Message

From: Milligan, Peter [PMilligan@osler.com]
Sent: 2017-11-25 3:26:39 PM
To: Peter Hamilton [PHamilton@stikeman.com]; Saulnier, Brett [bsaulnier@torys.com]; Glenn Zacher [GZacher@stikeman.com]; Michael Boll [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=4811917e15054407b665fe16d12ff415-Michael Bol]; Anthony Martinello [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3fb7d76317b34780b15d96309b995c31-Anthony Mar]; Jeannette Briggs [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=148095610f7242f48a5a9da24b1a8a87-Jeannette B]; Kim Marshall [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=b63a22b42bf14587870d93119a054d88-Kim Marshal]
CC: Feldman, Michael [mfeldman@torys.com]; Ramchandani, Rima [rramchandani@torys.com]; 'leslie.wong@opg.com' [leslie.wong@opg.com]; dup-john.s.lee@opg.com [john.s.lee@opg.com]; 'ken.ryfa@opg.com' [ken.ryfa@opg.com]; Sebastiano, Rocco [RSebastiano@osler.com]; Fullerton, Rick [RFullerton@osler.com]; Mansoori, Nina [nmansoori@torys.com]; LAURETA LAPIRA May -TREASURY [may.lapira@opg.com]; LADAK Lubna -TREASURY [lubna.ladak@opg.com]; 'matthew.go@opg.com' [matthew.go@opg.com]
Subject: RE: Fair Hydro -- Revised MTSA and Acknowledgement & Indemnity
Attachments: Compare IESO Indemnity (Nov 17 v Nov 25).PDF; Compare MTSA (Nov 23 v Nov 25).PDF; Master Transfer and Servicing Agreement (Osler) - Nov 25.DOCX; Acknowledgement and Indemnity Agreement - Nov 25 (Osler).DOC

All,

Attached are revised drafts of the MTSA and the IESO Acknowledgement and Indemnity Agreement. Also attached is a comparison of the MTSA to the draft circulated by Peter Hamilton on November 23 and a comparison of the IESO Acknowledgement and Indemnity Agreement to the draft circulated by Osler on November 17. These drafts have not been reviewed by the dealers or by Torys/OPG and are delivered subject to any comments they may have.

Generally, we have conformed the indemnity to the indemnity being provided by OPG to the Specified Creditors in the Management Agreement. The OPG indemnity covers the breach by OPG of its obligations under the Management Agreement and other Program Agreements.

The requirements for an Implementation Plan from OPG (in the management agreement) and the IESO (in the MTSA) are drafted in substantively identical fashion. There are indications from a rating agency that it would be preferable to have the implementation plan in place at the time of issuance. As that did not seem possible to the dealers we have drafted it as a plan to make a plan.

With respect to the specific comments below, I note the following (the number of the response corresponding to the number of the comment):

1. All of the funds for this transaction are being provided by the Specified Creditors (primarily, noteholders). Fair Hydro Trust is a special purpose entity without substance. The Specified Creditors (acting through the Indenture Trustee) seek a direct remedy against the IESO for breach of its obligations without regard to the relationship between the IESO and Fair Hydro Trust. The Specified Creditors are relying on the IESO to perform its obligations.
2. No comment required.
3. While the Specified Creditors have the benefit of the indemnity, we agree that the rights of the Specified Creditors under the indemnity will be enforced through the Indenture Trustee with the Specified Creditors only having rights to enforce where the Indenture Trustee fails to take action despite instructions, funding and the appropriate indemnity from Specified Creditors. We see this as a typical trust indenture provision. Provisions to this effect are now included in the Acknowledgement and Indemnity Agreement.
4. Our position is that the specified creditors should obtain full recovery of their losses in accordance with the indemnity without regard to the status of any losses suffered by Fair Hydro Trust for which the IESO may also be liable.

5. On the indemnity, our position is that the Specified Creditors are not claiming through Fair Hydro Trust. The indemnity as a direct obligation from the IESO in favour of the Specified Creditors to indemnify the Specified Creditors for any losses they suffer as a result of a breach by the IESO.

Let me know if you need further clarification of our positions.

Thanks,

Peter Milligan
Osler

From: Peter Hamilton [mailto:PHamilton@stikeman.com]
Sent: Thursday, November 23, 2017 11:24 AM
To: Saulnier, Brett <bsaulnier@torys.com>; Glenn Zacher <GZacher@stikeman.com>; Michael Boll <Michael.Boll@ieso.ca>; Anthony Martinello (Anthony.Martinello@ieso.ca) <Anthony.Martinello@ieso.ca>; Jeannette Briggs (jeannette.briggs@ieso.ca) <jeannette.briggs@ieso.ca>; kim.marshall@ieso.ca
Cc: Feldman, Michael <mfeldman@torys.com>; Ramchandani, Rima <rramchandani@torys.com>; 'leslie.wong@opg.com' <leslie.wong@opg.com>; dup-john.s.lee@opg.com <john.s.lee@opg.com>; 'ken.ryfa@opg.com' <ken.ryfa@opg.com>; Sebastiano, Rocco <RSebastiano@osler.com>; Milligan, Peter <PMilligan@osler.com>; Fullerton, Rick <RFullerton@osler.com>; Mansoori, Nina <nmansoori@torys.com>; LAURETA LAPIRA May -TREASURY <may.lapira@opg.com>; LADAK Lubna -TREASURY <lubna.ladak@opg.com>; 'matthew.go@opg.com' <matthew.go@opg.com>
Subject: RE: Fair Hydro -- Revised MTSA and Acknowledgement & Indemnity

Please see attached a revised draft of the MTSA. This draft incorporates with only minor changes the Torys comments sent on Friday, the Oslers comments and the DBRS comments communicated last night by Torys.

The DBRS comments on the draft security agreement are all fine.

On the indemnity, we made a number of comments none of which were accepted in the Oslers mark-up.

In our mark-up were had tried to reflect the following principles:

1. The IESO contract is with the Issuer, and in the event of breach the IESO's primary liability ought to be to the issuer.
2. Recognizing the institutional relationship between the IESO and the Issuer, it is not unreasonable that the Indenture Trustee have the right to enforce the contract directly in circumstances where the Issuer fails to do so (even though such a direct right is often not a feature of a securitization).
3. Conferring a direct cause of action on the indenture trustee, in its capacity as such, is sufficient to address the procedural issues of the finance parties and it is not necessary or appropriate to create multiple causes of action in favour of an open ended class of potential claimants, none of whom are party to the contract.
4. No double recovery. Indemnification of the Issuer in full against all of its losses resulting from an IESO breach should satisfy in full any other claim
5. Providing for a direct cause of action in favour of a person or persons not party to the MTSA should not expand the IESO's contractual liability under the MTSA. This is consistent with the position of the Indenture Trustee as an assignee of the Issuer's rights under the MTSA. Generally an assignee acquires no better or higher rights than the assignor. However, again in recognition of the institutional relationship between the IESO and the OPG, the IESO would agree not to assert against the indenture trustee personal defences which the IESO might have asserted as against the Indenture trustee.

Rather than us sending out a dueling draft, which would merely repeat the comments which Oslers did not accept, perhaps we might hear from the dealers which of these principles is unacceptable to them (and why).

If we cannot engage on that basis, I am open to suggestions as to how to proceed.

Peter Hamilton

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From: Saulnier, Brett [mailto:bsaulnier@torys.com]
Sent: Wednesday, November 22, 2017 8:39 PM
To: Glenn Zacher; Michael Boll; Anthony Martinello (Anthony.Martinello@ieso.ca); Jeannette Briggs (jeannette.briggs@ieso.ca); kim.marshall@ieso.ca; Peter Hamilton
Cc: Feldman, Michael; Ramchandani, Rima; 'leslie.wong@opg.com'; dup-john.s.lee@opg.com; 'ken.ryfa@opg.com'; Sebastiano, Rocco; Milligan, Peter; Fullerton, Rick; Mansoori, Nina; LAURETA LAPIRA May -TREASURY; LADAK Lubna - TREASURY; 'matthew.go@opg.com'
Subject: RE: Fair Hydro -- Revised MTSA and Acknowledgement & Indemnity

All,

Please find attached a revised MTSA and IESO Security Agreement reflecting comments provided by DBRS. I note that we are still awaiting comments from Moody's. The attached are being circulated to all parties concurrently and therefore remain subject to review by Osler and OPG.

Please also let us know when we should expect comments on the changes to the MTSA and Acknowledgement & Indemnity circulated on Friday (below). On the implementation plan, Osler provided the same comment on the management agreement and we think it would make the most sense for OPG/IESO to compare notes and come up with a joint implementation plan that both parties are comfortable with. Let us know if we can help facilitate that at all.

Thanks,
Brett

Brett Saulnier

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TORYS LLP

From: Saulnier, Brett
Sent: November-17-17 5:43 PM
To: Glenn Zacher <GZacher@stikeman.com>; Michael Boll <Michael.Boll@ieso.ca>; Anthony Martinello (Anthony.Martinello@ieso.ca) <Anthony.Martinello@ieso.ca>; Jeannette Briggs (jeannette.briggs@ieso.ca) <jeannette.briggs@ieso.ca>; kim.marshall@ieso.ca; Peter Hamilton <PHamilton@stikeman.com>
Cc: Feldman, Michael <mfeldman@torys.com>; Ramchandani, Rima <rramchandani@torys.com>; Saulnier, Brett <bsaulnier@torys.com>; 'leslie.wong@opg.com' <leslie.wong@opg.com>; 'dup-john.s.lee@opg.com' <john.s.lee@opg.com>; 'ken.ryfa@opg.com' <ken.ryfa@opg.com>; Sebastiano, Rocco <RSebastiano@osler.com>;

'Milligan, Peter' <PMilligan@osler.com>; Fullerton, Rick <RFullerton@osler.com>
Subject: Fair Hydro -- Revised MTSA and Acknowledgement & Indemnity

All,

Attached are revised drafts of the MTSA and indemnity to the indenture trustee, in clean and blackline reflecting comments from Osler. For background on the MTSA changes, Osler advised that the provisions added regarding implementation under the servicer duties were drafted based on the IESO presentation made to the rating agencies. The changes to the carrying costs provisions are to ensure that the financing entity has sufficient cash on hand in advance of the payments it's required to make with a mechanism to true up for over or under payment from time to time.

Please also note that we were advised that the rating agencies will be providing some feedback on the MTSA. As soon as we are in a position to share this we will let you know.

Thanks,
Brett

Brett Saulnier