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The Futures & Options Association
36-38 Botolph Lane, 2nd Floor
London EC3R 8DE
United Kingdom

Dear Sirs/Mesdames,

Netting Analyser Library - FOA Collateral Opinion - Ontario and Canadian Federal Law - Non-Situs

You have asked us to give an opinion in respect of the laws of Ontario and the federal laws of Canada applicable in Ontario ("**this jurisdiction**") in respect of the Security Interests given under Agreements in the forms specified in Annex 1 to this opinion letter (each an "**Agreement**") or under an Equivalent Agreement (as defined below). Where the term "this jurisdiction" refers to a physical place it means the province of Ontario.

Terms used in this opinion letter and not otherwise defined herein shall have the meanings ascribed to them in the Agreement.

We understand that your fundamental requirement is for the effectiveness of the Security Interest Provisions of the Agreement to be substantiated by a written and reasoned opinion. Our opinion on the validity of the Security Interest Provisions is given in paragraph 3 of this opinion letter.

References herein to "*this opinion*" are to the opinions given in paragraph 3.

1. TERMS OF REFERENCE AND DEFINITIONS

1.1 Subject as provided at paragraph 1.2, this opinion is given in respect of

1.1.1 Persons that are corporations incorporated under the business corporations legislation of Canada, namely the *Canada Business Corporations Act* (Canada) (***CBCA***), the *Business Corporations Act* (Ontario) (***OBCA***), or similar legislation in any other province of Canada,

insofar as each may act as a counterparty (a "**Counterparty**") providing Collateral (as defined in paragraph 1.3) to a member firm

of the Futures and Options Association (each a "**Firm**") under an Agreement.

1.2 However, this opinion is also given in respect of Counterparties providing Collateral to a Firm that are any of the following, subject to the terms of reference, definitions, modifications and additional assumptions and qualifications set out in the applicable Schedule:

1.2.1 Financial Institutions that are Banks, Trust and Loan Companies or Cooperative Credit Associations (Schedule 1);

1.2.2 Investment Firms/Broker Dealers (Schedule 2);[1]

1.2.3 Partnerships (Schedule 3);

1.2.4 Insurance Companies (Schedule 4);

1.2.5 Individuals domiciled and resident in Ontario (Schedule 5);

1.2.6 Investment Funds, but not including Pension Entities described in 1.2.10 (Schedule 6);

1.2.7 Sovereign, State of a Federal Sovereign and Sovereign Owned Entity (Schedule 7);

1.2.8 Private Trusts that are not funds described in 1.2.6 or Pension Entities described in 1.2.10 (Schedule 8);

1.2.9 Charitable Corporations (Schedule 9);

1.2.10 Pension Entities (Schedule 10); and

1.2.11 Ontario Municipal corporations (Schedule 11).

insofar as each may act as a Counterparty to a Firm under an Agreement. Although this coverage includes entities that are not formed under the laws of the province of Ontario or the federal laws of Canada, our opinion is restricted to this jurisdiction's laws and does not consider any provisions of the laws of those other provinces even if those laws may be relevant and applicable to the issues addressed in this opinion.

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1 Investment firms and brokers are typically incorporated under general business corporations legislation.

1.3 This opinion is given in respect of cash and account-held securities which are the subject of the Security Interest Provisions ("**Collateral**"). The amount and value of such Collateral may fluctuate from time to time on a day to day, and possibly intra-day basis.

1.4 In this opinion letter:

1.4.1 "**Security Interest**" means the security interest created pursuant to the Security Interest Provisions;

1.4.2 "**Equivalent Agreement**" means an agreement:

(a) which is governed by the law of England and Wales;

(b) which has broadly similar function to any of the Agreements listed in Annex 1;

(c) which contains the Core Provisions (with no amendments, or with Non-material Amendments); and

(d) which neither contains (nor is modified, amended, or superseded by) any other provision which may invalidate, adversely affect, modify, amend, supersede, conflict with, provide alternatives to, compromise or fetter the operation, implementation, enforceability and effectiveness of all or part of the Core Provisions (in each case, excepting Non-material Amendments) or any of the matters opined on in this opinion;

1.4.3 A "**Non-material Amendment**" means an amendment having the effect of one of the amendments set out at Annex 3;

1.4.4 "**Insolvency Proceeding**" means any of the following proceedings, which are the proceedings to which a Party would be subject in this jurisdiction:

(i) Proceedings under the Bankruptcy and *Insolvency Act* (Canada) (**BIA**) for either (i) liquidation (**BIA Bankruptcy**) or (ii) reorganization/ arrangement with creditors under Part III, Division I (**BIA Proposals**);

(ii) Proceedings under the *Winding-up and Restructuring Act* (Canada) (**WURA**) for either (i) liquidation or (ii) reorganization/ arrangement with creditors (**WURA Proceedings**) (but not corporations governed by the Canada Business Corporations Act);

(iii) Proceedings under the *Companies' Creditors Arrangement Act* (Canada) (**CCAA**) for reorganization/ arrangement of claims of creditors of corporations (**CCAA Plan of Arrangement**);

(iv) Court administered receivership proceedings for liquidation of the Party under the national receivership provisions of the BIA (**Receivership**);

(v) Corporate plans of arrangement involving insolvent entities and providing for the reorganization/arrangement of claims of creditors (**Corporate Plans of Arrangement**).

1.4.5 "**Insolvency Statutes**" means the BIA, the WURA and the CCAA.

1.4.6 "**enforcement**" means, in the relation to the Security Interest, the act of:

(i) sale and application of proceeds of the sale of Collateral against monies owed, or

(ii) appropriation of the Collateral,

in either case in accordance with the Security Interest Provisions.

1.4.7 in other instances other than those referred to at 1.4.5 above, references to the word "**enforceable**" and cognate terms are used to refer to the ability of a Party to exercise its contractual rights in accordance with their terms and without risk of successful challenge. We do not opine on the availability of any judicial remedy.

1.4.8 terms defined or given a particular construction in the Agreement have the same meaning in this opinion letter unless a contrary indication appears;

1.4.9 any reference to any legislation (whether primary legislation or regulations or other subsidiary legislation made pursuant to primary legislation) shall be construed as a reference to such legislation as the same may have been amended or re-enacted on or before the date of this opinion letter;

1.4.10 certain terms relating specifically to the Agreement or to the provisions thereof are set out at Annex 2;

1.4.11 headings in this opinion letter are for ease of reference only and shall not affect its interpretation; and

1.4.12 References to "Core Provisions" include Core Provisions that have been modified by a Non-Material Amendment.

2. ASSUMPTIONS

We assume the following:

2.1 That the Agreements are legally binding and enforceable against both Parties under their governing laws.

2.2 That the Security Interest Provisions are enforceable under the governing law of the Agreement to create a Security Interest.

2.3 That the Security Interest Provisions are effective under the law of the place where the Collateral is located to create an enforceable security interest.

2.4 That each Party has the capacity, power and authority under all applicable law(s) to enter into the Agreement; to perform its obligations under the Agreement; and that each Party has taken all necessary steps to execute, deliver and perform the Agreement.

2.5 That each Party has obtained, complied with the terms of and maintained all authorisations, approvals, licences and consents required to enable it lawfully to enter into and perform its obligations under the Agreement and Transactions and to ensure the legality, validity, enforceability or admissibility in evidence of the Agreement in this jurisdiction.

2.6 That the Agreement has been properly executed by both Parties.

2.7 That the Agreement is entered into prior to the commencement of any Insolvency Proceedings in respect of either Party.

2.8 The Agreement has been entered into, and each of the transactions referred to therein is carried out, by each of the parties thereto in good faith, for the benefit of each of them respectively, on arms' length commercial terms and for the purpose of carrying on, and by way of, their respective businesses.

2.9 That the Agreement accurately reflects the true intentions of each Party.

2.10 That no provisions of the Agreement, or a document of which the Agreement forms part, or any other arrangement between the Parties, invalidate the enforceability or effectiveness of the Security Provisions or the Rehypothecation Clause under the governing law of the Agreement.

2.11 That there is no other agreement, instrument or other arrangement between the Firm and the Counterparty which modifies or supersedes the Agreement.

2.12 That all acts, conditions or things required to be fulfilled, performed or effected in connection with the Agreement and the creation and perfection of the security interests thereunder pursuant to laws of any jurisdiction

other than this jurisdiction have been duly fulfilled, performed and effected.

2.13 That there are no provisions of the laws of any jurisdiction (apart from this jurisdiction) which would be contravened by the execution or the delivery of the Agreement.

2.14 That any accounts and the assets expressed to be subject to a Security Interest pursuant to the Security Provisions shall at all relevant times be located outside this jurisdiction.

2.15 An account located outside of this jurisdiction for purposes of paragraph 2.14 means:

2.15.1 An account maintained by a financial institution located outside of Ontario (meaning not incorporated under the laws of Ontario and not having its chief executive office or head office in Ontario), which account is not governed by Ontario law or maintained in an office located in Ontario; or

2.15.2 An account maintained at the Non-Defaulting Party itself and the Non-Defaulting Party is located outside of Ontario, which account is not governed by Ontario law or maintained in an office located in Ontario.

2.16 An asset located outside of this jurisdiction for purposes of paragraph 2.14 means:

2.16.1 If the asset is a certificated security or instrument in physical form, the physical certificate or instrument is located outside of Ontario at all relevant times;

2.16.2 If the asset is an uncertificated security[2], the issuer's jurisdiction (as determined under the conflict of laws rules of this jurisdiction)[3] is outside of Ontario and the issuer or transfer agent maintains the transfer or ownership records outside of Ontario; and

2.16.3 If the asset or account is a securities account or security entitlements maintained in a securities account with a securities intermediary (including a clearing organization), the jurisdiction

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2 A security not evidenced by a physical certificate that is held directly by the holder, not by a securities intermediary.

3 The jurisdiction under which the issuer is incorporated or otherwise organized, or, if the law of that jurisdiction permits, another jurisdiction specified by the issuer.

of the securities intermediary (as determined under the conflict of laws rules of this jurisdiction)[4] is outside of Ontario.

2.17 That any cash comprising the Collateral is in a currency that is freely transferable internationally under the laws of all relevant jurisdictions.

2.18 That no provision of the Agreement that is necessary for the giving of our opinions and advice in this opinion letter has been altered in any material respect. In our view, an alteration contemplated in the definition of "Equivalent Agreement" above would not constitute a material alteration for this purpose. We express no view whether an alteration not contemplated in the definition of Equivalent Agreement would or would not constitute a material alteration of the Agreement.

3. OPINIONS

On the basis of the foregoing terms of reference and assumptions and subject to the qualifications set out in paragraph 4 below, we are of the following opinion.

3.1 Valid Security Interest

3.1.1 Subject to the qualifications and provisos in this paragraph 3.1, following the occurrence of an Event of Default, including as a result of the opening of any Insolvency Proceedings, the Non-Defaulting Party would be entitled to enforce the Security Interest in respect of the Collateral.

Requirement for Valid and Perfected Security Interest in Cash Collateral under Ontario law

With respect to cash collateral that is not credited to a securities account, recognition that the Non-Defaulting Party has an

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4 The securities intermediary's jurisdiction is determined in accordance with the rules set out in section 45(2) of the *Securities Transfer Act* (Ontario). Those rules specify a number of alternatives for determining the securities intermediary's jurisdiction applied in the following order:

(i) the jurisdiction specified as the securities intermediary's jurisdiction for the purpose of law, the STA or any provision of the STA in the securities account agreement between the intermediary and its entitlement holder;

(ii) the expressly stated governing law of the securities account agreement;

(iii) if the securities account agreement expressly provides that the securities account is maintained at an office in a particular jurisdiction, then that jurisdiction;

(iv) the jurisdiction in which the office identified in an account statement as the office serving the entitlement holder's account is located; or

(v) the jurisdiction where the chief executive office of the securities intermediary is located.

enforceable security interest that can be asserted against other consensual secured creditors or an Insolvency Representative will require compliance with the requirements of the Ontario **Personal Property Security Act** ("**PPSA**") with respect to the validity and perfection of the security interest. Validity and perfection of a security interest in intangibles (which is how cash collateral is classified for PPSA purposes) is under PPSA conflict of laws rules governed by the law of the place where the debtor is located. A debtor is located where it has its chief executive office. Further, if the means of perfection is registration, then as far as Ontario law is concerned perfection of the security interest is a matter of Ontario law if the debtor is located in Ontario. A debtor is located in Ontario if its place of business is in Ontario, or if it has more than one place of business, its chief executive office is in Ontario. The place where the cash collateral is located is not relevant. In our view the Security Interest Provisions do create a valid security interest in such cash collateral. To perfect the security interest the secured party must file a financing statement in Ontario against the name of the Ontario Party. One filing can be made by a secured party with respect to the Agreement for a term of years. (It is anticipated that the Ontario government may pass legislation to provide for a perfection by control regime for cash collateral accounts in 2013 and a conflict of laws rule that looks to the location of the account institution's jurisdiction, but no draft legislation has yet been introduced.)

Perfection of a Security Interest in Non-Cash Collateral

If a party is relying on perfection by registration with respect to the Non-Cash Collateral, then under Ontario PPSA conflict of laws rules, perfection is governed by the law of the place where the debtor is located. If that is Ontario, then it will be necessary to file a financing statement to perfect the security interest. Issues of validity, the effect of non-perfection and priority are governed by the law of the location of the Non-Cash Collateral as defined in the Assumptions above.

In summary, if relying on perfection by registration with respect to Cash or Non-Cash Collateral, a secured party should file a financing statement in Ontario with respect to any Counterparty with its chief executive office in Ontario. Regardless of the method of perfection, the secured party should be filing a financing statement in Ontario with respect to Cash Collateral for any Counterparty with its chief executive office in Ontario.

Power to Charge

The PPSA imposes certain duties on secured creditors with respect to the care and custody of collateral. There is no express conflict of laws rule that applies to the duties of a secured creditor in possession or control of collateral. Consequently, it would be prudent to assume that Ontario law might apply to where the Defaulting Party is located in Ontario.[5]

The PPSA does permit a secured party to repledge collateral to the extent permitted by the security agreement (a) if the debtor's right to redeem is not affected (which presumably it would be in many circumstances) or (b) the collateral is "investment property" over which secured party has "control". Investment property is a security, whether certificated or uncertificated, security entitlement, securities account, futures contract or futures account, each of which terms is defined in the PPSA or the *Securities Transfer Act* (Ontario) ("**STA**"). Consequently to the extent the Power to Charge clause or rehypothecation rights extend beyond this type of property, there is a possibility that the PPSA would apply and it would constitute a breach of the PPSA to charge the collateral in a manner that would defeat the right to redeem of the Defaulting Party.

Power of Sale

For Collateral located outside of this jurisdiction we expect that the sale would also take place outside of this jurisdiction. Consequently, the notice of sale requirements of the PPSA would not apply.

Power of Appropriation

For Collateral located outside of this jurisdiction we expect that the appropriation would also take place outside of this jurisdiction. Consequently, the notice of foreclosure requirements and private sale restrictions of the PPSA would not apply.

Lien Clause

We believe the Lien Clause is too vaguely drafted to create a valid security interest under Ontario law to the extent Ontario

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5 More likely jurisdictions for the applicable law are (i) the governing law of the security agreement or (ii) the place where the collateral is located.

law is relevant.[6] It does not include a sufficiently precise description of the property to meet the attachment requirements of the PPSA.

3.1.2 Subject to the qualifications set out below, there is no law of this jurisdiction which would impose a moratorium or stay which would prevent, delay or otherwise affect the right of the Non-Defaulting Party to enforce the Security Interest in respect of the Collateral as long as the Collateral is "financial collateral" within the meaning of the applicable Insolvency Statutes (see below) and the obligations secured are obligations under an "eligible financial contract" (**EFC**). Any Transaction listed on Annex 4, part A (i) to (iv) is in our view an EFC subject to meeting the general criteria relevant to all Transaction types. Transactions listed on Annex 2, parts (B), (C) and (D) and part A(v) may be EFCs if they are of a type listed in the definition above and they meet general criteria relevant to all Transaction types. The Agreement would be characterized as an EFC. The definition of EFC and criteria for being an EFC are set out at Annex 7. If the Collateral is not "financial collateral" and if the obligations secured are not obligations under an EFC, then the laws of this jurisdiction would or could impose a moratorium or stay which would prevent, delay or otherwise affect the right of the Non-Defaulting Party to enforce the Security Interest in respect of the Collateral if the insolvency representative had jurisdiction over the assets.

In Canadian Insolvency Proceedings, the Insolvency Representative is given jurisdiction over the world wide assets of the entity and has the power to seek to enforce interests outside of Canada. It can seek recognition orders in foreign jurisdictions in order to obtain control of such assets. Whether any court outside of Canada would provide such assistance to a Canadian insolvency representative is not within the scope of this opinion.

However, in many cases where an entity has assets in a number of jurisdictions, there may be concurrent proceedings in several jurisdictions. A Canadian court may entertain concurrent main proceedings or ancillary proceedings that defer to various degrees with main or concurrent proceedings in a foreign jurisdiction. The BIA and CCAA both have explicit provisions dealing with international insolvencies that allow the court to recognize a

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[6] Given that it applies to all "property" including that held with Associates, Ontario law may potentially apply.

foreign insolvency representative and to enter into protocols to deal with creditor claims in various ways. There can be concurrent main proceedings under the BIA or CCAA and the foreign regime, there can be a main proceeding in a foreign state and ancillary proceedings in Canada under section 18.6 of the CCAA or section 271 of the BIA. There can be various other types of proceedings, such as a receivership in Canada and a proceeding of various types under foreign proceedings (e.g. Chapter 15 or Chapter 11 proceedings under the U.S. Bankruptcy Code). The current procedures adopt a balance between principles of comity and protecting domestic creditors and debtors. In policy terms the BIA and CCAA provisions are close to the objectives of the UNCITRAL Model Law on Cross-Border Insolvency. The scope for judicial discretion is broad in either regime, including a discretion to enforce or decline to enforce any order made by a foreign court. The court will consider public policy and generally would not make orders contrary to domestic law.

The BIA and CCAA[7] adopt a modified version of the Model Law. These provisions are different in each of the BIA and CCAA reflecting the fact that the BIA is both a liquidation and restructuring regime and the CCAA a restructuring regime.[8] The provisions allow for cross-border cooperation and coordination. If a recognition order is granted under the provisions, the court may make any order that it considers appropriate on the foreign representative's application, if it is satisfied that it is necessary for the protection of the debtor company's property or the interests of creditors. Certain stay orders (stay of domestic proceedings for example) are mandatory once a recognition order is made. The Acts specifically state that the Canadian court is not obligated to make any order contrary to public policy. The Model Law is not incorporated into the WURA, which will continue to allow for cross-border cooperation consistent with the court's territorial jurisdiction over institutions doing business in Canada.

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[7] S.C. 2005, c.47 as amended by S.C. 2007, c.36. Proclaimed into force on September 19, 2009.

[8] The many ways in which this law differs from the Model Law is beyond the scope of this opinion. We refer you to an article on this topic: Janis Sarra, 16 Int. Insolv. Rev. 19-61 (2007) entitled *Northern Lights, Canada's Version of the UNCITRAL Model Law on Cross-Border Insolvency*. Please note that S.C. 2007,c.36 made further amendments to the law that are not reflected in the article.

Consequently, the following analysis applies to the extent the Canadian insolvency representative would, under Canadian law and any procedures adopted in the particular proceeding, having jurisdiction over the Collateral.

In the Insolvency Statutes, there is express statutory protection for "dealings with financial collateral". The PCSA also provides the same express protection where it applies.

The specific context for each proceeding is set out in the discussion with respect to each proceeding below. A summary chart is set out below. First we highlight the relevant definitions and common elements of the protections.

Dealing with Collateral. The express statutory protection applies to any "dealing" or right to "deal with" "financial collateral" in the manner provided for in the agreement between the parties. Dealing with includes the following actions:

> (a) selling or foreclosing [appropriating] or, in the Province of Quebec, surrendering financial collateral; and
>
> (b) setting off or compensating financial collateral or applying the proceeds or value of financial collateral.[9]

Financial Collateral. "Financial collateral" is defined as:

> "financial collateral" means any of the following that is subject to an interest, or in the Province of Quebec a right, that secures payment or performance of an obligation in respect of an **eligible financial contract** or that is subject to a **title transfer credit support agreement**:
>
> > (a) cash or cash equivalents, including negotiable instruments and demand deposits,
> >
> > (b) securities, a securities account, a security entitlement or a right to acquire securities, or

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9 BIA bankruptcy, s.69.3(2.1); BIA proposal, s.65.1(9); CCAA, s.34(8) and (9)); CDIC Act, s.35.15(7); PCSA, s.13(1.1); WURA, s.22.1(1). The BIA bankruptcy provision (s.69.3(2.1)) protects dealings with financial collateral but does not go on to include this wider description of what constitutes dealing with.

> (c) a futures agreement or a futures account;[10] [emphasis added]

Other than Commodities, the type of Collateral contemplated by this opinion would constitute "financial collateral".

"Securities", "securities account", and "security entitlement" are not defined, but in our view would include any publicly traded debt or equity securities. Commodities are not financial collateral.

A title transfer credit support agreement is:

> "title transfer credit support agreement" means an agreement under which a debtor company has provided title to property for the purpose of securing the payment or performance of an obligation of the debtor company in respect of an eligible financial contract;[11]

Bankruptcy and Winding-Up

In summary, dealings with financial collateral for an EFC are permitted in BIA bankruptcy and WURA proceedings by virtue of a statutory safe-harbour. Otherwise there is a risk that the court would grant a temporary stay in the case of the BIA and under the WURA.

As a general matter, secured creditors fall outside the bankruptcy provisions of the BIA and the WURA and are not prevented from realizing on collateral. The BIA prevents creditors from taking any remedy against the bankrupt's property once a proceeding has commenced, but specifically states that this stay provision does not prevent a secured creditor from realizing or otherwise dealing with its security in the same manner as it would have been entitled to do in the absence of the stay.[12] The court may, however, make a specific order staying a secured creditor, but the maximum stay period is six months where the debt is owing to the creditor at the date of commencement of the bankruptcy.[13] Such stay orders are rarely asked for or granted. They may be appropriate in situations where the trustee in bankruptcy requires a period of time to value the collateral and determine if it should exercise a right to redeem. There are no similar provisions in the WURA, but the case law has established a similar position for liquidations under the WURA. If

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10 BIA, s.2; CCAA, s.2; CDIC Act, s.35.15(9); PCSA, s.13(2); WURA, s.22.1(2).
11 BIA, s.2; CCAA, s.2; CDIC Act, s.35.15(9); PCSA, s.13.2; WURA, s.22.1(2).
12 BIA, s.69.3(2).
13 BIA, s.69.3(2).

the WURA proceeding is a restructuring, as opposed to a winding-up, the court might grant a wider general stay.

If the secured party has already exercised its realization rights prior to the trustee in bankruptcy obtaining the stay order, then it will be unaffected by the stay, so there is some benefit to prompt realization. Stay orders generally do not bind a person until it becomes aware of the order.

A trustee in bankruptcy or liquidator might also delay[14] a secured creditor in realizing on its collateral by giving the secured creditor notice of its intention to inspect the property of the bankrupt that is subject to the security, generally for the purpose of valuing the collateral.[15]

A trustee in bankruptcy or liquidator is also entitled to require a secured creditor to value its collateral and the trustee or liquidator may redeem the collateral on payment to the secured creditor of the debt or the value of the collateral as assessed.[16] Exercise of this right is unlikely to significantly prejudice the secured party. It is also unlikely to be exercised by a trustee in bankruptcy or liquidator as it provides little or no benefit to the estate given the nature of the Collateral and their usually easily determined value.

Neither the BIA bankruptcy provisions nor the WURA (including both the reorganization and liquidation provisions) impose any stay on the exercise of rights of set-off with respect to mutual claims.

If the protections of the PCSA apply, then any of the limited stays described above would not apply.

Further, both the BIA and WURA exempt dealings with financial collateral. The WURA expressly provides that nothing in the WURA and no order of a court prevents or prohibits any dealing with financial collateral.[17] Also, the BIA exempts any dealing with "financial collateral" from the court's power to grant the stay.[18]

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14 No specific period is provided for, but it would generally be a short time.

15 BIA, s.128.

16 BIA, s.128(3); WURA, s.78, 79.

17 WURA, s. 22(1). This section only applies to a Canadian branch of a foreign bank, however, with respect to eligible financial contracts with respect to its business in Canada.

18 Section 69.3(2.1). The trustee still has the power to redeem the collateral under s.128.

Receivership Orders

In summary, there is no safe-harbour for dealings with financial collateral in Receivership proceedings. However, we do not believe that there is significant stay risk with respect to financial collateral for an EFC given current practice in Ontario.

In Ontario, a corporation might also be liquidated through a court administered receivership.[19] The terms and conditions of the receivership are determined by the court order. A receivership order might stay realization and set-off rights. A court appointed receiver realizes on the property of an insolvent party for the benefit of all creditors. As the secured party would be in possession or control of the Collateral and would likely have prior ranking claims to the Collateral as against other consensual creditors, its Collateral is likely to be excluded from the terms of the court order, unless it itself sought the receivership order and was, therefore, content to have the receiver realize upon the Collateral. Consequently, receivership is not a particular practical concern for a secured party in terms of realizing on its Collateral.

Further, even if a Receivership order was made that covered the Collateral, given the protections that exist under the federal insolvency statutes with respect to "financial collateral" for EFCs, we believe that a court could be persuaded to not maintain a stay even though there is no express statutory exemption. Nor should any stay prevent the set-off. Current practice in Ontario is to exempt EFCs from the court ordered stays.

Also, if the party is a "financial institution" within the meaning of the PCSA, its protections should override any inherent power of the court to grant a stay in a receivership proceeding.

Proposals under the BIA

In summary, dealings with financial collateral for an EFC are permitted in BIA proposal proceedings by virtue of a statutory safe-harbour. Otherwise there is a risk that the court would grant a temporary stay (up to 6 months while the plan is being developed and perhaps permanently as part of the plan).

Once the amount of a claim is determined, subject to certain exceptions, the BIA proposal provisions prevent any action or proceeding against the property of a debtor to collect payment of

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19 Liquidation by a privately appointed receiver is also possible, but only with respect to property, which is subject to the security of the appointee.

the claim, including the realization of collateral, during the reorganization period.[20] This stay is automatic and is not dependent on notice being sent or received.

The BIA also permits a party affected by any of the stays to apply to the court for an order permitting it to exercise its rights and the court will grant the order if satisfied that the operation of the stay would likely cause it financial hardship.[21]

Any stay against enforcing payment lasts until a bankruptcy order is made or until completion of the restructuring.

The proposal provisions of the BIA do not specifically provide for a stay on the exercise of rights of set-off. Therefore, if real set-off rights are created, they will be enforceable in a BIA proposal proceeding, although they may be temporarily delayed until the claims are processed. The plan proposed by the debtor and voted upon by its creditors could propose a compromise of the rights of secured creditors and this compromise could involve a continuance of the stay in whole or in part pending a new default.

The stay on realization does not apply to a secured creditor who took possession of the secured assets "for the purpose of realization" before the notice of intention under section 50.4 was filed. A secured creditor must be in the process of exercising its realization rights prior to the section 50.4 notice being filed in order to be exempt from the stays on this basis.

In addition, any dealings with financial collateral for obligations under EFCs entered into before the filing are exempt from the stay.

Companies' Creditors Arrangement Act

In summary, dealings with financial collateral for an EFC are permitted in CCAA proceedings by virtue of a statutory safe-harbour. Otherwise there is a risk that the court would grant a stay. There is no time limit on the period of this stay and it depends on many factors unique to the particular proceeding and entity. The plan proposed in the proceeding may permanently stay the ability to deal with the collateral.

A court order in a CCAA proceeding typically stays the ability of a secured party to realize on collateral[22] pending development of a

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20 BIA, s.69(1)(l).

21 BIA, s.65.1(6).

22 But this stay does not apply to close-out netting rights under certain eligible financial contracts.

plan of compromise and arrangement. The plan itself may provide for a permanent stay of these rights, subject to any new event of default. A secured party would have a right to vote on this plan, but would not necessarily have sufficient power within the voting class (e.g. all secured creditors) to veto the plan. Dissenting creditors are bound by a plan approved by the requisite majorities and the court.

Set-off rights are respected in a CCAA proceeding.[23] This express protection should apply to the right to set-off against cash Collateral.

In any event, the CCAA also includes the exemption from the court's power to grant a stay for dealings with "financial collateral" for an eligible financial contract entered into before the commencement of the CCAA proceeding. [24]

To the extent that the exemption does not apply and Collateral has a volatile value, the Secured Party should have grounds to ask the court to lift the stay, but there is no specific statutory procedure for applying for a lift of the stay order.

Corporate Plans of Arrangement

While there is some precedent granting a stay,[25] we do not believe that a stay should be granted in a properly argued case.

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23 CCAA, s. 21.

24 CCAA, s. 34(8) and (9)).

25 Proceedings involving Abitibi-Consolidated.

Summary of Collateral Realization

Collateral Enforcement and Insolvency Proceeding Stays and Exemptions

	Stay on Realization of Margin	Length of Stay on Realization of Credit Support (without statutory exemption)	Statutory Exemption Allowing Dealing with Financial Collateral for EFCs
BIA Bankruptcy	Unlikely (but possible) for securities, cash or other margin with easily determined value	Up to 6 months	Yes
BIA Proposal	Automatic stay on dealings with credit support	Up to 6 months plus possibility that plan may stay permanently (subject to new default) or otherwise compromise rights	Yes
WURA	Unlikely (but possible) for securities, cash or other margin with easily determined value	Up to 6 months (may be longer in restructuring proceedings)	Yes
CCAA	Automatic stay on dealings with credit support	No limit; plus possibility that plan or court order may stay permanently (subject to new default) or otherwise compromise rights	Yes
Receivership	Unlikely (but possible) for securities, cash or other margin with easily determined value	No limit	No, but practice in Ontario follows the practice in CCAA and BIA so order will likely include an exemption; express exemption if PCSA applies
Corporate Plan	Unlikely (but possible) for securities, cash or other margin with easily determined value	No limit	No

3.1.3 Following exercise of the Firm's rights under the Security Interest Provisions, the ranking of the Firm's rights to the proceeds of realisation of the Collateral in relation to the interests of the Counterparty and any other person with a consensual competing security interest would with respect to priority over other consensual secured creditors be a matter to be determined under the internal law of:

(a) the place where the Collateral is situated where the Collateral constitutes physically certificated securities and instruments;

(b) the place where the securities intermediary is located where the Collateral constitutes a securities account or security entitlements credited to a securities account; and

(c) the place where the Party granting the security interest is located where the Collateral constitutes cash that is not credited to a securities account or other intangible personal property; and

Priority over other types of adverse claimants would be determined in accordance with the following laws:

(a) The law of the issuer's jurisdiction[26] governs whether an adverse claim can be asserted against a person to whom the transfer of a certificated security is registered.[27] Ontario and Alberta incorporated issuers or the Ontario and Alberta Crown may specify a different jurisdiction to govern this issue.[28]

(b) The law of the place where the security certificate is located at the time of delivery governs whether an adverse claim may be asserted against a person to whom the security certificate is delivered.

(c) The law of the issuer's jurisdiction governs whether an adverse claim can be asserted against a person to whom the transfer of an uncertificated security is registered or who obtains control of an uncertificated security.

(d) The internal law of the securities intermediary's jurisdiction[29] governs whether an adverse claim may be asserted against a person who (i) acquires a security entitlement from the securities intermediary, or (ii) purchases (which includes taking a security interest) a security entitlement, or interest in it, from an entitlement holder.[30]

Priority as against other consensual secured creditors (and any Insolvency Representative) will be a matter for Ontario law with respect to cash collateral not credited to a securities account or where registration is the method of perfection relied on. Priority as against other consensual secured creditors whose security interest

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26 For a definition of "issuer's jurisdiction" see footnote 3.

27 STA, s.44(2)(d).

28 STA, s.44(3).

29 For a definition of "securities intermediary's jurisdiction" see footnote 4.

30 STA, s.45(1).

is governed by the PPSA and who have a competing security interest in the asset is by order of registration of financing statements.

3.2 **Further acts**

No further acts, conditions or things would be required by the law of this jurisdiction to be done, fulfilled or performed under the laws of this jurisdiction in order to enable the Non-Defaulting Party to enforce the Security Interest in respect of the Collateral, except the following:

(a) Filing of a financing statement in Ontario with respect to any cash Collateral or Non-Cash Collateral perfection.

(b) The Non-Defaulting Party will be required to comply with the realization procedures of the PPSA with respect to any enforcement action taken in Ontario against Collateral, which is unlikely for Collateral located outside of Ontario.

4. QUALIFICATIONS

The opinions in this opinion letter are subject to the following qualifications:

(a) We offer no opinion to the extent that the Agreement incorporates terms or definitions or provisions of statutes of jurisdictions other than this jurisdiction.

(b) Our opinions as to enforcement of the Security Interest do not apply to the Lien Clause or to any non-cash Collateral or property unless it is of a type listed in paragraphs 2.15 and 2.16 and in particular does not include documents of title, chattel paper, intangibles, or goods (including equipment, inventory, consumer goods).

(c) If the Collateral constitutes all or substantially all of the assets of the Defaulting Party at the date of enforcement, the BIA imposes non-waivable notice requirement as a condition of enforcement.[31]

(d) Our opinion with respect to the Corporate Plans of Arrangement is subject to the additional qualification that the Court has not imposed any stay on termination or acceleration of the Agreement or Transactions.

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31 BIA, s. 244.

(e) The Counterparty, Insolvency Representative or other representative of creditors may be able to recover any transfers of Collateral made to a secured party during a certain "suspect period" preceding the date of the insolvency. Whether it will be able to or not depends very much on the facts of the case. There are a number of different preference laws with potential application, some of which apply only to certain types of entities.

There are preference provisions in the BIA and in the WURA. There are also provincial laws, namely the 10-day preference and fraudulent conveyance provisions of the *Assignments and Preferences Act* (APA) and the fraudulent conveyance provisions of the *Fraudulent Conveyances Act.*

The discussion below refers to the preference laws only, as it seems unlikely to us that a fraudulent conveyance issue could be raised in a typical Transaction since it requires proof of fraudulent intent. The BIA provisions are incorporated by reference into the CCAA. The preference periods relate to the period prior to commencement of the Insolvency Proceeding, and under the CCAA the monitor (as opposed to the bankruptcy trustee) would have the right to bring the proceeding.

The provincial Act, the APA, can apply to any Party type and can be enforced by creditors, a trustee in bankruptcy, a receiver or a liquidator.

Under any of the preference laws there is a risk (although in the typical situation probably not a significant one) that a transfer of Collateral made by an insolvent Party or one on the verge of insolvency, particularly to the extent it relates to a pre-existing transaction, will be set aside as a creditor preference even if it is made pursuant to a binding security agreement entered into prior to the insolvency. In most cases, if the transfer or payment is made by the Party with the genuine intent to try to avoid bankruptcy and to remain in business, then any presumption that the transfer or payment prefers the Firm will be rebutted. The risk of transfers of Collateral being set aside as creditor preferences is unlikely to be material. However, the risk is not one that can be accurately assessed at the time of entering into the Agreement because the relevant intention is the intention the Party has at the time of making the transfer.

The insolvency laws which protect the right to deal with financial collateral in the context of an Insolvency Proceeding do not go so far as to protect transfers of Collateral for such obligations from challenge under preference laws. The federal statutes (BIA and WURA) do, however, recognize a limited protection for transfers of financial collateral under terms of an EFC in that there is no presumption that transfers with a preferential effect are made with a preferential intent, as there is for other types of collateral. Under such laws the Insolvency Representative must prove actual intent on the part of the debtor to prefer the secured party, not only that the transfer, charge or payment had the effect of preferring the secured party, with respect to a transfer made in connection with "financial collateral" and in accordance with the provisions of EFCs. For non-financial collateral or non-EFC Transactions there is a rebuttable presumption of intent if that is the effect of the transaction.

The APA does not include such an exception requiring proof of actual intent, but the presumption only applies to transfers during a period of 60 days preceding the commencement of a suit to challenge the transfer. The APA is rarely relied on in practice.

Payments within 30 Days of Winding-up under the WURA

With respect to entities subject to the WURA, there is an additional provision, not found in the BIA or provincial legislation, which must be considered in relation to any transfers of money. Transfers of money made within 30 days of the commencement of liquidation can be set aside. Subsection 101(1) voids every "payment" made within 30 days of commencement of the liquidation by an insolvent company to a person who knows of the insolvency or who has reason to know of it. Intent in making the payment is not relevant under this provision. If, during this 30-day period, the transferee had actual knowledge of the Counterparty's insolvent state or reason to question its solvency, then the payments made during this period might be set aside.

This provision does not apply, however, to a payment made in connection with financial collateral in accordance with the provisions of an EFC.

Transfers at an Undervalue (BIA, CCAA)

A "transfer at an undervalue" is void as against or may not be set up against the trustee. In addition, any person that is a party to the transaction or is a privy of a party to the transaction may be ordered to make compensatory payments to the estate if the transaction is found to be a transaction at an undervalue. A "transfer at an undervalue" is:

a disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor;

Where the debtor and the party to the transaction are dealing at arm's length, the trustee must prove that (i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event (e.g. the date of the assignment, the filing of a notice to make a proposal etc.) and that ends on the date of the bankruptcy, (ii) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, and (iii) the debtor intended to defraud, defeat or delay a creditor. Where proved the transfer is void and the transferee may be ordered to pay the difference between the value of the consideration the given or received by the debtor and the fair market value of the property or services given or received by the debtor.

(f) Our opinion as to priority of any security interest in any Collateral is subject to the qualification that there are special priority security interests, liens and deemed trusts that can take priority over perfected consensual security interests and these are not restricted to property located in Canada. Successful assertion of these liens can result in impediments to enforcing security interests or reversal of enforcement action. These are described in more detail in Annex 8.

There are no other material issues relevant to the issues addressed in this opinion letter which we draw to your attention.

This opinion is given for the sole benefit of the Futures and Options Association and such of its members (excluding associate members) as subscribe to the Futures and Options Associations' opinions library (and whose terms of subscription give them access to this opinion). This opinion may not be relied upon by any other person unless we otherwise specifically agree with that

person in writing, although we consent to its being shown to such Futures and Options Association members' affiliates (being members of such persons' groups, as defined by the UK Financial Services and Markets Act 2000) and to any competent authority supervising such member firms and their affiliates in connection with the compliance of such members and such affiliates with their obligations under prudential regulation.

Yours faithfully,

Stikeman Elliott LLP

SCHEDULE 1
FINANCIAL INSTITUTIONS

Subject to the modifications and additions set out in this Schedule 1 (*Financial Institutions*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Financial Institutions. For the purposes of this Schedule 1 (*Financial Institutions*), "***Financial Institution***" means a bank incorporated under the *Bank Act* (Canada), a corporation incorporated as a trust company under the *Trust and Loan Companies Act* (Canada) or cooperative credit association under the *Cooperative Credit Associations Act* (Canada). This Schedule also covers non-Canadian banks authorized to do business in Canada with respect to a branch or branches in Canada.

Except where the context otherwise requires, references in this Schedule to "*paragraph*" are to paragraphs in the opinion letter (but not to its Annexes or Schedules) and references to "*sections*" are to sections of this Schedule.

1. MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS

None.

2. ADDITIONAL ASSUMPTIONS

None.

3. MODIFICATIONS TO OPINIONS

On the basis of the terms of reference and assumptions and subject to the qualifications (in each case set out in this opinion letter as modified, or added to, by this Schedule), we are of the following opinion.

Any reference to the BIA or CCAA does not apply. The references to the WURA do apply.

With respect to deposit taking Financial Institutions, the following additional analysis applies to the question dealt with in 3.1.2 of whether there are any stays that could affect the enforcement of rights against the Collateral.

Restructuring or Receivership Under the CDIC Act

CDIC Act. Prior to the involvement of the Canada Deposit Insurance Corporation (**CDIC**) in the restructuring or liquidation of a federal deposit taking institution such as a bank, the Superintendent of Financial Institutions may take control of the institution's assets.[32] After taking

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[32] The statutory authority for the Superintendent's intervention depends upon the type of entity involved. The *Bank Act* (Canada), S.C. 1991, c.46, s.538 confers the authority with respect to banks. The *Trust and Loan Companies Act* (Canada), S.C. 1991, c.45, s.510 confers the authority with respect to federal trust or loan companies.

control, the Superintendent might also, as a further step, take over the management of the business and affairs of the institution. 33 The Superintendent is not given any extraordinary powers that could, in our view, allow him to alter the contractual arrangements of the Financial Institution.

In certain circumstances, CDIC can obtain an order vesting the shares and subordinated debt of such institutions in it in order to attempt a sale of the institution, an amalgamation or any other transaction to restructure a substantial part of the institution's business.[34] Where CDIC obtains the vesting order, the CDIC Act[35] imposes a number of different limitations on the rights that can be exercised against the institution because of 1. the institution's insolvency, 2. the making of the order, or 3. a default before the order was made in any performance of obligations under the agreement. [36] It automatically prevents certain actions including realization on collateral:

- prevents a person from terminating or amending any agreement with the institution or claim an accelerated payment only the exercise of any right of set-off;
- subject to certain exceptions, prevents any proceeding against the property of a debtor to collect payment of the claim, including the realization of collateral, during the reorganization period;[37] and
- voids any stipulation in an agreement that provides that the insolvent institution ceases to have the rights to use or deal with assets that it would otherwise have, upon the institution's insolvency, default under the agreement or the Superintendent having made a vesting order under the Act.[38] In our view, this provision does not have any effect on the secured party if it is already in possession and control of

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33 Bank Act, s.538; Trust and Loan Companies Act, s.514.

34 CDIC Act, s.39.19.

35 CDIC Act, s.39.15.

36 CDIC Act, s.39.15(1)(d). Note that the CDIC Act differs from section 65.1(1) of the BIA in that under the *CDIC Act* a prior default, such as a payment default, cannot provide grounds for termination once an order is made, whereas under the BIA the pre-proceeding defaults can be relied on. The Governor in Council (essentially the federal cabinet), in making the order, has the power to provide that these provisions do not apply to the institution, but no such order has been made (s.39.15(1))

37 CDIC Act, s.39.15(1)(c). With respect to financial institutions subject to the CDIC Act, the Superintendent of Financial Institutions in giving permission to create security interests, has the power to exempt the security agreement from the application of these stay provisions (s. 39.15(3)(b)), but has not exercised this power as far as we are aware.

38 CDIC Act, s.39.15(2).

the Collateral prior to insolvency, an Event of Default or the CDIC Act order, although the matter is not free from doubt.

The CDIC Act also permits a party affected by any of the stays to apply to the court for an order permitting it to exercise its rights and the court will grant the order if satisfied that (a) the person is likely to be materially prejudiced if the permission is not granted or (b) it is equitable on other grounds to grant the permission.[39]

Subject to the bridge institutions provisions discussed below, the CDIC Act also includes the exemption from these stays for dealings with "financial collateral" for an EFC.[40] Consequently, it should override any of the other provisions imposing stays on set-off of the value of the Collateral or realization actions against Collateral as long as the Collateral is financial collateral (see definition in the main body of the opinion).

The restructuring provisions of the CDIC Act do stay the exercise of set-off rights,[41] but expressly state that the insolvent financial institution cannot require payment of any amount owing by the other party that could otherwise be set-off. The provisions for lifting the stay against the realization of financial collateral apply also to this stay against exercise of set-off rights. If the set-off relates to the value of collateral, the exemption for dealings with financial collateral would also apply to the extent it is securing obligations under an EFC.

There is an automatic temporary (one business day) stay on termination, set-off and realization on financial collateral under EFCs in a CDIC Act receivership proceeding where an order is made to incorporate a bridge institution. There is also the possibility of a permanent stay if the Transactions are transferred to the new bridge institution or CDIC guarantees payment of this obligations under the Transactions. This is discussed in greater detail in the qualifications below.

In summary, subject to the bridge institution provisions, the right of the Non-Defaulting Party to deal with financial collateral is not adversely affected by the making of an order to facilitate a restructuring of a federal deposit taking financial institution under the CDIC Act. If, however, the government incorporates a bridge institution and CDIC makes the undertaking referred to above, then the EFC safe-harbour does not apply. The stay is a permanent stay if and when the contracts have been assigned to the bridge institution, even if the insolvent member is later wound up under the WURA.

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39 CDIC Act, s.39.16(1).

40 CDIC Act, s. 35.15(7).

41 But this does not apply to close-out netting rights under certain eligible financial contracts.

A summary of the analysis is encapsulated in the following chart:

	Stay on Realization of Margin	Length of Stay on Realization of Credit Support (without statutory exemption)	Statutory Exemption Allowing Dealing with Financial Collateral for EFCs
WURA	Unlikely (but possible) for securities, cash or other margin with easily determined value	Up to 6 months (may be longer in restructuring proceedings)	Yes
CDIC Act	Automatic stay on dealings with credit support	No limit	Yes, but subject to bridge institution exemptions
Receivership (unlikely to apply)	Unlikely (but possible) for securities, cash or other margin with easily determined value	No limit	No, but practice in Ontario follows the practice in CCAA and BIA so order will likely include an exemption; express exemption if PCSA applies

4. ADDITIONAL QUALIFICATIONS

The following additional qualification applies:

(a) Where an order directing the incorporation of a bridge institution is made, there is (1) an automatic temporary stay that prevents reliance on the eligible financial contract safe-harbour and (2) the possibility of a permanent stay where the Agreement is assumed by a bridge institution or CDIC guarantees the payment obligations under the Agreement. These stays take precedence over the stay protections in the PCSA.[42] It is anticipated that an order incorporating a bridge institution would be made at or around the same time that the receivership order under the CDIC Act is made.

The Temporary Stay

The *Jobs and Growth Act, 2012* (Canada)[43] passed on December 14, 2012 amended the CDIC Act to provide for a new temporary stay in the event that an order is made directing the incorporation of a bridge institution.[44] The stay prevents reliance on the member institution's insolvency, the making of the order appointing CDIC as receiver, the making of the order directing incorporation of the bridge institution, or the assignment of the eligible financial

[42] PCSA, s. 13(1.2).
[43] S.C. 2012, c. 31.
[44] CDIC Act, s.39.15(7.01).

contract to or assumption of it by the bridge institution as grounds for accelerating or terminating any eligible financial contract.[45] This stay lasts from the time the order directing incorporation of the bridge institution is made until 5:00 p.m. on the following business day[46] (Ottawa time). During this period presumably CDIC will determine whether or not the bridge institution will assume the eligible financial contracts. (This stay does not apply to an eligible financial contract between the federal member institution and a clearing house that provides clearing and settlement services for a clearing and settlement system designated under section 4 of the PCSA or a securities and derivatives clearing house as defined under subsection 13.1(3) of the PCSA.[47])

The Conditional Stay

After operation of the temporary stay, a conditional stay may become effective. The counterparty of the member institution cannot rely on the eligible financial contracts exemption if CDIC undertakes to either guarantee unconditionally the payment of any amount due or that may become due in accordance with the provisions of the contract by the member institution or ensure that all obligations arising from the contract will be assumed by the bridge institution. We refer to this as the conditional stay as it is conditional on CDIC making these undertakings. The relevant section reads as follows:

> 39.15 (7.1) If an order directing the incorporation of a bridge institution is made and the Corporation undertakes to unconditionally guarantee the payment of any amount due or that may become due by the federal member institution, in accordance with the provisions of the eligible financial contract, or to ensure that all obligations of the federal member institution arising from the eligible financial contract will be assumed by the bridge institution, the actions referred to in

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[45] There is an exemption for certain designated clearing and settlement systems or designated securities and derivatives clearing houses; CDIC Act, s.39.15(7.02).

[46] A business day is a day other than Saturday, Sunday or a day on which the clearing and settlement systems operated by the Canadian Payments Association are closed; CDIC Act, s.39.15(7.03).

[47] CDIC Act, s.39.15(7.02).

> subsection (7) [*ed. termination, netting and dealing with financial collateral for an eligible financial contract*] are not to be taken by reason only of
>
> (a) the federal member institution's insolvency;
>
> (b) the making of an order or an order appointing the Corporation as receiver in respect of the federal member institution or the making of the order directing the incorporation of the bridge institution; or
>
> (c) the eligible financial contract being assigned to or assumed by the bridge institution.[48]

Until the CDIC undertakings referred to in the provision are made there is no impediment to relying on the eligible financial contracts exemption. The provision prevents reliance on the exemption only if the reason for termination of the agreements is one or more of the matters set out in (a) to (c) immediately above. It does not, for example, preclude relying on the exemption if there has been a performance default, such as a failure to transfer margin.

The stay is a permanent stay once the contracts have been assigned to the bridge institution.

A subsequent WURA proceeding with respect to the insolvent member institution cannot be relied on as a new Event of Default. The following scenarios may apply:

- If a Non Defaulting Party's Transactions are transferred to and assumed by the bridge institution and a liquidation order is subsequently made with respect to the defaulting member institution, the Non Defaulting Party would not be permitted to rely on the eligible financial contracts stay exemption in the WURA to allow it to it to exercise its rights with respect to the

[48] S.C. 2009, c. 2, s. 245(7).

Agreement and Transactions assumed by the bridge institution.[49]

- If the Non Defaulting Party's Transactions are not assigned and CIDC does guarantee the payment of any amount due by the defaulting member institution, would not be permitted to rely on the eligible financial contracts stay exemption in the WURA to allow it to exercise its rights with respect to the Agreement and Transactions.[50]

- If the Non Defaulting Party's Transactions are not assigned and the insolvent member institution is to be liquidated under the CDIC Act or WURA, CDIC might chose not to provide the guarantee, in which case there would be no impediment to relying on the eligible financial contracts stay exemption.

CDIC is a federal Crown corporation that is an agent of Her Majesty in right of Canada so it is the federal Crown that ultimately stands behind the statutory obligation of CDIC to ensure that the bridge institution meets its financial obligations (where the eligible financial contracts are assumed by the bridge institution) or the CDIC guarantee of the obligations of the defaulting member institution (where the eligible financial contracts are not assigned to the bridge institution and the guarantee is provided).

5. MODIFICATIONS TO QUALIFICATIONS

Furthermore, the qualifications at paragraph 4 are deemed modified as follows.

The preference provisions of provincial law or under the BIA would not apply to a Financial Institution. The WURA provisions would apply.

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[49] CDIC Act, s.39.18(b).
[50] CDIC Act, s.39.18(b).

SCHEDULE 2
INVESTMENT FIRMS/BROKER DEALERS

Subject to the modifications and additions set out in this Schedule 2 (*Investment Firms/Broker Dealers*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Investment Firms/Broker Dealers. For the purposes of this Schedule 2 (*Investment Firms/Broker Dealers*), "**Investment Firms/Broker Dealers**" means a corporation incorporated under the business corporations legislation of a province of Canada or the *Canada Business Corporations Act* (Canada) that does not conduct commercial banking activities but deals in and/or manages securities and/or other financial instruments as an agent for third parties. It may also conduct such activities as principal. Its business normally includes holding securities and/or other financial instruments for third parties and operating related cash accounts. This type of entity is referred to as a "broker-dealer" in Canada.

Except where the context otherwise requires, references in this Schedule to "paragraph" are to paragraphs in the opinion letter (but not to its Annexes or Schedules) and references to "*sections*" are to sections of this Schedule.

1. MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS

None.

2. ADDITIONAL ASSUMPTIONS

None.

3. MODIFICATIONS TO OPINIONS

The analysis in the main body of the opinion applies, except that Investment Firms are highly unlikely to be subject to the WURA.

	Stay on Realization of Margin	Length of Stay on Realization of Credit Support (without statutory exemption)	Statutory Exemption Allowing Dealing with Financial Collateral for EFCs
BIA Bankruptcy, including Part XII of the BIA[51]	Unlikely (but possible) for securities, cash or other margin with easily determined value	Up to 6 months	Yes
BIA Proposal	Automatic stay on dealings with credit support	Up to 6 months plus possibility that plan may stay permanently (subject to new default) or otherwise compromise rights	Yes
CCAA	Automatic stay on dealings with credit support	No limit; plus possibility that plan or court order may stay permanently (subject to new default) or otherwise compromise rights	Yes
Receivership	Unlikely (but possible) for securities, cash or other margin with easily determined value	No limit	No, but practice in Ontario follows the practice in CCAA and BIA so order will likely include an exemption; express exemption if PCSA applies
Corporate Plan	Unlikely (but possible) for securities, cash or other margin with easily determined value	No limit	No

4. ADDITIONAL QUALIFICATIONS

None.

5. MODIFICATIONS TO QUALIFICATIONS

None.

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51 This is the most likely process for an insolvent broker dealer. The others are possible but insolvency typically results in bankruptcy liquidation.

SCHEDULE 3
PARTNERSHIPS

Subject to the modifications and additions set out in this Schedule 3 (*Partnerships*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Partnerships. For the purposes of this Schedule 3 (*Partnerships*), "**Partnerships**" means a limited partnership formed under the laws of a province of Canada, such as the *Limited Partnership Act* (Ontario) or an ordinary partnership formed by partnership agreement and governed by the laws of a province of Canada, such as the *Partnership Act* (Ontario).

Except where the context otherwise requires, references in this Schedule to "paragraph" are to paragraphs in the opinion letter (but not to its Annexes or Schedules) and references to "sections" are to sections of this Schedule.

1. MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS

None.

2. ADDITIONAL ASSUMPTIONS

None.

3. MODIFICATIONS TO OPINIONS

The following chart summarizes the analysis with respect to insolvency stay risk as it would apply to a partnership.

	Stay on Realization of Margin	Length of Stay on Realization of Credit Support (without statutory exemption)	Statutory Exemption Allowing Dealing with Financial Collateral for EFCs
BIA Bankruptcy	Unlikely (but possible) for securities, cash or other margin with easily determined value	Up to 6 months	Yes
BIA Proposal	Automatic stay on dealings with credit support	Up to 6 months plus possibility that plan may stay permanently (subject to new default) or otherwise compromise rights	Yes
CCAA (with respect to a general partner that is a corporation)	Automatic stay on dealings with credit support	No limit; plus possibility that plan or court order may stay permanently (subject to new default) or otherwise compromise rights	Yes
Receivership	Unlikely (but possible) for securities, cash or other margin with easily determined value	No limit	No, but practice in Ontario follows the practice in CCAA and BIA so order will likely include an exemption; express exemption if PCSA applies
Corporate Plan (with respect to a general partner that is a corporation)	Unlikely (but possible) for securities, cash or other margin with easily determined value	No limit	No

4. ADDITIONAL QUALIFICATIONS

None.

5. MODIFICATIONS TO QUALIFICATIONS

None.

SCHEDULE 4
INSURANCE COMPANIES

Subject to the modifications and additions set out in this Schedule 4 (*Insurance Companies*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Insurance Companies. For the purposes of this Schedule 4 (*Insurance Companies*), "**Insurance Companies**" means an insurance corporation incorporated under the *Insurance Companies Act* (Canada) or provincial incorporation legislation applicable to the incorporation of companies licensed to carry on insurance business, and Canadian branches of non-Canadian insurance companies licensed to carry on insurance business in Canada. Except where the context otherwise requires, references in this Schedule to "paragraph" are to paragraphs in the opinion letter (but not to its Annexes or Schedules) and references to "sections" are to sections of this Schedule.

1. MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS

None.

2. ADDITIONAL ASSUMPTIONS

None.

3. MODIFICATIONS TO OPINIONS

Any reference to the BIA, CCAA and CDIC does not apply. The references to the WURA do apply.

With respect to insolvency stay risk the following chart summarizes the applicable analysis for insurance companies.

	Stay on Realization of Margin	Length of Stay on Realization of Credit Support (without statutory exemption)	Statutory Exemption Allowing for Dealing with Financial Collateral for EFCs
WURA	Unlikely (but possible) for securities, cash or other margin with easily determined value	Up to 6 months (may be longer in restructuring proceedings)	Yes
Receivership	Unlikely (but possible) for securities, cash or other margin with easily determined value	No limit	No, but practice in Ontario follows the practice in CCAA and BIA so order will likely include an exemption; express exemption if PCSA applies

4. ADDITIONAL QUALIFICATIONS

None.

5. MODIFICATIONS TO QUALIFICATIONS

None.

SCHEDULE 5
INDIVIDUALS

Subject to the modifications and additions set out in this Schedule 5 (*Individuals*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Individuals. For the purposes of this Schedule 5 (*Individuals*), "**Individual**" means a natural person domiciled and resident in Ontario.

Except where the context otherwise requires, references in this Schedule to "paragraph" are to paragraphs in the opinion letter (but not to its Annexes or Schedules) and references to "sections" are to sections of this Schedule.

1. MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS

None.

2. ADDITIONAL ASSUMPTIONS

None.

3. MODIFICATIONS TO OPINIONS

On the basis of the terms of reference and assumptions and subject to the qualifications (in each case set out in this opinion letter as modified, or added to, by this Schedule), we are of the following opinion.

Because individuals are not subject to the CCAA, Receivership, WURA or Corporate Plans, the analysis with respect to insolvency stay risk is modified to refer only to the BIA. In addition, an individual may be subject to a Consumer Proposal regime if the individual owes $250,000 or less. As with BIA Proposal, there is an exemption from the automatic stay that would otherwise prevent realization on Collateral, for financial collateral for an EFC. The following chart summarizes the insolvency stay risk analysis.

	Stay on Realization of Margin	**Length of Stay on Realization of Credit Support (without statutory exemption)**	**Statutory Exemption Allowing for Dealing with Financial Collateral for EFCs**
BIA Bankruptcy	Unlikely (but possible) for securities, cash or other margin with easily determined value	Up to 6 months	Yes
BIA Proposal	Automatic stay on dealings with credit support	Up to 6 months plus possibility that plan may stay permanently (subject to new default) or otherwise compromise rights	Yes
Consumer Proposal	Automatic stay on dealings with credit support	Up to 6 months plus possibility that plan may stay permanently (subject to new default) or otherwise compromise rights	Yes

4. ADDITIONAL QUALIFICATIONS

The opinions in this opinion letter are subject to the following additional qualifications.

(a) None of the Collateral is consumer goods, meaning goods that are used primarily for personal, family or household purposes.

5. MODIFICATIONS TO QUALIFICATIONS

None.

SCHEDULE 6
INVESTMENT FUNDS

Subject to the modifications and additions set out in this Schedule 6 (*Investment Funds*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Investment Funds. For the purposes of this Schedule 6 (*Investment Funds*), "***Investment Funds***" means a corporation of the type covered by the opinion as a Corporation, a limited partnership of the type covered by Schedule 3 of this opinion, or a common law trust established under the laws of one of the common law provinces of Canada, established to provide investors with a share in profits or income arising from property acquired, held, managed or disposed of by the manager(s) of the legal entity or arrangement or a right to payment determined by reference to such profits or income, not including a Pension Entity, but including an Investment Fund trust in which a Pension Entity invests. In Canada such funds are known as (i) prospectus qualified mutual funds subject to National Instrument 81-102; (ii) pooled funds which are mutual funds that are not prospectus qualified; (iii) a non-redeemable investment fund, typically listed and prospectus qualified, but not necessarily.

Except where the context otherwise requires, references in this Schedule to "paragraph" are to paragraphs in the opinion letter (but not to its Annexes or Schedules) and references to "sections" are to sections of this Schedule.

1. MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS

None.

2. ADDITIONAL ASSUMPTIONS

None.

3. MODIFICATIONS TO OPINIONS

An Investment Fund may be subject to the following types of Insolvency Proceedings under the laws of this jurisdiction, and which are relevant for the purposes of this opinion letter, are as follows:

1.1.1 With respect to any Investment Fund that is a corporation, partnership or "income trust" as defined in the CCAA and perhaps with respect to any other Investment Fund that is in the form of a trust, proceedings under the *Bankruptcy and Insolvency Act* (Canada) (**BIA**) for either (i) liquidation (**BIA Bankruptcy**) or (ii) reorganization/ arrangement with creditors under Part III, Division I (**BIA Proposals**);

1.1.2 With respect to any Investment Fund that is a corporation or corporate general partner of a limited partnership (and unless it is a corporation incorporated under the Canada Business Corporations

Act), proceedings under the *Winding-up and Restructuring Act* (Canada) (**WURA**) for either (i) liquidation or (ii) reorganization/ arrangement with creditors (**WURA Proceedings**);

1.1.3 With respect to any Investment Fund that is a corporation, corporate general partner of a limited partnership or "income trust" as defined in the CCAA, proceedings under the *Companies' Creditors Arrangement Act* (Canada) (**CCAA**) for reorganization/ arrangement of claims of creditors of corporations (**CCAA Plan of Arrangement**);

1.1.4 Court administered receivership proceedings for liquidation of the Party under the national receivership provisions of the BIA or under Ontario provincial law (**Receivership**);

1.1.5 With respect to any Investment Fund that is a corporation or corporate general partner of a limited partnership, Corporate plans of arrangement involving insolvent entities and providing for the reorganization/arrangement of claims of creditors (**Corporate Plans of Arrangement**); or

1.1.6 With respect to any Investment Fund in the form of a trust, voluntary wind-up by the trustee of the Investment Fund pursuant to the terms of the trust deed, agreement or declaration (**Voluntary Wind-up**).[52]

An "income trust" is a trust which has assets in Canada if (a) its units are listed on a prescribed stock exchange on the date of the initial bankruptcy event or (b) the majority of its units are held by a trust whose units are listed on a prescribed stock exchange on the date of the initial bankruptcy event.[53]

The following chart summarizes the insolvency stay risk.

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52 This is not strictly speaking an insolvency regime, but it is likely the manner in which an insolvent trust would be dealt with.

53 BIA, s.2; CCAA, s.2(1).

	Stay on Realization of Margin	Length of Stay on Realization of Credit Support (without statutory exemption)	Statutory Exemption Allowing Dealing with Financial Collateral for EFCs
BIA Bankruptcy	Unlikely (but possible) for securities, cash or other margin with easily determined value	Up to 6 months	Yes
BIA Proposal	Automatic stay on dealings with credit support	Up to 6 months plus possibility that plan may stay permanently (subject to new default) or otherwise compromise rights	Yes
WURA	Unlikely (but possible) for securities, cash or other margin with easily determined value	Up to 6 months (may be longer in restructuring proceedings)	Yes
CCAA	Automatic stay on dealings with credit support	No limit; plus possibility that plan or court order may stay permanently (subject to new default) or otherwise compromise rights	Yes
Receivership	Unlikely (but possible) for securities, cash or other margin with easily determined value	No limit	No, but practice in Ontario follows the practice in CCAA and BIA so order will likely include an exemption; express exemption if PCSA applies
Corporate Plan	Unlikely (but possible) for securities, cash or other margin with easily determined value	No limit	No
Voluntary Wind-up if a trust	No	NA	NA

4. ADDITIONAL QUALIFICATIONS

None.

5. MODIFICATIONS TO QUALIFICATIONS

None.

SCHEDULE 7
SOVEREIGN, STATE OF A FEDERAL SOVEREIGN AND SOVEREIGN-OWNED ENTITY

Subject to the modifications and additions set out in this Schedule 7 (*Sovereign, State of a Federal Sovereign and Sovereign-Owned Entity*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Sovereign and Public Sector Entities. For the purposes of this Schedule 7 Sovereign, State of a Federal Sovereign and Sovereign-Owned Entity), "**Sovereign**" means Her Majesty the Queen in right of Canada acting through the federal Minister of Finance. "**State of a Federal Sovereign**" means Her Majesty the Queen in right of Ontario acting through the Ontario Financing Authority as agent of the Minister of Finance. "**Sovereign-Owned Entity**" means a corporation wholly owned by Canada or Ontario and which is for all purposes an agent of the Crown, and not including any public sector pension plan (which is considered in Schedule 10) or municipal government/local authority (which is considered in Schedule 11).

Except where the context otherwise requires, references in this Schedule to "paragraph" are to paragraphs in the opinion letter (but not to its Annexes or Schedules) and references to "sections" are to sections of this Schedule.

1. MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS

None

2. ADDITIONAL ASSUMPTIONS

None.

3. MODIFICATIONS TO OPINIONS

On the basis of the terms of reference and assumptions and subject to the qualifications (in each case set out in this opinion letter as modified, or added to, by this Schedule), we are of the following opinion.

None of the Insolvency Proceedings would apply to Canada, Ontario or a Sovereign Owned Entity that acts as agent of the Crown. Legislation would be required to wind-up or reorganize the affairs of an insolvent Sovereign or Sovereign Owned Entity.

Based on the law as it stands today, the Power to Charge, Power of Sale, Power of Appropriation would remain as enforceable as they are outside of an Insolvency Proceeding. In other words, no existing insolvency or other law and no insolvency proceeding in which an automatic or court

ordered stay of rights against collateral or interferes with those otherwise enforceable contractual and proprietary rights.

(A Sovereign Owned Entity that was not an agent of the Crown for all purposes could be subject to the same Insolvency Proceedings as a Corporation as considered in the body of the main opinion.)

4. ADDITIONAL QUALIFICATIONS

The opinions in this opinion letter are subject to the following additional qualifications.

4.1.1 We have not reviewed the governing legislation for any particular Sovereign Owned Entity for the purposes of this opinion. Such legislation may alter the analysis and conclusions in this opinion.

4.1.2 As with any contract with any government, there is a possibility that the legislature could pass legislation aimed at relieving Canada or Ontario or any Sovereign Owned Entity of its contractual obligations or altering the terms of the contracts to which it is a party, or could pass debt moratorium legislation. The following factors should be considered in amelioration of this possibility. First, the passing of legislation to relieve a government from contractual obligations, particularly under contracts of a commercial nature rarely happens in Canada. Second, we do not believe a federal or provincial government of Canada has ever passed debt moratorium or similar legislation to deal with its financial difficulties.

5. MODIFICATIONS TO QUALIFICATIONS

Furthermore, the qualifications at paragraph 4 are deemed modified as follows.

The qualifications would not apply.

SCHEDULE 8
PRIVATE TRUSTS

Subject to the modifications and additions set out in this Schedule 8 (*Private Trusts*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Private Trusts. For the purposes of this Schedule 8 (Private Trusts) "**Private Trusts**" means the trustee(s) of an arrangement without legal personality that is organized by agreement, declaration or deed of trust to carry on business, other than an Investment Fund (Schedule 6) or a Pension Entity (Schedule 10) and which is governed by the laws of a common law province of Canada.

Except where the context otherwise requires, references in this Schedule to "paragraph" are to paragraphs in the opinion letter (but not to its Annexes or Schedules) and references to "sections" are to sections of this Schedule.

1. MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS

None.

2. ADDITIONAL ASSUMPTIONS

None.

3. MODIFICATIONS TO OPINIONS

On the basis of the terms of reference and assumptions and subject to the qualifications (in each case set out in this opinion letter as modified, or added to, by this Schedule), we are of the following opinion.

Voluntary Wind-up

If the trustee of a trust is conducting a voluntary wind-up outside of a court process, then there is no order stay possible that could interfere with the Power to Charge, Power of Sale, or Power of Appropriation.

The following chart summarizes the insolvency stay risk relevant to this entity type.

	Stay on Realization of Margin	Length of Stay on Realization of Credit Support (without statutory exemption)	Statutory Exemption Allowing Dealing with Financial Collateral for EFCs
BIA Bankruptcy	Unlikely (but possible) for securities, cash or other margin with easily determined value	Up to 6 months	Yes
BIA Proposal	Automatic stay on dealings with credit support	Up to 6 months plus possibility that plan may stay permanently (subject to new default) or otherwise compromise rights	Yes
Receivership	Unlikely (but possible) for securities, cash or other margin with easily determined value	No limit	No, but practice in Ontario follows the practice in CCAA and BIA so order will likely include an exemption; express exemption if PCSA applies
Voluntary Wind-up	No	NA	NA

4. ADDITIONAL QUALIFICATIONS

None.

5. MODIFICATIONS TO QUALIFICATIONS

None.

SCHEDULE 9
CHARITABLE CORPORATIONS

Subject to the modifications and additions set out in this Schedule 9 (*Charitable Corporations*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Charitable Corporations. For the purposes of this Schedule 9 (*Charitable Corporations*), "**Charitable Corporations**" means corporations without share capital organized under the general legislation for the incorporation of companies that are incorporated to carry on charitable purposes, under the *Canada Corporations Act* (Canada) and the *Corporations Act* (Ontario).

Except where the context otherwise requires, references in this Schedule to "paragraph" are to paragraphs in the opinion letter (but not to its Annexes or Schedules) and references to "sections" are to sections of this Schedule.

1. MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS

None.

2. ADDITIONAL ASSUMPTIONS

None.

3. MODIFICATIONS TO OPINIONS

On the basis of the terms of reference and assumptions and subject to the qualifications (in each case set out in this opinion letter as modified, or added to, by this Schedule), we are of the following opinion.

No modifications.

4. ADDITIONAL QUALIFICATIONS

None.

5. MODIFICATIONS TO QUALIFICATIONS

None.

SCHEDULE 10
PENSION ENTITIES

Subject to the modifications and additions set out in this Schedule 10 (*Pension Entities*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Pension Entities. For the purposes of this Schedule 10 (*Pension Entities*), "**Pension Entities**" means:

- privately established pension arrangements in the form of common law trusts governed by the *Pension Benefits Act* (Ontario) or the *Pension Benefits Standards Act* (Canada) that are not established for public sector employees; and
- the following public sector pension plans:
    - the Ontario Teachers' Pension Plan Board - **OTPPB** (which is a statutory corporation created by the *Ontario Teachers' Pension Act* (Ontario));
    - OMERS Administration Corporation - **OMERS** (which is a statutory corporation created by *the Ontario Municipal Employees Retirement System Act, 2006* (Ontario));
    - Healthcare of Ontario Pension Plan Board - **HOOPP** (formerly Hospitals of Ontario Pension Plan Board);
    - Canadian Pension Plan Investment Board - **CPPIB** - governed by the *Canadian Pension Plan Investment Board Act* (Canada); and
    - Public Sector Pension Investment Board - **PSPIB** - governed by the *Public Sector Pension Investment Board Act* (Canada).

Except where the context otherwise requires, references in this Schedule to "*paragraph*" are to paragraphs in the opinion letter (but not to its Annexes or Schedules) and references to "*sections*" are to sections of this Schedule.

1. MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS

None.

2. ADDITIONAL ASSUMPTIONS

None.

3. MODIFICATIONS TO OPINIONS

On the basis of the terms of reference and assumptions and subject to the qualifications (in each case set out in this opinion letter as modified, or added to, by this Schedule), we are of the following opinion.

Voluntary Wind-up

If the pension is in the form of a trust and the trustee is conducting a voluntary wind-up outside of a court process, then there is no stay possible.

Most Pension Entities are financial institutions within the meaning of the PCSA. Hence, the PCSA would apply to protect the right to deal with financial collateral for Transactions that are EFCs, if the other party is also a financial institution.

Involuntary Windup under Supervision of Pension Regulator

It is our view that in the course of winding-up a pension plan voluntarily or under the supervision of OSFI there would be no impediment to exercising rights against collateral. In addition, section 13 of the PCSA might prevent the pension regulator from compromising such rights, although it is not clear that Section 13 applies to this type of process.

Ontario PBA

There is nothing in the Ontario PBA that expressly imposes any stay on enforcement of contracts pursuant to their terms, including liquidating credit support when a wind-up is commenced. Nor is there anything that expressly gives the regulator the power to impose any such requirement.

If the regulator purported to exercise such a power, section 13 of the PCSA might provide a basis upon which to challenge his action. Under section 13, termination rights in "netting agreements" between "financial institutions" are enforceable "notwithstanding anything in any law relating to bankruptcy or insolvency or any order of a court made pursuant to an administration of a reorganization, arrangement or receivership involving insolvency". The trustees would be a "financial institution". However, there is uncertainty as to whether section 13 applies because of the fact that the pension statute is not strictly speaking an "insolvency" law.[54]

In any event, as noted above, we do not believe that the Ontario regulator would have any power to prevent a party from exercising its rights to deal with collateral under the Agreement to the extent they are triggered and we believe any attempt to do so could be successfully challenged in our view simply on the basis that he does not have the statutory jurisdiction to take such action.

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54 There may also be constitutional limitations to applying the PCSA to a provincial winding-up process.

Federal PBSA

There is nothing in the Federal *Pension Benefits Standards Act* (**Federal PBSA**) BSA that expressly imposes any stay on liquidating collateral when a wind-up is commenced. Nor is there anything that expressly gives the regulator the power to impose any such requirement. The federal Superintendent of Financial Institutions (the pension regulator) does have wide remedial powers of a general nature. Section 11 of the Federal PBSA provides that the Superintendent can give directions to plan administrators "or any person" in respect of a pension plan who is about to commit an act or pursue a course of conduct that is contrary to safe and sound financial or business practices. The Superintendent can direct the person to refrain from committing the act or to perform a remedial act. We do not believe that this general power would give the Superintendent jurisdiction to order a party to a Transaction with the trustee/administrator of the plan to refrain from terminating its agreement.55

> Superintendent's directions to administrators
>
> 11. (1) If, in the opinion of the Superintendent, an administrator, an employer or any person is, in respect of a pension plan, committing or about to commit an act, or pursuing or about to pursue any course of conduct, that is contrary to safe and sound financial or business practices, the Superintendent may direct the administrator, employer or other person to
>
> (a) cease or refrain from committing the act or pursuing the course of conduct; and
>
> (b) perform such acts as in the opinion of the Superintendent are necessary to remedy the situation.
>
> Directions in the case of non-compliance
>
> (2) If, in the opinion of the Superintendent, a pension plan does not comply with this Act or the regulations or is not being administered in accordance with this Act, the regulations or the plan, the Superintendent may direct the administrator, the employer or any person to
>
> (a) cease or refrain from committing the act or pursuing the course of conduct that constitutes the non-compliance; and
>
> (b) perform such acts as in the opinion of the Superintendent are necessary to remedy the situation.

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55 Given that the Superintendent of Financial Institutions is also the regulator that requires financial institutions to have robust termination and netting rights under such contracts, it would be surprising if it tried to undermine those same rights by attempting to use the section 11 power to prevent a third party institutions from exercising them.

> Opportunity for representations
>
> (3) Subject to subsection (4), no direction shall be issued under subsection (1) or (2) unless the Superintendent gives the administrator, employer or other person a reasonable opportunity to make written representations.
>
> Temporary direction
>
> (4) If, in the opinion of the Superintendent, the length of time required for representations to be made under subsection (3) might be prejudicial to the interests of the members, former members or any other persons entitled to pension benefits or refunds under the pension plan, the Superintendent may make a temporary direction with respect to the matters referred to in subsection (1) or (2) that has effect for a period of not more than fifteen days.
>
> Continued effect
>
> (5) A temporary direction under subsection (4) continues to have effect after the expiry of the fifteen day period referred to in that subsection if no representations are made to the Superintendent within that period or, if representations have been made, the Superintendent notifies the administrator, employer or other person that the Superintendent is not satisfied that there are sufficient grounds for revoking the direction.

If the Superintendent purported to have such a stay power with respect to the termination or set-off rights, section 13 of the PCSA might provide a basis upon which to challenge his action. As with Ontario PBA plans, there is uncertainty as to whether section 13 applies because of the fact that the Federal PBSA is not strictly an "insolvency" law.[56]

In any event, as noted above, we do not believe that the Superintendent has any power to prevent a party from exercising its contractual rights and we believe any attempt to do so could be successfully challenged in our view simply on the basis that he does not have the statutory jurisdiction to take such action.

Special Circumstances of CPPIB and PSPIB

Given the statutory immunity from insolvency proceedings, there are no insolvency laws currently in place that could interfere with the exercise of collateral enforcement rights. CPPIB and PSPIB cannot be subject to an insolvency type proceeding unless Parliament takes the very significant step of passing legislation.

4. ADDITIONAL QUALIFICATIONS

[56] Although unlike the Ontario case, there is no constitutional impediment to the PCSA taking priority over the provincial regime.

None.

5. MODIFICATIONS TO QUALIFICATIONS

Furthermore, the qualifications at paragraph 4 are deemed modified as follows.

The qualifications would not apply to CPPIB or PSPIB.

SCHEDULE 11
MUNICIPAL CORPORATIONS

Subject to the modifications and additions set out in this Schedule 11 (*Municipal Corporations*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Municipal Corporations. For the purposes of this Schedule 11 (*Municipal Corporations*), "**Municipal Corporations**" means municipalities governed by the *Municipal Act* (Ontario).

Except where the context otherwise requires, references in this Schedule to "paragraph" are to paragraphs in the opinion letter (but not to its Annexes or Schedules) and references to "sections" are to sections of this Schedule.

1. MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS

None.

2. ADDITIONAL ASSUMPTIONS

None.

3. MODIFICATIONS TO OPINIONS

On the basis of the terms of reference and assumptions and subject to the qualifications (in each case set out in this opinion letter as modified, or added to, by this Schedule), we are of the following opinion.

Effect of OMB Restructuring on Power of Sale, Power of Appropriation and General Lien

An insolvent municipal corporation could be subject to the appointment or designation with respect to it, of the Ontario Municipal Board under Part III of the *Municipal Affairs Act* (Ontario) (**OMB Restructuring**). In an OMB Restructuring procedure, the Ontario Municipal Board (**OMB**) has certain specified powers. When a municipality becomes subject to Part III, notice is published of this fact in the Ontario Gazette. When that notice is published, it operates as a "stay of all actions or proceedings pending against the municipality and as a stay of execution, as the case may be, and thereafter, without leave of the OMB, no action or other proceedings against the municipality shall be commenced or continued... "[57] The stay ends when a compromise or plan is reached with creditors. A municipality might argue that this prevents action against Collateral or

[57] s.25(1).

the assertion of a lien. In our view this stay of "proceedings" is not wide enough to prevent such actions, although the matter is not free from doubt.

The Ministry and the OMB also have the power to make such orders from time to time as it considers necessary to carry out the provisions of Part III (s.43). While the matter is not free from doubt, we do not believe that any of these powers confers on the OMB or the Ministry the power to order a stay preventing the exercise of collateral enforcement rights.

Please note, however, that if the OMB did make such an order it may be difficult to challenge it. Section 42(1) states that the Ministry or OMB has exclusive jurisdiction as to all matters arising under Part III or out of the exercise by the municipality or any person of any of the powers conferred by it, and "such jurisdiction is not open to question or review in any action or proceeding or by any court". Also, any order made or approval given by the Ministry or OMB is final and conclusive and "not open to question in any court" (s.42(3)).

4. ADDITIONAL QUALIFICATIONS

None.

5. MODIFICATIONS TO QUALIFICATIONS

Furthermore, the qualifications at paragraph 4 are deemed modified as follows.

(a) We have not reviewed any legislation or regulation relating to any specific municipality. Some Municipal Corporations, like the City of Toronto, have unique legislation.

ANNEX 1
FORM OF FOA AGREEMENTS

1. Professional Client Agreement (2007 Version), including Module G (*Margin and Collateral*) (the "**Professional Client Agreement 2007**")

2. Professional Client Agreement (2009 Version), including Module G (*Margin and Collateral*) (the "**Professional Client Agreement 2009**")

3. Professional Client Agreement (2011 Version) including Module G (*Margin and Collateral*) (the "**Professional Client Agreement 2011**")

4. Retail Client Agreement (2007 Version) including Module G (*Margin and Collateral*) (the "**Retail Client Agreement 2007**")

5. Retail Client Agreement (2009 Version) including Module G (*Margin and Collateral*) (the "**Retail Client Agreement 2009**")

6. Retail Client Agreement (2011 Version) including Module G (*Margin and Collateral*) (the "**Retail Client Agreement 2011**")

7. Eligible Counterparty Agreement (2007 Version) including Module G (*Margin*) (the "**Eligible Counterparty Agreement 2007**")

8. Eligible Counterparty Agreement (2009 Version) including Module G (*Margin*) (the "**Eligible Counterparty Agreement 2009**")

9. Eligible Counterparty Agreement (2011 Version) including Module G (*Margin*) (the "**Eligible Counterparty Agreement 2011**")

For the avoidance of doubt none of the forms of the Agreements listed at this Annex 1 include or incorporate the Title Transfer Securities and Physical Collateral Annex to the Netting Modules published by the Futures and Options Association.

Where the form of any Agreement listed in this Annex 1 (as published by the Futures and Options Association) (the "**FOA Published Form Agreement**") expressly contemplates the election of certain variables and alternatives, the Agreements listed above shall be deemed to include any such document in respect of which the parties have made such expressly contemplated elections (and have made any deletions required by such elections, where such deletions are expressly contemplated in the event of such election by the applicable FOA Published Form Agreement).

Each of the Agreements listed in this Annex 1 may be deemed to include Agreements identical to the relevant FOA Published Form Agreement, save for the substitution of Two Way Clauses in place of the equivalent terms in the FOA Published Form Agreement.

ANNEX 2
DEFINED TERMS RELATING TO THE AGREEMENTS

1. The "**Eligible Counterparty Agreements**" means each of the Eligible Counterparty Agreement 2007, the Eligible Counterparty Agreement 2009 and the Eligible Counterparty Agreement 2011 (each as listed and defined at Annex 1).

2. The "**Professional Client Agreements**" means each of the Professional Client Agreement 2007, the Professional Client Agreement 2009 and the Professional Client Agreement 2011 (each as listed and defined at Annex 1).

3. The "**Retail Client Agreements**" means each of the Retail Client Agreement 2007, the Retail Client Agreement 2009 and the Retail Client Agreement 2011 (each as listed and defined at Annex 1).

4. An "**Equivalent 2011 Agreement without Core Rehypothecation Clause**" means an Equivalent Agreement in the form of the Eligible Counterparty Agreement 2011, Retail Client Agreement 2011 or Professional Client Agreement 2011 but which does not contain the Rehypothecation Clause.

5. "**Core Provisions**" means:

   (a) with respect to all Equivalent Agreements, the Security Interest Provisions; and

   (b) with respect to Equivalent Agreements that are in the form of the Eligible Counterparty Agreement 2011, Retail Client Agreement 2011 or Professional Client Agreement 2011 (but not with respect to an Equivalent 2011 Agreement without Core Rehypothecation Clause), the Rehypothecation Clause.

6. "**Rehypothecation Clause**" means:

   (i) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.13 (***Rehypothecation***);

   (ii) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.15 (***Rehypothecation***);

   (iii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.13 (***Rehypothecation***); and

(iv) in the case of an Equivalent Agreement, a clause that is identically the same in form and language as a clause referred to in any of the foregoing paragraphs (i) to (iii) of this definition (except insofar as variations may be required for internal cross-referencing purposes);

7. "**Security Interest Provisions**" means:

(a) the "**Security Interest Clause**", being:

(i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.6 (***Security interest***);

(ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.6 (***Security interest***);

(iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.7 (***Security interest***);

(iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.8 (***Security interest***);

(v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.8 (***Security interest***);

(vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.9 (***Security interest***);

(vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.6 (***Security interest***);

(viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.6 (***Security interest***);

(ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.7 (***Security interest***); and

(x) in the case of an Equivalent Agreement, a clause that is identically the same in form and language as a clause referred to in any of the foregoing paragraphs (i) to (ix) of this definition (except insofar as variations may be required for internal cross-referencing purposes);

(b) the "**Power to Charge Clause**", being:

(i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.10 (***Power to charge***);

(ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.10 (***Power to charge***);

(iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.10 (***Power to charge***);

(iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.12 (***Power to charge***);

(v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.12 (***Power to charge***);

(vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.12 (***Power to charge***);

(vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.10 (***Power to charge***);

(viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.10 (***Power to charge***);

(ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.10 (***Power to charge***); and

(x) in the case of an Equivalent Agreement, a clause that is identically the same in form and language as a clause referred to in any of the foregoing paragraphs (i) to (ix) of this definition (except insofar as variations may be required for internal cross-referencing purposes);

(c) the "**Power of Sale Clause**", being:

(i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.11 (***Power of sale***);

(ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.11 (***Power of sale***);

(iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.11 (***Power of sale***);

(iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.13 (***Power of sale***);

(v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.13 (***Power of sale***);

(vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.13 (***Power of sale***);

(vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.11 (***Power of sale***);

(viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.11 (***Power of sale***);

(ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.11 (***Power of sale***); and

(x) in relation to an Equivalent Agreement, a clause that is identically the same in form and language as the clauses referred to in any of the foregoing paragraphs (i) to (ix) of this definition (except insofar as variations may be required for internal cross-referencing purposes);

(d) the "**Power of Appropriation Clause**", being:

(i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.12 (***Power of appropriation***);

(ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.12 (***Power of appropriation***);

(iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.12 (***Power of appropriation***);

(iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.14 (***Power of appropriation***);

(v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.14 (***Power of appropriation***);

(vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.14 (***Power of appropriation***);

(vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.13 (***Power of appropriation***)

(viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.13 (***Power of appropriation***);

(ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.12 (***Power of appropriation***); and

(x) in the case of an Equivalent Agreement, a clause that is identically the same in form and language as a clause referred to in any of the foregoing paragraphs (i) to (ix) of this definition (except insofar as variations may be required for internal cross-referencing purposes);

(e) the "**Lien Clause**", being:

(i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.13 (***General lien***);

(ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.13 (***General lien***);

(iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.14 (***General lien***);

(iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.15 (***General lien***);

(v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.15 (***General lien***);

(vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.16 (***General lien***);

(vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.12 (***General lien***);

(viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.12 (***General lien***);

(ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.14 (***General lien***); and

(x) in the case of an Equivalent Agreement, a clause that is identically the same in form and language as a clause referred to in any of the foregoing paragraphs (i) to (ix) of this definition (except insofar as variations may be required for internal cross-referencing purposes); and

(f) the "**Client Money Additional Security Clause**", being:

(i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 7.8 (***Additional security***) at module F Option 4 (where incorporated into such Agreement);

(ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 7.9 (***Additional security***) at module F Option 1 (where incorporated into such Agreement);

(iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 7.9 (***Additional security***) at module F Option 1 (where incorporated into such Agreement);

(iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 7.8 (***Additional security***) at module F Option 4 (where incorporated into such Agreement);

(v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 7.9 (***Additional security***) at module F Option 1 (where incorporated into such Agreement);

(vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 7.9 (***Additional security***) at module F Option 1 (where incorporated into such Agreement);

(vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 6.8 (***Additional security***) at module F Option 4 (where incorporated into such Agreement);

(viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 6.9 (***Additional security***) at module F Option 1 (where incorporated into such Agreement);

(ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 6.9 (***Additional security***) at module F Option 1 (where incorporated into such Agreement); and

(x) in the case of an Equivalent Agreement, a clause that is identically the same in form and language as the clauses referred to in any of the foregoing paragraphs (i) to (ix) of this definition (except insofar as variations may be required for internal cross-referencing purposes).

8. "**Two Way Clauses**" means each of the Futures and Options Association's Short-Form Two-Way Clauses 2007, the Short-Form Two-Way Clauses 2009, the Short-Form Two-Way Clauses 2011, the Long-Form Two-Way Clauses 2007, the Long-Form Two-Way Clauses 2009 and the Long-Form Two-Way Clauses 2011.

ANNEX 3
NON-MATERIAL AMENDMENTS

1. Any change to the numbering or order of a provision or provisions or the drafting style thereof (e.g., addressing the other party as "you", "Counterparty", "Party A/Party B") provided in each case that the plain English sense and legal effect both of each such provision and of the Agreement as a whole (including the integrity of any cross references and usage of defined terms) remains unchanged.

2. Any change to a provision or provisions by defining certain key terms (e.g., party, exchange, currency, defaulting party or non-defaulting party) and using these terms in large caps throughout the Agreement provided in each case that the plain English sense and legal effect both of each such provision and of the Agreement as a whole (including the integrity of any cross references and usage of defined terms) remains unchanged.

3. An addition to the list of events that constitute an Event of Default (e.g. without limitation, the failure to deliver securities or other assets, a force majeure, cross default or downgrading event the death or incapacity of a Party or its general partner any default under a specified transaction or a specified master agreement), such change may or may not be coupled with a grace period or the serving of a written notice on the Defaulting Party by the Non-Defaulting Party, such change may be expressed to apply to one only of the Parties.

4. Any change to an Insolvency Event of Default (i) introducing a grace period for the filing of a petition for bankruptcy proceedings (of e.g. 15 or 30 days), (ii) modifying or deleting any such grace period, (iii) requiring that the filing of the petition is not frivolous, vexatious or otherwise unwarranted or (iv) that the non-defaulting party has reasonable grounds to conclude that the performance by the defaulting party of its obligations under the Agreement, Transactions, or both, is endangered.

5. Any change to an Insolvency Event of Default more particularly describing (i) the relevant procedures that would or would not constitute such event of default or termination event (ii) the relevant officers the appointment of which would or would not constitute such Insolvency Event of Default.

6. Any change to an Insolvency Event of Default extending its scope to events occurring with respect to the credit support provider, an affiliate, a custodian or trustee of a Party.

7. Any change to an Insolvency Event of Default replacing such event of default with a provision aligned to Section 5(a)(vii) of the 1992 or 2002 ISDA Master Agreement (or relevant part thereof).

8. Any change to the Agreement requiring the Non-defaulting Party when exercising its rights under the Security Interest Provisions (or other provisions) or making determinations to act in good faith and/or a commercially reasonable manner.

9. Any change clarifying that the Non-defaulting Party must, or may not, notify the other party of its exercise of rights under the Security Interest Provisions or other provision.

ANNEX 4
List of Transactions

The following groups of Transactions may be entered into under the Agreements:

(A) (Futures and options and other transactions) Transactions as defined in the Agreements itemised at Annex 1:

(i) a contract made on an exchange or pursuant to the rules of an exchange;

(ii) a contract subject to the rules of an exchange; or

(iii) a contract which would (but in terms of maturity only) be a contract made on, or subject to the rules of, an exchange and which, at the appropriate time, is to be submitted for clearing as a contract made on, or subject to the rules of, an exchange,

in any of cases (i), (ii) and (iii) being a future, option, contract for difference, spot or forward contract of any kind in relation to any commodity, metal, financial instrument (including any security), currency, interest rate, index or any combination thereof; or

(iv) a transaction which is back-to-back with any transaction with any transaction within paragraph (i), (ii) or (iii) of this definition, or

(v) any other Transaction which the parties agree to be a Transaction;

(B) (fixed income securities) Transactions relating to a fixed income security or under which delivery of a fixed income security is contemplated upon its formation;

(C) (equities) Transactions relating to an equity or under which delivery of an equity is contemplated upon its formation;

(D) (commodities) Transactions relating to, or under the terms of which delivery is contemplated, of any base metal, precious metal or agricultural product.

Annex 5
APPLICATION OF INSOLVENCY REGIMES

	BIA	WURA	CCAA	CDIC Act	Provincial Receiver	BIA Receiver	Corp.plan
Banks	X	√	X	√	Unclear but very unlikely	X	X
Corporations (other than Insurance Companies, Financial Institutions, Pension Funds)	√	Not if CBCA; Others theoretically possible but not likely	√	X	√	√	√
Partnerships	√	X	Only corporate general partners	X	√	√	Only corporate general partners
Insurance Companies– Canadian or Provincial	X	√	X	X	Unclear but very unlikely	X	X
Financial Institutions that are trust/loan/savings corporations	X	√	If federal X; if prov. unclear but not likely	If federal √; Not presently if prov.	Unclear but very unlikely	X	X
Financial Institutions that are Cooperative Credit Associations	√	√ (possibly if non-CPA members)	Unclear but not likely if CPA members; possibly if not CPA members	X	Unclear but not likely if CPA members; possibly if not CPA members	√	Depends on governing legislation
Individuals	√	√ (consumer proposals in certain cases)	X	X	X	X	X

Investment Funds that are Income Trusts*	√	X	√	X	√	√	X
Investment Funds that are trusts or Private Trusts (other than Income Trusts or Pension Plans)	Unclear	X	Unclear	X	√	√	X
Sovereign Entities	X	X	X	X	X	X	X
Charitable Corporations	√	theoretically possible but not likely	√	X	√	√	X
Pension Entities if CPPIB, PSPIB	X	X	X	X	X	X	X
Pension Entities (not CPPIB, PSPIB)[58]	Unclear but not likely	X	X	X	√	√	X
Municipal Corporations[59]	√	X	√	X	X	X	X

* publicly traded.

58 As noted in the memorandum, pension plan trusts are likely to be wound up by the trustee either voluntarily or under the supervision of the regulator.

59 Subject to unique OMB Restructuring Process

Annex 6
Insolvency Proceeding Stays

	Likelihood of Stay on Realization of Collateral	Length of Stay on Realization of Collateral (without statutory exemption)	Likelihood of Stay on Set-off	Statutory Exemption for Financial Collateral for Eligible Financial Contracts
BIA Bankruptcy	Unlikely for securities or cash collateral	Up to 6 months	No stay likely	Yes
BIA Proposal	Automatic stay	Up to 6 months plus possibility that plan may stay permanently (subject to new default) or otherwise compromise rights	No stay likely	Yes
WURA	Unlikely for securities or cash collateral	Up to 6 months (may be longer in restructuring proceedings)	No stay	Yes, subject to bridge institution provisions if preceded by CDIC Act receivership proceeding
CCAA	Automatic stay	No limit; plus possibility that plan or court order may stay permanently (subject to new default) or otherwise compromise rights	No stay (temporary only)	Yes
CDIC	Automatic stay	No limit; if proceeding is a liquidation, Superintendent may realize on secured party's behalf	Automatic stay	Yes, but subject to the bridge bank provisions
Receivership	Unlikely	No limit	Unlikely	No, unless PCSA applies
Corporate Plan	Unlikely	No limit	Unlikely	No
Voluntary Wind-up	No stay	N/A	No stay	No
Windup by pension regulator	No stay	N/A	No stay	No unless PCSA applies

Annex 7

Eligible Financial Contract

The concept of an EFC is relevant to the statutory safe-harbours from automatic or court ordered stays in the BIA Proposal provisions, the WURA, the CCAA and the PCSA.[60] Consequently we will begin with an analysis of this term. Each of the aforementioned Acts provides that an "eligible financial contract" is defined by the regulations to the Act. The regulations to each of the Acts are identical in terms of the definition. The definition is framed in general terms and includes a wide range of non-exclusive underlying interests (defined non-exclusively). An "eligible financial contract" is:

(a) a derivatives agreement, whether settled by payment or delivery, that

(i) trades on a futures or options exchange or board, or other regulated market, or

(ii) is the subject of recurrent dealings in the derivatives markets or in the over-the-counter securities or commodities markets;

(b) an agreement to

(i) borrow or lend securities or commodities, including an agreement to transfer securities or commodities under which the borrower may repay the loan with other securities or commodities, cash or cash equivalents,

(ii) clear or settle securities, futures, options or derivatives transactions, or

(iii) act as a depository for securities;

(c) a repurchase, reverse repurchase or buy-sellback agreement with respect to securities or commodities;

(d) a margin loan in so far as it is in respect of a securities account or futures account maintained by a financial intermediary;

(e) any combination of agreements referred to in any of paragraphs (a) to (d);

(f) a master agreement in so far as it is in respect of an agreement referred to in any of paragraphs (a) to (e);

(g) a master agreement in so far as it is in respect of a master agreement referred to in paragraph (f);

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[60] Also in the CDIC Act which is relevant to Financial Institutions considered in Schedule 1.

(h) a guarantee of, or an indemnity or reimbursement obligation with respect to, the liabilities under an agreement referred to in any of paragraphs (a) to (g); and

(i) an agreement relating to financial collateral, including any form of security or security interest in collateral and a title transfer credit support agreement, with respect to an agreement referred to in any of paragraphs (a) to (h).

...

A "derivatives agreement" is:

> ... a financial agreement whose obligations are derived from, referenced to, or based on, one or more underlying reference items such as interest rates, indices, currencies, commodities, securities or other ownership interests, credit or guarantee obligations, debt securities, climatic variables, bandwidth, freight rates, emission rights, real property indices and inflation or other macroeconomic data and includes
>
> (a) a contract for differences or a swap, including a total return swap, price return swap, default swap or basis swap;
>
> (b) a futures agreement;
>
> (c) a cap, collar, floor or spread;
>
> (d) an option; and
>
> (e) a spot or forward.

For the purpose of the margin loan category, the definition of "financial intermediary" is:

> (a) a clearing agency; or
>
> (b) a person, including a broker, bank or trust company, that in the ordinary course of business maintains securities accounts or futures accounts for others.

General Criteria Relevant to all Transactions

Subject of Recurrent Dealings. A general element of the definition of "derivatives agreement" is that the agreement must be "the subject of recurrent dealings in the derivatives markets or in the over-the-counter securities or commodities markets". Any futures contract or option on futures with sufficient liquidity to trade over an organized futures market should meet this criterion. This is not by its terms restricted to Canadian markets and we believe that it would not be interpreted to refer only to Canadian markets. As to other Transactions that do not trade over an

exchange, if the Transaction was sufficiently unique or very new to the global market it may not be covered by the definition of a derivatives agreement.

Financial Agreement. The definition of "derivative agreement" encompasses the concept of a "financial" agreement. We believe that the intention of the definition is not to require evidence in individual cases that transactions have a "financial" element in the particular context if the transaction is one of the listed types of contracts, such as a swap, future, option, spot or forward, and if it relates to an underlying interest that is specifically listed. In other words, such contracts should be, by definition, "financial" agreements. This approach to the definition meets the purpose of the legislation, which is to provide certain and express protection for termination, netting and collateral enforcement rights for the types of contracts that are the subject of recurrent dealings in derivatives, futures, securities, financing and commodities markets.

If this interpretation is not correct, then we believe that any Transactions that provide for cash settlement or Transactions that involve an element of financial risk management or speculation would be found to be "financial" agreements. Also, if the analysis of the Ontario Court of Appeal in *Re Androscoggin Energy LLC*[61] is applied, the presence of termination and netting rights such as the Netting Provision is itself a key indication of the financial nature of the contract. (See following note re Physical Commodity Transactions.)

Physical Commodity Transactions

What is a Commodity? In interpreting the former definition of EFC[62], the Alberta Court of Appeal in *Re Blue Range Resource Corporation* defined a "commodity" as a product that was interchangeable and readily identifiable as a fungible commodity, capable of being traded on a futures exchange or as the underlying asset of an over-the-counter derivative transaction. The product must trade in a volatile market, with a sufficient trading volume to ensure a competitive trading price, in order that the transaction may be marked to market and its value determined. Presumably any commodity trading on a futures market would be a commodity within the meaning of the definition. With respect to other Transactions involving commodities, our conclusion that Transactions listed in Annex 2 are EFCs is, with respect to any Transaction involving a "commodity," based on the assumption that the commodity in issue would meet these criteria.

Physical Commodity Contracts Generally. In *Blue Range,* the Alberta Court of Appeal held that physically settled gas transactions are commodity contracts within the meaning of this definition; it was considering forward

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61 (2005), 8 C.B.R. (5th) 11.

62 The definition of eligible financial contract that applied to commodity transactions until the most recent change to the definition of eligible financial contract was "a spot, future, forward or other commodity contract and any master agreement in respect of any such contract".

contracts at a fixed price. The Ontario Court of Appeal in *Re Androscoggin Energy LLC* agreed that physical gas contracts could be EFCs, but put a gloss on the definition by also stating that the contract had to have a "financial purpose". It found that the "hallmark" of a financial purpose, and, consequently, an EFC, is the presence of termination and netting rights. Because there was no master agreement in that case, the court found that the contracts were not EFCs. While the existence of termination and netting rights is a hallmark of an EFC, it may not be determinative in a particular case.

This need for a financial purpose was reaffirmed by the Alberta Court of Queen's Bench in *Re Calpine Canada Energy Limited*[63], where the court held that a right of refusal to obtain unspecified quantities of gas from a particular field at a spot price (a call on production agreement) was not an EFC. A typical Transaction would be easily distinguishable from the Calpine type of agreement. Therefore, physical commodity Transactions documented subject to an Agreement should generally satisfy the statutory criteria.

However, the analysis applied in these cases and which may still apply given the presence of the word "financial" as part of the definition of a "derivative agreement" suggests that while physical contracts are covered, they may not be covered if they do not also have an element of risk management or price speculation.

"Forward" contracts and "spot" contracts are not defined in the legislation. An agreement for the forward sale of a commodity at a price which is the market spot price at the time of the sale, might not be a "forward". In the *Blue Range* decision, the court included as one of the key elements of a forward contract that the price be a defined price or be determined by a pricing mechanism that would provide for a certain price. While the market price at the date of delivery may be a price that is determined by a pricing mechanism, given that the court referred to the marking to market of the forward contracts, it is likely that court meant a price other than the market spot price at the time of the delivery. Also, the inclusion of the word "financial", might also suggest that a physical commodity transaction must have a price risk management or price speculation element to it in order to enjoy the protection of the EFC safe-harbour.

Arguably such an interpretation is consistent with the policy underlying the exemption. The purpose of the EFC exemption is, in part, to allow termination of transactions that manage or redistribute financial risk (which, in the case of commodity contracts, is essentially price risk) in order to facilitate the replacement of the contract with a similar hedging contract with a solvent

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63 The definition of eligible financial contract that applied to commodity transactions until the most recent change to the definition was "a spot, future, forward or other commodity contract and any master agreement in respect of any such contract".

entity. Consequently, price risk allocation is likely an essential element of a forward.

There are, however, arguments to support the position that such a physical commodity transaction is an EFC even if it does not involve an element of price risk management or allocation.

- As noted above, one reading of the definition is that forward and spot contracts are by definition financial agreements since they are specifically listed. In that case, the need to show a price risk management or allocation element should only arise for the types of contracts that are not determined to be a spot or forward (or other listed type of contract).
- Spot contracts are specifically mentioned and they do not (unless they are rolling spots) have a price risk management element. As a result, a position can be taken that contracts for the forward sale of a commodity at a "spot" price are intended to be EFCs.
- Financial institutions, such as banks, and their commodity marketing subsidiaries are important participants in these commodity markets for liquidity purposes. It is the financial nature of the market generally that should as a policy matter drive the interpretation of the provision, not the purpose of the individual parties to the Transaction.
- On the Ontario court's analysis in *Androscoggin*, the presence of the Netting Provision in the Agreement should lead to the conclusion that such Transactions and Agreement are "financial" agreements and, consequently, EFCs.
- A restructuring of the insolvent entity is not put in jeopardy if the transaction is terminated because supply can always be purchased for the same price on the spot market if the commodity is liquid and fungible.

Consequently, we believe that there is a solid basis for the view that if the OTC Transaction is a commodity contract it should be encompassed in the definition without requiring that the specific Transaction meet any additional criterion of having a price risk management or allocation element to it.

Annex 8

Deemed Trusts, Liens, Security Interests and other priority charges

Special Liens and Priorities

The laws of this jurisdiction also provide for a number of statutory super priority liens or deemed trusts that can take priority over perfected consensual security interests regardless of the law governing consensual security interests. Successful assertion of these liens can result in impediments to enforcing security interests or reversal of enforcement action. These include such debts as employee income tax remittances, Canada Pension Plan contributions, contributions to the Employment Insurance Plan, statutory vacation pay claims, employer contributions to employee pension plans, and sales tax remittances. They may take priority over certain types of collateral only and may apply only in certain circumstances. Priority also may depend on whether or not there is a bankruptcy proceeding.[64] This is a very complex area of law that cannot be adequately addressed in the context of an opinion such as this. Many of these types of super-priorities should not attach to Cash Margin.[65]

However, a prior ranking security interest might, in certain circumstances, attach to Cash Margin, where the Defaulting Party owes Canadian Revenue Agency (the Canadian federal taxing authority) with respect to amounts it did or should have withheld at source. This security interest is provided for under the *Income Tax Act* (Canada).[66] A recent decision of the Supreme Court of Canada held that the Crown's claim for income tax and employment insurance remittance arrears arising prior to the date of the exercise of the set-off right took priority over a credit institution's right to set-off loan obligations against its own term deposit liability to the borrower.[67]

The BIA also includes a secured priority charge for employee wage claims of up to $2000 per employee that can take priority over any other secured creditors.

Provincially created special liens and charges are generally subordinated in federal bankruptcy proceedings under the BIA. In restructuring proceedings generally the order of priorities that would prevail in bankruptcy is adhered to (to avoid legal arbitrage among the different types of proceedings). However, there are some provincial liens and charges that could prevail over

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64 Certain Crown claims have priority outside of bankruptcy, but not if the debtor becomes bankrupt under the BIA or WURA.

65 On the other hand, assignments of receivables as collateral are clearly subordinate to Crown claims for employee income tax remittances, Canada Pension Plan and Unemployment Insurance contributions and in certain cases Goods & Services Tax on the sale of the goods or services that gave rise to the receivable.

66 Section 227(4.1)

67 *Caisse Desjardins de l'Est du Drummond v. Canada*, 2009 SCC 29 (S.C.C.)

certain secured creditors. For example, the provincial lien and deemed trust over the assets of an employer for the amount of the unfunded liabilities in certain types of pension plans may prevail over cash collateral arrangements. A recent decision of the Ontario Court of Appeal held that this provincial lien extended to all unfunded liabilities in provincially regulated defined benefit pension plans (not just for funding payments actually due at the time but which would have been payable over time).[68] An appeal has been heard by the Supreme Court of Canada[69], but no decision has been rendered yet. Parties may want to determine if their counterparties have such plans for their employees and if so consult with counsel to understand the risks.

Court ordered Liens in Restructuring Proceedings

Debtor in Possession Financing Under the CCAA and BIA Proposals. In a CCAA or BIA Proposal proceeding the court has the statutory jurisdiction to authorize a security interest or a charge in favour of the debtor-in-possession financier and to order that this security interest or charge has priority over the security interest of any other secured party.[70] A similar jurisdiction to grant a priority charge is available with respect to (i) credit granted by critical suppliers to the debtor, (ii) indemnities in favour of directors and officers who continue to service the debtor company after the filing, and (iii) fees and expenses of the monitor and experts (such as lawyers and financial experts) engaged by the monitor, the debtor or any other interested person[71] for the purpose of the proceedings under the Act. Affected secured creditors are entitled to prior notice of any application requesting such a charge on the assets of the debtor.

Similar provisions apply in BIA proposal proceedings.[72]

However, there are applicable exemptions to these priorities. Both the BIA and CCAA provide that no order can be made under the Act that has the effect of subordinating "financial collateral" for an "eligible financial contract."[73]

Therefore, to the extent that the Transactions are EFCs and the Collateral is financial collateral, these court ordered priority security interests will not apply. Otherwise they will, unless the court specifically exempts them.

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68 *Re Indalex*, 2011 ONCA 265.

69 December 1, 2011.

70 Previously courts granted such orders based on their inherent jurisdiction.

71 Where engaged by a person other than the debtor or the monitor the court must be satisfied that the security or charge is necessary for their effective participation in the proceedings.

72 Although the BIA does not expressly provide for a charge for critical suppliers.

73 S.C. 2007, c. 29; see CCAA, s.34(11); BIA, s. 88.