTS AND CONCLUSION

A. THE FUTURE OF COMPLETION GUARANTEES: THE CONVERGENCE OF ENTERTAINMENT LAW AND COMPUTER LAW

In order to understand the direction in which the area of completion guarantees is likely to evolve, it is necessary to examine, in broader terms, current and anticipated trends in the field of entertainment law generally.

A noticeable development in the field of entertainment law, for over a decade, has been its growing convergence with the area of computer law. In 1984, American attorney Mark A. Fischer wrote of the similarities between the entertainment and computer industries, noting in particular that both are characterized by rapid change. He identified the convergence phenomenon and attributed it to two trends: 1) the adoption by computer software companies of marketing and distribution techniques first established by entertainment and publishing companies; and 2) the growing importance of technologically advanced methods of distributing information and entertainment.²⁷¹ Mr. Fischer predicted that:

²⁷¹M.A. Fischer, "Entertainment/Computer Law: Converging Industries, Converging Law" (1984) 20 Trial 42 at 42. Mr. Fischer cites cable television and electronic publishing as examples of these methods.

Ultimately, the fields of computer software, entertainment, and publishing will share certain electronic distribution techniques and media.... As this happens, the distinctions between various information/entertainment suppliers will be less clear, and attorneys who understand communications, high technology, and entertainment will guide their legal relations.²⁷²

It is certainly true that today many attorneys who have an understanding of both entertainment law and computer law are guiding the legal relations of dealmakers who seek to marry the entertainment and computer industries. Multimedia joint ventures, such as those involving the production and exploitation of interactive CD-ROM titles, constitute one example of the "inter-industry marriages" in which such lawyers are actively involved.²⁷³

Practising law in the converging world of entertainment and computers would seem to have clear implications for the direction in which completion guarantees will evolve.

²⁷²Ibid. at 44.

²⁷³However, it has been noted that the marriage between the entertainment and computer industries has not been entirely harmonious, due primarily to the difficulties inherent in integrating the distinctive business cultures which characterize each of these industries. In the words of Steven Keeva, as found in his article "When Worlds Collide" (December 1994) ABA Journal 70 at 71:

Hollywood trade magazines provide tongue-in-cheek advice on how to succeed in the new "Siliwood," the business union of Silicon Valley technology and Hollywood entertainment. Among the tips: "How to talk geek" and what to eat when "doing lunch with techno nerds." And high-tech folks, perhaps not as well-known for their wit, place "Hollywood types" squarely at the butt-end of their jokes.

Although the development and production of many CD-ROMs was originally financed by their publishers, this scenario is rapidly changing. In the United States, since at least late 1994, the standard entertainment-industry financing model has been introduced into multimedia dealmaking: A publisher guarantees that it will pay the developer upon delivery of a finished CD-ROM and the developer uses this guarantee to secure interim bank financing. The risk that the CD-ROM will be delivered on time and on budget is borne by a completion guarantor.²⁷⁴

In the spring of 1996, it was announced that completion guarantor Film Finances, Inc., entertainment lender Coutts & Co. and the Los Angeles law firm of Loeb & Loeb created a deal to finance a series of "edutainment CD-ROMs", on the basis that their completion would be guaranteed by the completion guarantor.²⁷⁵

²⁷⁴A transaction of this nature, characterized as "the first CD-ROM deal to use a standard entertainment-industry financing model", was described in Keeva, ibid. at 72-73. In the words of lawyer Stan Coleman, who worked on this transaction, "It wasn't easy finding a bond company, because they tend to have lots of experience with movie-making but none with multimedia,... This is a whole new way of doing things"... (ibid. at 73).

²⁷⁵K. Stalter, "CD-ROMs get bonded; film biz financing comes to interactive market" Daily Variety (15 April 1996) News, 6 (LEXIS-NEXIS) and "Movie finance model for multimedia CD-Rom" Screen Digest (1 May 1996) (LEXIS-NEXIS).

The bonding of an entire CD-ROM title, rather than just its live-action elements (as was done in the Film Finances transaction) was first reported in the late summer of 1996: International Film Guarantors had agreed to complete and deliver to a British games distributor a £1.12 million CD-ROM game that was based upon the film "Eraser", starring Arnold Schwarzenegger. The report of this transaction pointed out that there were major distinctions between bonding a CD-ROM and bonding a traditional film/TV project. It was suggested that the differences between these two endeavours would include the following:

- i. While a film/TV project may be deemed "completed" once the approved script is shot and edited, there are no similar limits to a CD-ROM title;
- ii. A CD-ROM title generally has a budget which is much smaller than a film/TV project, so that the fees generated are far less attractive to completion guarantors than bond fees for film/TV project financing transactions;
- iii. While a completion guarantor will follow the progress of a film/TV

project for the average ten months of principal photography and post-production, usually a minimum of eighteen months is required to produce the master compact disc of a CD-ROM title;

iv. While the master negative of a film/TV project may be held at a third-party laboratory as it accumulates, the CD-ROM's source code need merely be held in an escrow account until the completion guarantor is released from its obligations; and

v. The traditional notions of "supervising" a film/TV project and exercising a "takeover" of a film/TV project may be difficult for a completion guarantor to apply to the completion of a CD-ROM title.²⁷⁶

To date, there have been no media reports of the issuance in Canada of completion guarantees to cover CD-ROM production.

²⁷⁶"IFG the first to bond an entire CD-ROM title" Screen Finance (8 August 1996) (LEXIS-NEXIS).

However, since Canadian guarantors operating in Quebec have for some time bonded computer-generated-imagery sequences in film projects,²⁷⁷ it is certainly likely that completion bonds will soon be covering the production of CD-ROM titles in Quebec, as well.²⁷⁸

As the realm of completion guarantees expands from its traditional motion picture and television base to encompass the new areas of multimedia and interactive products, the role of the lawyer who acts on the bonder's behalf is evolving concurrently:

Multimedia practice differs from traditional lawyering in several ways: It often puts the lawyer in the role of a translator who must be able to bridge the gap between very different business cultures, it requires skills from diverse disciplines, and it requires almost obsessive monitoring of the business environment.... As dealmakers, multimedia lawyers need intimate

²⁷⁷For example, Film Finances Canada (1984) Ltd. bonded such sequences as part of the completion guarantee that it issued in Montreal, in 1995, for the Bob Hoskins film "Rainbow", as was confirmed to this author by Mr. Michael Spencer (the bonder's President) on June 5, 1997. The Toronto-based Motion Picture Bond Company has also bonded digital sequences for traditional films and is currently working to create its own methods for supervising the production of CD-ROM titles; see: supra note 276.

²⁷⁸Completion guarantee companies that operate in Quebec are particularly well-positioned to profit from current interest in new media. For in the last two years, the provincial government has not only established a \$CDN 50 million Information Highway multimedia fund (the "Fond de l'autoroute de l'information"), but it has also established a refundable production tax credit intended to promote French-language content in CD-ROMs and the Internet; see: L. Rice-Barker, "Multimedia tax credit online by fall" Playback (3 June 1996) 6 and L. Rice-Barker, "Production in Quebec: Certified production to top \$300 million" Playback (28 August 1995) 22.

knowledge of how diverse parties see the world....²⁷⁹

It would thus seem that as the nature of entertainment production continues to be transformed by the impact of our digital age, there are increasing opportunities not only for completion guarantors, but also for the lawyers who counsel these and other entertainment industry clients.

²⁷⁹Keeva, supra note 273 at 72.

B. EXTRATERRITORIAL CONSIDERATIONS

As stated from the outset, the focus of this thesis has been on completion guarantees issued in connection with Quebec-based film/TV projects. However, some words of caution are in order: If any part of a film/TV project is to be produced or post-produced outside of Quebec, the completion guarantor should ensure that relevant security will be constituted and perfected according to the laws of these other jurisdictions.²⁸⁰ For example, if part of the project were to be shot in New York City, the completion guarantor would be required to perfect its security against the shot negatives in accordance with New York state filing requirements under article 9 of the Uniform Commercial Code.²⁸¹ If a portion of the film processing were to be conducted by a laboratory located in Toronto, the completion guarantor ought to take security against the film being

²⁸⁰Article 3097(1) CCQ provides that "real rights and their publication are governed by the law of the place where the property concerned is situated". More particularly, the validity of a moveable security is governed by the law of the country in which the property charged with it is situated at the time of creation of the security: article 3102(1) CCQ. As to the scope and effects of this "lex situs" rule, see: J. Talpis & C. Troulis, "Conflict of Laws Rules under the Civil Code of Quebec Relating to Security" in Barreau du Québec, ed., Développements récents sur l'hypothèque (1997) (Cowansville, Que.: Yvon Blais, 1997) 187 at 197ff. With respect to the principal differences between moveable hypothecs and security interests under personal property security legislation, see: ibid. at 195-196.

²⁸¹35 U.S.C.

processed in conformity with Ontario's Personal Property Security Act.²⁸²

Insofar as incorporeal moveables, such as intellectual property (including the film/TV project's copyright), are concerned, the general rule is that the validity of any security charged against such property is "governed by the law of the country where the [producer] was domiciled at the time of creation of the security".²⁸³ An exception is made to a security attached to a claim or charged on an incorporeal moveable established by a title in bearer form or to a security right evidenced by the holding of the title exercised by the creditor.²⁸⁴ In these circumstances, the "rule of domicile" is replaced by the general rule for validity of hypothecation of moveables.²⁸⁵ Accordingly, if the completion guarantor intends to rely upon Quebec law to

²⁸²R.S.O. 1990, c. P-10.

²⁸³Article 3105(1) CCQ. One point is especially noteworthy in respect of this provision: The term "domicile" would mean the producer's "head office", pursuant to article 307 CCQ. However, with respect to the exercise of civil rights, the domicile of a person is at the place of its principal establishment: article 75 CCQ. Some confusion may arise, in given circumstances, where the producer's head office (or "registered office", or "chief executive office", depending upon the language of the statute pursuant to which the producer was incorporated) and its place of principal establishment are not identical; see: Claxton, supra note 16 at 214, Payette, supra note 202 at 276-277 and Talpis & Troulis, supra note 280 at 206-209.

²⁸⁴Article 3105(3) CCQ.

²⁸⁵See: Claxton, supra note 16 at 212-213, Payette, supra note 202 at 275-276 and Talpis & Troulis, supra note 280 at 209-210.

assert the validity of its security, it must first ascertain the circumstances in which the "rule of domicile" applies, and thereafter assure itself that the producer was indeed "domiciled" in Quebec at the time the security was created.

C. CONCLUSION

The field of entertainment law has been aptly described as "a synthesis of many disciplines applied to the particular insanity of show business".²⁸⁶ It would appear that attorneys who practise in the field of entertainment financing and, more specifically, in the specialized area of completion guarantees, certainly require at least some knowledge of the general precepts of contract and property law, corporate, banking and business law. This thesis has attempted to demonstrate how a variety of these precepts may be applied in the particular context of the bonding of film/TV projects in North America and, more particularly, in the Province of Quebec.

While the standard documentation of the completion guarantor operating in Quebec may vary little from the documentation found in other jurisdictions,²⁸⁷ the legal framework within

²⁸⁶D. Pollack, "Hollywood Lawyers: Risky Business" (1985) 7 L.A. Law 21, cited in K.T. Schroder, "Entertainment Law: Some Practice Considerations For Beginners" (1996) 13:4 Entertainment and Sports Lawyer 8 at 8.

²⁸⁷Copies of the precedent completion agreement and completion guarantee utilized by American completion guarantor Film Finances, Inc. are available through the Internet at the following World Wide Web addresses: <http://www.primenet.com/~ffi/ca.html> (for the completion agreement) and <http://www.primenet.com/~ffi/cg.html> (for the completion guarantee). A comparison between these precedents and those used by Film Finances Canada (1984) Ltd. (*supra* notes 83 and 88, respectively) does not reveal any significant differences.

which the Quebec completion guarantor utilizes such documentation is surely unique.

For example, it would seem that when a completion guarantor wishes to provide a completion guarantee in Quebec for a film/TV project financing transaction, it will take advantage of the many distinctive security devices available pursuant to the general principles of Quebec civil law. As indicated, the completion guarantor will probably obtain from the producer second-ranking hypothecs over the specific corporeal and incorporeal property associated with the proceeds of the film/TV project for which financing the completion guarantee was issued. The completion guarantor may also benefit from the additional possibility of hypothecating universalities of the producer's present and future property.

In the words of American entertainment lawyer Gary Concoff, "...the collateral in a motion picture secured transaction is often a 'pot pourri' of intangibles, contract rights, goods, and rights to payment".²⁸⁸ In Quebec, specific hypothecs and hypothecs on universalities, granted on the producer's "pot pourri" of present and future moveable property, would appear to be more advantageous to the

²⁸⁸G. Concoff, "Motion Picture Secured Transactions Under the Uniform Commercial Code: Problems in Perfection" (1966) 13 U.C.L.A. Law Review 1214 at 1225.

completion guarantor, than other security devices available under provincial law (for example, floating hypothecs).

Finally, a general comment: It is really not enough for a completion guarantor to have a well-drafted completion guarantee (and related documentation) and to take advantage of all the security devices open to it under the law. In order to minimize the completion guarantor's risk, both the guarantor and its legal counsel are wise to familiarize themselves with all aspects of the entertainment industry²⁸⁹ and, more specifically, the players with which the guarantor wishes to do business.

For example, it is crucial for the completion guarantor to examine the track records of the performers, director, production manager and, most importantly, the producer involved in a project for which a completion guarantee is contemplated. To the extent that these parties have a history and reputation for meeting their commitments, the completion guarantor will have a head start in ensuring that artistic creativity does not induce financial calamity.

²⁸⁹As Melvin Simensky, an American entertainment law attorney, has stated (supra note 9 at 13), "practitioners of entertainment law must first understand the business practices which exist in the different branches of the industry".

Furthermore, in circumstances where it is uncertain whether payments owed under distribution and other agreements will be forthcoming when required, the completion guarantor will benefit by urging the interim financing bank to make appropriate arrangements (including obtaining letters of credit or Export Development Corporation insurance policies), to minimize the risk of non-payment.²⁹⁰ Although such non-payment is a risk borne by the bank and not the guarantor, co-operation between the completion guarantor and the bank on this issue may serve to prevent, or at least diminish, the unpleasantness and expense (particularly legal fees) that are necessarily suffered by the guarantor with the insolvency or breach of contract by a distributor.

It would thus seem that in the end, the issuance of a completion guarantee for the production of a film or television project is, at least in one respect, clearly no different from the issuance of a guarantee in relation to any other endeavour: In both cases, the guarantor must acquire and maintain a sufficient understanding of how business is conducted within the industry, as well as appreciate the economic and other factors that influence commercial decisions in the marketplace, in order to

²⁹⁰See: Weiss & Benjamin, supra note 14 at 209-211 and Rosenberg, supra note 14 at 1, 6.

minimize its risk and maximize the likelihood of a
successful transaction.

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