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VIA COURIER AND EMAIL

March 21, 2006

Mr. Eric Dagenais
Industry Canada
235 Queen Street
West Tower, 5th floor
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K1A 0H5

Dear Eric:

Re: Amendments to the Bankruptcy and Insolvency Act (BIA), Companies' Creditors Arrangement Act (CCAA)

Thank you again to your group for meeting with us on February 23. We very much appreciated the level of preparation and the obvious thought given to your questions and comments.

Policy Considerations

When we met we discussed with you whether including additional protections for eligible financial contracts, particularly in the context of a restructuring proceeding such as a BIA proposal or CCAA, would have an adverse effect on the insolvent company's ability to restructure. Because these are points we did not specifically address in our previous letter, we thought we would take this opportunity to set them out in writing.

Providing this protection would not be likely to compromise a restructuring. Stays on collateral generally serve the following purposes. They maintain the status

quo in order to (1) give the debtor time to develop a restructuring plan, (2) they allow the liquidator time to value the collateral in order to decide whether to redeem it, and (3) they allow the liquidator time to sort out competing priorities. None of these purposes is particularly relevant in the context of derivatives and securities financing transactions for the following reasons:

- The protection can be restricted to *financial collateral* that has been delivered into the ownership, control or possession of the collateral taker. It is therefore not a question of allowing realization against assets that are used in the debtor's day to day operations. They are not, in a sense, strategic assets. It has very little effect on the status quo to allow a collateral taker to actual sell, foreclose or set-off against assets which it was already in control of.
- In the case of securities financing and derivatives transactions, the collateral has a readily determined market value so there is no need to provide the trustee with the opportunity to value and redeem.
- There are unlikely to be priority disputes with respect to this type of collateral. There are special priority rules applicable to securities collateral that ensure the secured creditor who has taken control or possession has a first priority interest. The Ontario *Business Corporations Act* provides that a good faith purchaser of securities takes free of all adverse claims (including, we believe, statutory liens and deemed trusts) and the PPSA ensures priority over other secured creditors when possession is taken of the securities. As the Securities Transfer Act is enacted across Canada the risk of such disputes will be reduced even further.

Ultimately the effect on an individual debtor should not be the driving policy consideration. The overriding policy consideration should be the ability of Canadians to participate in global financial markets and protection against the systemic risks in those markets. In any event, as the above hopefully demonstrates, the potentially adverse effects on any individual debtor should not be significant.

Draft Language

At our meeting you invited us to provide you with some proposed wording for the expansion of the definition of eligible financial contract in both the BIA and CCAA. Our suggested wording is attached. We have revised the list to add new types of derivatives transactions. Also added are margin loans for the reasons set out in our earlier letter. The existing list is also somewhat confusing in that it lists certain transactions as separate transactions that are really just variations of other transactions. We've tried to make it more accurate. We also suggest amending the wording of the basket clause to provide more clarity as to when a transaction will be considered similar to the listed transactions. Our proposed language brings it more in line with the list in the U.S. legislation.

We also note that since we met, the Alberta Court of Queen's Bench has considered another case regarding the application of the eligible financial contracts exemption to physical gas contracts (*Calpine*). Again this case is of concern because it compromises the relatively bright line test set out in *Blue Range* with a form of judicial discretion to assess the "fairness" of treating the contract as an eligible financial contract. Such an approach creates an unacceptable level of uncertainty in the market regarding the treatment of any physical commodity contracts. If the underlying interest is truly a commodity and a spot market is available to the debtor (as buyer or seller), then the contract is by definition a financial contract. If it is a commodity, then supply is available to a debtor that needs the commodity and a market is available to the debtor that needs to sell the commodity. This is what differentiates commodities from other inputs or products and it is the basis of the exemption. There is obviously a judicial reluctance to accept this, but it is in fact the reality of commodity markets.

Our draft language addresses this issue by making it clear that a contract is an efc even if it has a purpose other than a purely financial purpose. There may be a policy basis to restrict the protection in the case of physical commodity contracts to those situations where the contract would pay the insolvent party the mark to market value of the contract (eg no walk away clause). We have included some optional language in this regard, but we note that taking this option would result in lesser protection for commodity contracts than is provided under U.S. legislation.

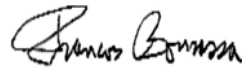
We have also taken the liberty of drafting language that would provide the required protection for collateral arrangements in terms of protection from stays. Our recommendation is to provide the protection by including collateral arrangements in the list of eligible financial contracts. We have suggested restricting the protection to "financial collateral" delivered into the control or possession of the secured party.

Also included are suggested amendments to deal with statutory priorities and automatic presumptions that preferences are intended.

We had previously sent you a copy of the ISDA 2002 Model Netting Act. ISDA has recently published for comment a new form of Model Netting Act. We have attached a draft.

We would be pleased to provide any further assistance at your request. Feel free to contact our counsel, Margaret Grottenthaler, mgrottenthaler@stikeman.com - (416) 869-5686.

Yours truly,



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