

## SUGGESTED AMENDMENTS

### Bankruptcy and Insolvency Act

The underlined words are our suggested language:

#### **BIA section 65.1 (7), (8) and (9)**

65.1 (1) If a notice of intention or a proposal has been filed in respect of an insolvent person, no person may terminate or amend any agreement, including a security agreement, with the insolvent person, or claim an accelerated payment, or a forfeiture of the term, under any agreement, including a security agreement, with the insolvent person, by reason only that

(a) the insolvent person is insolvent; or

(b) a notice of intention or a proposal has been filed in respect of the insolvent person.

(7) Subsection (1) does not apply and no order to the contrary may be made under this Act<sup>1</sup>

(a) in respect of an eligible financial contract; or

(b) to prevent a member of the Canadian Payments Association established by the *Canadian Payments Act* from ceasing to act as a clearing agent or a group clearer for an insolvent person in accordance with that Act and the by-laws and rules of that Association.

(8) In subsections (7) and (9),

“eligible financial contract” means

(a) a currency, cross-currency or interest rate swap, option, future, forward or spot agreement

(b) a basis swap agreement;

(c) a spot, future, forward or other foreign exchange agreement;

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<sup>1</sup> With courts in BIA proposals now making orders similar to those in the CCAA it is necessary to make it clear that the court cannot make such an order. Also, once the protections are extended to collateral, it becomes necessary to ensure they apply to the stays that are possible in a bankruptcy proceeding as well.

- (d) a cap, collar or floor transaction,
- (e) a forward rate agreement;
- (f) a commodity or commodity index swap,
- (g) a spot, option, future, forward or other commodity contract;
- (h) a spot, future, forward or other precious metals agreement;
- (i) an equity or debt security derivative, including a swap, a total return swap, an index swap, an option, an index option, a future, or a forward agreement;
- (j) a credit derivative, including a credit default, credit basket default, credit spread or total return swap, option, future or forward agreement;
- (k) a weather, bandwidth, freight, inflation, energy (including electricity) or carbon emissions swap, derivative or option;
- (l) a securities or commodities repurchase or reverse repurchase agreement;
- (m) an agreement to buy, sell, borrow or lend securities or commodities, to clear or settle securities or commodities transactions or to act as a depository for securities;
- (n) a margin loan;
- (o) any master agreement or general terms and conditions<sup>2</sup> in respect of any agreement or contract referred to in paragraphs (a) to (n) and (q) to (t);
- (p) any master agreement or general terms and conditions in respect of a master agreement or general terms and conditions referred to in paragraph (o),
- (q) any agreement similar to an agreement or contract referred to in this subsection;

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<sup>2</sup> Certain industry agreements are referred to as general terms and conditions as opposed to “master” agreements, but they have the same effect in that they contain the termination and netting provisions applicable to all transactions. Eg. Gas EDI agreement.

- (r) any agreement of a kind prescribed;<sup>3</sup>
- (s) any swap, contract for differences, forward, cap, collar, floor, or other derivative, or any combination or option in respect of an agreement or contract referred to in this paragraph and paragraphs (a) to (r);
- (t) any collateral arrangement or any other credit enhancement related to any agreements or transactions referred to in paragraphs (a) to (s), including any guarantee, indemnity or reimbursement obligation to the extent that it applies to obligations under any agreements or transactions referred to in paragraphs (a) to (s);

“cash” means money credited to an account in any currency or a similar claim for repayment of money, such as a money market deposit;

“collateral” means (i) cash, (ii) securities of any kind, including (without limitation) debt and equity securities, any securities account or other securities entitlement, and rights to acquire securities (including by subscription, purchase or exchange), or (iii) any futures agreement or futures account.

“collateral arrangement” means a title transfer collateral arrangement or a security interest collateral arrangement;

“net termination value” means the net amount obtained after netting or setting off the mutual payment or delivery obligations or entitlements between the parties to an eligible financial contract in accordance with its provisions, including the application of the proceeds of sale of any collateral or the setting off or application of the value of collateral against such obligations;

“security interest collateral arrangement” means an agreement under which a collateral provider provides collateral by way of security in favour of, or to, a collateral taker, and where the ownership of or an equity of redemption in the collateral remains with the collateral provider when the security right is

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<sup>3</sup> Changed the order of this in the list because if transactions are added by regulation, then it would be necessary to ensure that the master agreement definition and the derivative, combination or option would apply as well, without having to specify this in the regulation itself.

established, [where the collateral has been delivered, transferred, held, registered or otherwise designated so as to be in the possession or under the control of the collateral taker or of a person acting on the collateral taker's behalf]<sup>4</sup>, and any right of substitution or to withdraw excess collateral in favour of the collateral provider shall not prejudice the collateral having been provided to the collateral taker;

"title transfer collateral arrangement" means an arrangement, under which a collateral provider transfers title to or ownership of collateral to a collateral taker for the purpose of securing or otherwise covering the performance of obligations;

#### **Application of paragraphs 69(1)(a) and 69.1(1)(a)**

(9) For greater certainty, where an eligible financial contract entered into before the filing in respect of an insolvent person of

(a) a notice of intention, or

(b) a proposal, where no notice of intention was filed,

is terminated on or after that filing, the netting or setting off of obligations between the insolvent person and the other parties to the eligible financial contract, and the sale, foreclosure, setting off or application of the value of collateral, in accordance with its provisions, shall be permitted, and if net termination values determined in accordance with the eligible financial contract are owed by the insolvent person to another party to the eligible financial contract, that other party shall be deemed, for the purposes of paragraphs 69(1)(a) and 69.1(1)(a), to be a creditor of the insolvent person with a claim provable in bankruptcy in respect of those net termination values.

#### (9.1) An eligible financial contract,

(a) is an eligible financial contract notwithstanding that it may contain provisions relating to contracts, agreements or transactions that are not eligible financial contracts, but it is an eligible financial contract only with respect to those contracts,

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<sup>4</sup> We believe that it is not necessary to include the language in square brackets because priority rules will ensure that secured parties take these actions in any event. It would be best not to introduce the need to interpret possession and control where those concepts may not be used in the relevant jurisdictions in or outside of Canada.

agreements or transactions that fall within the definition of eligible financial contract;

(b) that is an eligible financial contract under paragraphs (8)(o) and (p) is a single agreement with respect to all eligible financial contracts subject to the agreement;

(c) is an eligible financial contract notwithstanding that the purpose of entering into the transaction may not be either wholly or partly financial.

[(9.2) Subsection 9.1(c) does not apply to a commodity forward or option unless the terminating party is obligated under the terms of the contract or otherwise to pay to the insolvent person the value of the insolvent person's position under the contract, as such value is calculated under the terms of the contract or in the absence of such terms under applicable legal principles, if the lack of such an obligation is wholly or partly because the terminating party is a non-defaulting party.]

### **Statutory Priorities in BIA**

A collateral arrangement as defined in section 65.1(8) should be exempt from any statutory priority under the BIA to make it clear that the party can apply the full proceeds of realization or the value of the collateral to the obligations. This will require the following amendments:

- Section 50.6(2) [added by Bill C-55] is amended by repealing it and replacing it with the following:

(2) The court may specify in the order that the security or charge ranks in priority over the claim of any secured creditor of the debtor, other than a secured creditor under a collateral arrangement within the meaning of subsection 65.1(8).
- Similar amendments to be made to section 64.1(2) re directors' charges, section 64.2(2) re costs of the proceeding, section 81.3(4) re employee claims, and sections 81.5(2) and 81.6(2) re pension plan contributions.
- It would be helpful to have a provision similar to section 11.04 of the CCAA in the BIA proposal provisions.

## Credit Preference Issues

These amendments are designed to ensure that substitute and top up collateral are not subject to a presumption that they are preferential simply on the basis that the credit support is transferred during periods shortly before the commencement of a BIA proceeding. Consequently in order to void a transfer of collateral made during the three month period before bankruptcy

- A new subsection should be added before 95(2.1) to require proof of an intent to prefer on the part of the collateral taker.

Subsection (2) does not apply in respect of a margin deposit made by a clearing member with a clearing house or the provision of collateral under a collateral arrangement within the meaning of section 65.1(8) unless the collateral taker is proven to have had knowledge that the insolvent person intended to give the collateral taker a preference over the other creditors.

- Subsection 95(2.1) of the BIA should be amended to remove the presumption of an intent to prefer as follows:

Subsection (2) does not apply in respect of a margin deposit made by a clearing member with a clearing house or the provision of collateral under a collateral arrangement within the meaning of section 65.1(8).

- Section 97(1) should be amended by adding a paragraph (e):

(e) the provision of collateral pursuant to a collateral arrangement within the meaning of section 65.1(8) where the collateral arrangement was entered into prior to the initial bankruptcy event.

## Companies' Creditors Arrangement Act

- Section 11.05 (1) should be amended to read as follows:

11.05(1) No order may be made under section 11 or section 11.02 staying or restraining the exercise of any right to terminate, amend, claim any accelerated payment, or a forfeiture of the term, under an eligible financial contract.

- Section 11.05(2) should be amended to read as follows:

11.05(2) For greater certainty, if an eligible financial contract entered into before an order is made under section 11 or section 11.02 is terminated on or after the date of the order, the netting or setting off of payment or delivery obligations or entitlements between the company and the other parties to the eligible financial contract and the sale, foreclosure, setting off or application of the value of collateral, in accordance with its provisions, is permitted and, if net termination values determined in accordance with the eligible financial contract are owed by the company to another party to the eligible financial contract, that other party is deemed to be a creditor of the company with a claim against the company in respect of the net termination values.

- Section 11.05(3) [as in Bill C-55] should be amended to be identical to the amendments to the BIA, section 65.1(8)
- New subsection should be added similar to those proposed above for the BIA adding certainty as to the interpretation of what is an eligible financial contract

11.05(4) An eligible financial contract,

- (a) is an eligible financial contract notwithstanding that it may contain provisions relating to contracts, agreements or transactions that are not eligible financial contracts, but it is an eligible financial contract only with respect to those contracts, agreements or transactions that fall within the definition of eligible financial contract;
- (b) that is an eligible financial contract under paragraphs (3)(o) and (p) is a single agreement with respect to all eligible financial contracts subject to the agreement;

(c) is an eligible financial contract notwithstanding that the purpose of entering into the transaction may not be either wholly or partly financial.

[(5) Paragraph (4)(c) does not apply to a commodity forward or option unless the terminating party is obligated under the terms of the contract or otherwise to pay to the insolvent person the value of the insolvent person's position under the contract, as such value is calculated under the terms of the contract or in the absence of such terms under applicable legal principles, if the lack of such an obligation is wholly or partly because the terminating party is a non-defaulting party.]

- Section 34(4) to be amended by adding a subsection (7)

Subsection (1) does not apply in respect of (a) an eligible financial contract; or (b) to prevent a member of the Canada Payments Association established by the *Canadian Payments Act* from ceasing to act as a clearing agent or group clearer for an insolvency person in accordance with that Act and the by-laws and rules of that Association.

## **Priorities**

- Section 11.2(3) regarding debtor-in-possession financing security is amended by repealing it and replacing it with the following:

(2) The court may specify in the order that the security or charge ranks in priority over the claim of any secured creditor of the company, other than a secured creditor under a collateral arrangement within the meaning of subsection 11.05(3).
- A similar amendment to sections 11.4(4) re supplier charges, 11.51(2) re directors' charges.
- We assume that there is no similar power with respect to section 11.52 re costs of the proceeding and consequently no similar amendment is required.