Court File No. CV-16-11290-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

THE ATTORNEY GENERAL OF CANADA

Applicant

- and -

MAPLE BANK GmbH

Respondent

IN THE MATTER OF MAPLE BANK GmbH; AND IN THE MATTER OF THE *WINDING-UP AND RESTRUCTURING ACT*, R.S.C. 1985, C.W-11, AS AMENDED; AND IN THE MATTER OF *THE BANK ACT*, S.C. 1991, C.46, AS AMENDED

FACTUM OF THE LIQUIDATOR
(Amended and Restated Data Custodian Order and Fifth Interim Distribution Order)

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PART I - OVERVIEW

1. On February 16, 2016, the Ontario Superior Court of Justice (Commercial List) (the "**Court**") commenced the within proceedings (the "**Winding-up Proceedings**") by granting an order (the "**Winding-Up Order**") pursuant to section 10.1 of the *Winding-Up and Restructuring Act* R.S.C. 1985, C.W-11 (the "***WURA***"): (i) winding-up the business (the "**Business**") in Canada of Maple Bank GmbH ("**Maple Bank**"); and (ii) appointing KPMG Inc. (the "**Liquidator**") as the Liquidator of the Business and the assets (as defined in section 618 of the *Bank Act* S.C. 1991, c. 46) of Maple Bank in Canada (the "**Toronto Branch**").

2. More than eight years later, the Winding-up Proceedings are nearing their end. Over this time, the Liquidator has conducted a claims process and addressed substantially all claims against the estate of the Toronto Branch. The Liquidator has also obtained various relief regarding the management of the Toronto Branch's data, including the transfer of certain data by the Liquidator to the German insolvency administrator (the "**GIA**") for Maple Bank's estate in Germany (the "**German Estate**"). Only two discrete matters remain to be resolved, these being the quantification of a settlement agreement with the Canada Revenue Agency (the "**CRA**") and the custodianship and eventual destruction of certain records and data of Maple Bank and the Toronto Branch.

3. Accordingly, on this motion, the Liquidator seeks two orders:

(a) the Fifth Interim Distribution Order (as defined below), approving a reduction of the Liquidator's funds held in reserve and transfer of CCT Records (as defined below) to the GIA, as well as authorizing and directing the Liquidator to make a $5-million distribution to the GIA; and

(b) the Amended and Restated Data Custodian Order (or "ARDCO", as defined below), amending the Data Custodian Order (as defined below) to extend the Liquidator's appointment as custodian of certain data of the Toronto Branch Estate, authorize the Liquidator to receive a monthly administration fee for its services, and increasing the funds held in reserve therefor.

4. In short, and as further elaborated below, several factors support the granting of an order for the Fifth Interim Distribution Order and the ARDCO:

(a) as set out in the Seventeenth Report of the Liquidator, the estimated reserves as established by the Liquidator (the "**Estimated Reserve**") is adequate to cover all existing unresolved claims and any future potential claims that may be made against the Toronto Branch, if any;

(b) on account of the Estimated Reserve, the proposed distribution will not prejudice the interests of any of the creditors of the Toronto Branch;

(c) the Liquidator has received confirmation from the GIA that it does not intend to pursue any claims against the Principal Officer (as defined below), and as such the reserve held by the Liquidator in respect of such potential claims may be released;

(d) the CCT Counterparties (as defined below) have been given notice that the CCT Records will be transferred to the GIA, and none have advised that Liquidator that there are any concerns regarding the proposed transfer; and

(e) the ARDCO will ensure that the GIA is able to satisfy its retention obligations under German Law, while simultaneously keeping the Custodial Data (as defined below) in Canada and subject to the protections of Canadian privacy legislation.

5. The Liquidator therefore requests that this Court grant the Fifth Interim Distribution Order and the ARDCO.

PART II - FACTS

6. The facts pertinent to this Motion are more fully set out in the Seventeenth Report of the Liquidator dated November 8, 2024 (the "**Seventeenth Report**") Capitalized terms used and not otherwise defined have the same meanings as set out in the Seventeenth Report. Unless otherwise indicated, all references to monetary amounts herein are denominated in Canadian dollars (CAD).

A. Background

7. Maple Bank is a Canadian-owned German bank, and an Authorized Foreign Bank in Canada under section 2 and Part XII.1 of the *Bank Act*. In Germany, Maple Bank is subject to regulation by the Federal Financial Supervisory Authority. As an Authorized Foreign Bank, Maple

Bank was regulated with respect to its business in Canada, as operated through the Toronto Branch, by the Office of the Superintendent of Financial Institutions ("**OSFI**").[1]

8. In February of 2016, the emergence of, *inter alia*, significant German tax claims led to the appointment of the GIA over the German Estate. The appointment of the GIA and Maple Bank's increasingly tenuous financial position in Germany led OSFI to request that the Attorney General of Canada obtain the Winding-Up Order in respect of the Business and the Toronto Branch Assets.[2]

9. Recognizing that, despite Maple Bank's problems in Germany, the Toronto Branch likely had a strong balance sheet, and that in all likelihood there would be a significant surplus available to the GIA, the February 16, 2016 Winding-Up Order was crafted to ensure: (i) cooperation with the GIA, including with respect to its stated objective of obtaining a distribution as soon as practicable; while at the same time (ii) preserving important statutory protections designed at first instance to ringfence the Toronto Branch Assets for the benefit of the creditors of Toronto Branch.[3]

10. In addition, paragraphs 8(a) and 9(a) of the Winding-Up Order expressly directed the Liquidator to exercise its powers to provide the GIA with such information regarding the Toronto Branch as reasonably required in order to permit the GIA to fulfill its statutory obligations under German law. The Liquidator and GIA were ordered to consult and exchange information in respect of the Assets and Business of Maple Bank in Canada.[4]

B. The Claims Process

11. In accordance with the Claims Procedure Order granted June 8, 2016, and under the supervision of the Court, the Liquidator has realized upon substantially all of the assets of the Toronto Branch, run a claims process (the "**Claims Process**"), and paid all liabilities of the Toronto Branch. As detailed below, the Liquidator has also made four interim distributions to the German Estate via the GIA. The only substantive issues remaining in the Winding-up Proceedings are:

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[1] Seventeenth Report of the Liquidator dated November 8, 2024 ("**Seventeenth Report**"), para. 1, Motion Record ("**MR**"), Tab 2.
[2] Seventeenth Report, paras. 3-4, MR, Tab 2.
[3] Winding-up Order dated February 16, 2016 ("**Winding-up Order**"), Appendix "A" to the Seventeenth Report, MR, Tab 2.
[4] Winding-up Order, Appendix "A" to the Seventeenth Report, MR, Tab 2.

(a) The records of the Toronto Branch and Maple Securities Canada Limited ("**MSCL**"), which remain in the Liquidator's possession in connection with its existing role as Data Custodian (as defined below), and the length of time they must be stored prior to their destruction; and

(b) The quantification of a settlement agreement between the Liquidator and the CRA.[5]

C. Resolution of Claims and Estimated Reserve

a. Prior Distribution Orders

12. Between February 16, 2016, and July 31, 2021, and pursuant to, among other things, claims proven through the Claims Process, the Court granted four orders approving partial and interim distributions from the Toronto Branch estate in the aggregate amount of approximately $1.52 billion. Of this amount:

(a) About $780 million has been distributed to the German Estate via the GIA; and

(b) About $741 million has been distributed to proven creditors of the Toronto Branch.[6]

b. The CRA Claims and CRA Refund

13. The only unresolved claims arising from the Claims Process are those filed by the CRA in respect of unremitted corporate taxes and HST (the "**CRA Claims**"). The Liquidator worked extensively with the CRA and its counsel, the Department of Justice (the "**DOJ**"), to resolve the CRA Claims which efforts culminated in the Liquidator and the CRA entering into an omnibus settlement agreement (the "**CRA Settlement**").[7]

14. Following finalization of the CRA Settlement, the Liquidator and its tax advisor, Ernst & Young Inc., worked cooperatively with the CRA on various complex calculations to ensure that the CRA Settlement was applied correctly and appropriately in the circumstances.[8]

[5] Seventeenth Report, para. 11, MR, Tab 2.
[6] Seventeenth Report, para. 30, MR, Tab 2.
[7] Seventeenth Report, para. 20, MR, Tab 2.
[8] Seventeenth Report, para. 21, MR, Tab 2.

15. The CRA is in the process of recalculating the Toronto Branch's tax liability based on the provisions of the CRA Settlement, pursuant to which the Liquidator anticipates a significant refund owing by the CRA to the estate of the Toronto Branch (the "**CRA Refund**"). The quantum of the CRA Refund will likely exceed the quantum of the CRA Claims, in which case the CRA will be in a net payable position.[9]

c. Quantum of the Estimated Reserve

16. Pursuant to the Fourth Interim Distribution Order dated July 23, 2020, the Liquidator continues to maintain a reserve (the "**Estimated Reserve**") to fund the completion of the estate and protect any further claimants of the Toronto Branch while, at the same time, allowing for a further interim distribution of the Toronto Branch's estimated surplus to the GIA.

17. The Estimated Reserve presently consists of the following:

(a) A reserve of $5 million, in respect of the legal fees of the former Principal Officer in respect of certain litigation that may be initiated against the former Principal Officer, pursuant to the Principal Officers Additional Claims Order (the "**Principal Officer Reserve**");

(b) A reserve of $5 million, in respect of all amounts potentially owing to CRA, including amounts in connection with the Initial CRA Claims and the Amended CRA Claim (the "**CRA Reserve**");

(c) A reserve of $5 million, in respect of A reserve of $5 million, in respect of the fees and disbursements of the Liquidator and its counsel, in connection with the resolution of the Initial CRA Claims and the Amended CRA Claim and the completion of the liquidation of the Toronto Branch, and other unforeseen future costs to the Toronto Branch (the "**General Reserve**"); and

[9] Seventeenth Report, para. 22, MR, Tab 2.

(d) A reserve of $750,000, in respect of all costs associated with the Liquidator's role as Data Custodian pursuant to the Data Custodian Order, as subsequently amended (the "**Data Custodian Reserve**").[10]

D. Data-Related Matters

a. Data Custodian Order and Data Custodian Extension Order

18. On July 23, 2020, the Court issued an Order (the "**Data Custodian Order**"), authorizing and appointing the Liquidator as data custodian of certain data and records of Maple Bank and its affiliates (the "**Data Custodian**"). On August 26, 2021, the Court issued an Order (the "**Data Custodian Extension Order**") which among other things, extended the Liquidator's role as Data Custodian.[11]

19. Pursuant to the Data Custodian order and Data Custodian Extension Order, the Liquidator in its capacity as Data Custodian has:

(a) continued to exercise control over the Custodial Data (as defined in the Data Custodian Order);

(b) negotiated and entered into various contract renewals with Cloud Iland Internet Canada ULC (formerly SunGard Availability Services) ("**Cloud Iland**") with respect to the ongoing maintenance and storage of certain of the Custodial Data at the Sungard Facility (as defined in the Data Custodian Order);

(c) liaised with former IT personnel of the Toronto Branch with respect to monitoring and maintaining the SunGard Facility; and

(d) provided ad hoc status updates and reporting to the GIA with respect to the SunGard Facility and the Custodial Data.[12]

[10] Seventeenth Report, para. 60, MR, Tab 2.
[11] Data Custodian Order dated July 23, 2020, Appendix "E" to the Seventeenth Report, MR, Tab 2; Data Custodian Extension Order dated August 26, 2021, Appendix "F" to the Seventeenth Report, MR, Tab 2.
[12] Seventeenth Report, para. 16, MR, Tab 2.

20. Additionally, the Liquidator has had extensive discussions with the GIA regarding the Custodial Data (including the data of MSCL, the comingled data of affiliated entities, and the personal data of employees and customers) and the GIA's need for this data to continue to be stored. This included, among other things, consideration by the Liquidator of the duration and structure by which the data could continue to be stored under the control of the Data Custodian.[13]

21. The GIA remains of the view that it does not want to have any of the Custodial Data destroyed given its concerns that it may require access to some or all of the data in the future in order to fulfill its statutory requirements under German Law.[14]

b. Cum-Cum Transactions

22. The Liquidator is in possession of certain documents and records of MSCL, including certain documents relating to certain "cum-cum transactions" (each a "**CCT**"), being securities lending transactions between MSCL and the Toronto Branch and/or non-affiliated, external third parties (each such third party being a "**CCT Counterparty**") which transactions were executed between 2010 and 2015.[15]

23. The GIA has requested that the Liquidator provide to it the documents and records associated with 309 CCTs (the "**CCT Records**"). Accordingly, on October 10, 2024, the Liquidator delivered letters to the various CCT Counterparties outlining, among other things, that the Liquidator intended to bring a motion seeking Court approval to deliver the CCT Records to the GIA.[16]

24. To date, no CCT Counterparty has expressed concern regarding the relief sought in connection with the CCT Records.

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[13] Seventeenth Report, para. 17, MR, Tab 2.
[14] Seventeenth Report, para. 52, MR, Tab 2.
[15] Seventeenth Report, para. 39, MR, Tab 2; Letters to Cum-Cum Transaction Third-Party Counterparties dated October 10, 2024 ("**CCT Letters**"), Appendix "D" to the Seventeenth Report, MR, Tab 2.
[16] CCT Letters, Appendix "D" to the Seventeenth Report, MR, Tab 2.

PART III - ISSUES

25. The issues to be determined by the Court on this motion are whether it is appropriate for the Court to grant:

(a) An order (the "**Fifth Interim Distribution Order**"), among other things:

(1) authorizing and directing the Liquidator to make a partial distribution in the amount of $5 million to the GIA;

(2) approving a reduction of the Estimated Reserve; and

(3) approving the Liquidator's transfer of the CCT Records to the GIA; and

(b) An order (the Amended and Restated Data Custodian Order, or "**ARDCO**") amending the Data Custodian Order to, among other things:

(1) extend the appointment of the Liquidator as Data Custodian to conclude and be terminated on the earlier of, *inter alia*, three years from the date of the ARDCO;

(2) authorize and direct the Data Custodian to transfer the Custodial Data to a third-party storage facility in Canada; and

(3) increase the Data Custodian Reserve to $1,000,000; and

(4) authorize the Data Custodian to charge a monthly administration fee of $10,000.

PART IV - LAW

A. The Proposed Distribution and Reductions to Estimated Reserve are Appropriate

26. The underlying purpose of the *WURA* is to provide a mechanism for (i) the orderly gathering of and realization on the assets of a debtor as inexpensively and expeditiously as

possible, together with (ii) the corresponding distribution of the proceeds thereof by the Liquidator under the supervision of the Court.[17]

27. Sections 75 and 77 of the *WURA* provide a skeletal framework for the distribution in full or in part of the assets of a debtor by the Liquidator to the debtor's creditors.[18]

28. It is not a precondition to a distribution to creditors of a debtor under the *WURA* that: (i) all claims filed in the *WURA* proceeding at the date of the intended distribution be allowed or disallowed by the Liquidator; nor (ii) that there be complete certainty that all potential creditors have submitted proofs of claim at the date of the intended distribution. Consequently, there is authority for the granting of interim distributions in the context of *WURA* proceedings.[19]

29. Moreover, while Section 158.1(2) of *WURA* provides for a distribution scheme pursuant to which an Authorized Foreign Bank in liquidation in Canada may, with the approval of the Court, receive the winding-up surplus after all creditors with proven claims have received the full value of their proven claims and Statutory Interest (the "**Priority Amounts**"), the statutory provision does not act as a bar to an interim distribution. Section 158.1(2) is set out below:

> **Distribution of Property**
>
> 158.1 (1) Where a winding-up order is made in respect of an authorized foreign bank, claims shall be paid in the following order of priority:
>
> (a) charges, costs and expenses, including the remuneration of the liquidator, incurred in the winding-up of the business in Canada of the authorized foreign bank and of the liquidation of its assets;
>
> (b) claims of preferred creditors, specified in section 72; and
>
> (c) debts and liabilities of the authorized foreign bank in respect of its business in Canada in order of priority as set out in sections 625 and 627 of the *Bank Act*.
>
> **Distribution and release of surplus assets**

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[17] *Coopérants, Mutual Life Insurance Society (Liquidator of) v. Dubois*, [1996] 1 S.C.R. 900, at paras. 36-37; *Re Maple Bank GmbH*, 2017 ONSC 2536 (Commercial List) at para. 24 [***Maple Bank***].
[18] *Winding-up and Restructuring Act*, R.S.C., 1985, c.W-11 ("***WURA***") at ss. 75-77; *Maple Bank*, *supra*, at para. 25.
[19] *Maple Bank supra*, at paras. 26-27; *Canada (Attorney General) v. Confederation Life Insurance Co.*, (2002) 39 CBR (4th) 182 (Ont. S.C.J. [Commercial List]) at para. 4.

> (2) Any assets that remain after payment of the claims referred to in paragraphs (1)(a) to (c) are to be applied firstly in payment of interest from the commencement of the winding-up at the rate of five per cent per annum on all claims proved in the winding-up and according to their priority. The liquidator may, with the approval of the court, release to the authorized foreign bank any assets remaining after payment of the interest.[20]

30. The purpose of section 158.1(2) is to ensure that an Authorized Foreign Bank will only be entitled to a distribution where there are sufficient funds in the Canadian estate to satisfy the Priority Amounts. Section 158.1 is not a bar to an interim distribution of surplus to an Authorized Foreign Bank where sufficient reserves are established to ensure that all Priority Amounts will be paid in due course.[21]

31. In his endorsement in support of the First Interim Distribution Order granted November 18, 2016, Regional Senior Justice Morawetz (as he then was) identified two factors to be considered in determining whether an interim distribution is appropriate. These factors are:

(a) whether the proposed distribution is likely to be prejudicial to creditors of the estate; and

(b) whether the proposed distribution is equitable.

a. <u>No Prejudice to the Toronto Branch creditors</u>

32. Central to the granting of the First Interim Distribution Order was the finding that, by virtue of the Estimated Reserve maintained by the Liquidator, the creditors of the Toronto Branch would not suffer prejudice:

> I am satisfied that the Interim Distribution is appropriate in the context of these proceedings. I am satisfied that no creditors of the Toronto Branch will suffer prejudice as a result of the Interim Distribution, as the Toronto Branch has a significant surplus and the Liquidator has calculated that it will be able to maintain adequate reserves which will ultimately pay all Proven Claims and Future Potential Claims.[22]

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[20] ***WURA***, s. 158.1.
[21] ***Maple Bank***, *supra*, at paras. 29, 31, 37, and 38.
[22] ***Maple Bank***, *supra*, at paras. 34 and 37.

33. As stated above, the Liquidator has resolved all claims against the Toronto Branch estate except the CRA Claims, making the CRA the estate's only remaining creditor. However, there is no concern that the interim distribution sought on the within motion could be prejudicial to the CRA because:

(a) the quantum of the CRA Refund will likely exceed the quantum of the CRA Claims, in which case the CRA will not be a creditor of the Toronto Branch estate; and

(b) to the extent that, net of the CRA Refund, the CRA Claims exceed $0, any amount owing to the CRA can be paid out of the CRA Reserve.

34. Moreover, the Estimated Reserve is adequate to cover existing and future obligations related to the fees and distributions of the Liquidator and its counsel, as well as any costs incurred in respect of the Data Custodian's appointment.

35. Consequently, and in keeping with the approach, as endorsed by granting of the First Interim Distribution Order, the proposed Fifth Interim Distribution Order will not be prejudicial to the CRA as the remaining creditor of the Toronto Branch.

b. An Interim Distribution to the GIA is Equitable

36. Where the Court is satisfied that adequate reserves are posted, and no prejudice would result from an interim distribution, no principled basis exists to delay distribution of the surplus. Per Regional Senior Justice Morawetz on granting the First Interim Distribution Order:

> In these circumstances, there is no principled basis on which to delay the distribution of the surplus to the GIA, until such time as the Liquidator resolves all outstanding claims against the Toronto Branch. Indeed, it would be inequitable to delay the distribution.[23]

37. The proposed distribution will be, in essence, a transfer to another insolvency administrator for the benefit of the creditors of the German Estate.

38. In the context of cross-border insolvency proceedings, the Court has recognized, as a matter of policy, that where possible Canadian Courts should complement, coordinate, and accommodate

[23] *Maple Bank*, *supra*, at para. 35.

insolvency proceedings in foreign jurisdictions in order to preserve and maximize value for the benefit of all creditors.[24]

39. This approach is also consistent with the Court's previous interpretation of the cross-border provisions of insolvency legislation as promoting co-operation with foreign jurisdictions in cases of cross-border insolvencies. This statutory recognition follows the principles of international comity in respect of foreign insolvency proceedings.[25]

40. Lastly, the Court possesses broad authority to make orders that deal with entities in insolvency proceedings even where there is a lack of permissive statutory language and have all of the powers that are necessary to do justice between the parties. Except where expressly to the contrary, the Court's jurisdiction is unrestricted in substantive law in civil matters.[26]

41. The Fifth Interim Distribution Order is appropriate in the context of these proceedings because (i) no creditors of the Toronto Branch will suffer prejudice as a result of the proposed distribution, and (ii) the proposed distribution is in accordance with the recognized stated objective of the Court to, where possible, assist with and accommodate foreign insolvency proceedings in order to maximize value for all affected creditors.

c. The Estimated Reserve Should Be Reduced

42. Given that the purpose of the Estimated Reserve is to ensure that adequate funds are available for potential and unresolved claims against the Toronto Branch estate, a reduction to the Estimated Reserve is substantively similar to a distribution. Accordingly, the aforementioned factors of prejudice and equity are equally applicable to the Court's decision as to whether it is appropriate to reduce the Estimated Reserve.

43. First, the Liquidator seeks a release of the Principal Officer Reserve on that basis that, in accordance with the Principal Officers Additional Claims Order, the Principal Officer Reserve may be released upon the GIA's confirmation that it does not intend to take up any claims against the former Principal Officer, which confirmation has now been received. Notwithstanding the

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[24] *Re United Air Lines Inc.*, (2003) 43 CBR (4th) 284 (Ont. S.C.J. [Commercial List]) at para. 1; *Re Matlack Inc.*, (2001) 26 CBR (4th) 45 (Ont. S.C.J. [Commercial List]) at para. 3.
[25] *Re MtGox Co.*, 2014 ONSC 5811 (Commercial List) at paras. 10-12.
[26] *Maple Bank*, *supra*, at para. 36.

reserve release provision in the Principal Officers Additional Claims Order, there is no reasonable expectation that the Principal Officer will become a claimant in the Winding-up Proceedings by virtue of claims brought against him by the GIA.

44. Second, the Seventeenth Report indicates a reduction of the General Reserve in the amount of approximately $1.4 million. This accounts for the fees and disbursements of the Liquidator and its counsel, as well as the costs of the Toronto Branch. Accordingly, the General Reserve is not being reduced, but has been drawn down in accordance with its approved purpose.

45. In each case, there is no prejudice to the parties having an interest in the respective reserve, and there is no reason why the Estimated Reserve ought not be reduced in the manner proposed by the Liquidator.

B. The CCT Records Should Be Transferred to the GIA

46. The Liquidator is not aware of any party opposing the transfer of the CCT Records to the GIA. In any event, the Liquidator is not aware of any prejudice or privacy risk that will result from the proposed transfer.

47. Per the Supreme Court of Canada's decision in *143471 Canada Inc. v. Quebec (Attorney General); Tabah v. Quebec (Attorney General)*, business records do not generally attract privacy-related concerns:

> […] The expectation of privacy in business records is necessarily low. They do not ordinarily contain the type of personal information that lies at the heart of the constitutional protection of privacy. […][27]

48. The CCT Records are business records. They are physical documents consisting of trade tickets, dividend worksheets, system-generated reports, and related emails, and includes International Securities Identification Numbers, trade quantities, security description, transaction dates, and the identity of counterparties, including CCT Counterparties.[28]

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[27] *143471 Canada Inc. v. Quebec (Attorney General); Tabah v. Quebec (Attorney General)*, [1994] SCJ No 45 (QL) at para. 7.
[28] CCT Letters, Appendix "D" to the Seventeenth Report, MR, Tab 2.

49. In any event, the CCT Counterparties do not have a subjective expectation of privacy which would be compromised by the proposed transfer of the CCT Records. The GIA is already in possession of certain digital records associated with the CCTs. The proposed transfer of the CCT Records is effectively a re-possession by Maple Bank of its own data and the data of its wholly owned subsidiary.[29]

50. The GIA does not intend to share the CCT Records with any third party unless presented with (1) a *bona fide* request therefor or (2) a court order requiring disclosure. In either case, the GIA's disclosure of the CCT Records will be subject to the European Union's *General Data Protection Regulation*.[30]

C. <u>The Amendments in the ARDCO Do Not Engage Any Substantive Legal Issues</u>

51. The ARDCO is substantially identical to the Data Custodian Order, save for certain amendments that are intended to address the GIA's need to maintain the Custodial Data over the near term in accordance with their obligations under German Law.

52. The amendments sought in the ARDCO seek to, among other things:

(a) Extend the term of the Liquidator's appointment as Data Custodian;

(b) Authorize and direct the Data Custodian to transfer the Custodial Data to a third-party storage facility in Canada;

(c) Authorize the Data Custodian to charge a monthly administration fee in the amount of $10,000, exclusive of HST (the "**Administration Fee**"), and pay itself from the Data Custodian Reserve;

(d) Increase the amount of the Data Custodian Reserve from $750,000 to $1,000,000;

(e) Extend the Released Claims (as defined in the ARDCO) to cover the period between the date of the Data Custodian Order and the date of the ARDCO; and

[29] CCT Letters, Appendix "D" to the Seventeenth Report, MR, Tab 2.
[30] CCT Letters, Appendix "D" to the Seventeenth Report, MR, Tab 2.

(f) Add the Data Custodian, KPMG, and their respective counsel as Released Parties (as defined in the ARDCO).[31]

53. Therefore, the ARDCO does not engage any substantive legal issues. Most importantly:

(a) The ARDCO does not contemplate the transfer of the Custodial Data to a location outside of Canada, such that the Custodial Data shall at all times remain subject to the protections of Canadian privacy laws; and

(b) Notwithstanding the outstanding CRA Claim, which the Liquidator reasonably expects to be set off in its entirety by the CRA Refund, the GIA (as representative of the German Estate) is the sole remaining economic stakeholder of the Toronto Branch. The GIA has advised that it is amenable to both the Administration Fee and the increase to the Data Custodian Reserve.

PART V - RELIEF

54. For the reasons set out above, the Liquidator requests that the Court grant the relief requested in the Fifth Interim Distribution Order and the Amended and Restated Data Custodian Order substantially in the form of the draft Orders attached as Schedules "A" and "B" respectively to the Notice of Motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of November 2024.

Alex MacFarlane / Nick Hollard

Lawyers for KPMG Inc., in its capacity as Liquidator of the business in Canada of Maple Bank GmbH

[31] Seventeenth Report, para. 56, MR, Tab 2.

SCHEDULE "A"

1. *Coopérants, Mutual Life Insurance Society (Liquidator of) v. Dubois*, [1996] 1 S.C.R. 900

2. *Re Maple Bank GmbH*, 2017 ONSC 2536 (Commercial List)

3. *Canada (Attorney General) v. Confederation Life Insurance Co.*, (2002) 39 CBR (4th) 182 (Ont. S.C.J. [Commercial List])

4. *Re United Air Lines Inc.*, (2003) 43 CBR (4th) 284 (Ont. S.C.J. [Commercial List])

5. *Re Matlack Inc.*, (2001) 26 CBR (4th) 45 (Ont. S.C.J. [Commercial List])

6. *Re MtGox Co.*, 2014 ONSC 5811 (Commercial List)

7. *143471 Canada Inc. v. Quebec (Attorney General); Tabah v. Quebec (Attorney General)*, [1994] SCJ No 45 (QL)

SCHEDULE "B"

***Winding-up and Restructuring Act*, R.S.C. 1985, c W-11**

Winding-up Order

Cases where winding-up order may be made

10 A court may make a winding-up order in respect of a company

(a) where the period, if any, fixed for the duration of the company by the Act, charter or instrument of incorporation of the company has expired, or where an event, if any, has occurred, on the occurrence of which it is provided by the Act, charter or instrument of incorporation that the company is to be dissolved;

(b) if the company at a special meeting of shareholders — or, if the company is a federal credit union, at a special meeting of members or shareholders — called for the purpose has passed a resolution requiring the company to be wound up;

(c) when the company is insolvent;

(d) when the capital stock of the company is impaired to the extent of twenty-five per cent thereof, and when it is shown to the satisfaction of the court that the lost capital will not likely be restored within one year; or

(e) when the court is of opinion that for any other reason it is just and equitable that the company should be wound up.

Creditors required to prove claims

75 (1) The liquidator may give notice in writing to creditors who have sent in their claims to him or of whose claims he has notice, and to creditors whose claims he considers should not be allowed without proof, requiring them to attend before the court on a day to be named in the notice and prove their claims to the satisfaction of the court.

Disallowance on default

(2) Where a creditor does not attend in pursuance of the notice given under subsection (1), his claim shall be disallowed, unless the court sees fit to grant further time for the proof thereof.

Disallowance on hearing

(3) Where a creditor attends in pursuance of the notice given under subsection (1), the court may on hearing the matter allow or disallow the claim of that creditor in whole or in part.

Rank of claims sent in after distribution started

77 Where any claim or claims are sent in to the liquidator after any partial distribution of the assets of a company, the claim or claims, subject to proof and allowance as required by this Act, shall rank with other claims of creditors in any future distribution of assets of the company.

(…)

Distribution of Property

158.1 (1) Where a winding-up order is made in respect of an authorized foreign bank, claims shall be paid in the following order of priority:

(a) charges, costs and expenses, including the remuneration of the liquidator, incurred in the winding-up of the business in Canada of the authorized foreign bank and of the liquidation of its assets;

(b) claims of preferred creditors, specified in section 72; and

(c) debts and liabilities of the authorized foreign bank in respect of its business in Canada in order of priority as set out in sections 625 and 627 of the *Bank Act*.

Distribution and release of surplus assets

(2) Any assets that remain after payment of the claims referred to in paragraphs (1)(a) to (c) are to be applied firstly in payment of interest from the commencement of the winding-up at the rate of five per cent per annum on all claims proved in the winding-up and according to their priority. The liquidator may, with the approval of the court, release to the authorized foreign bank any assets remaining after payment of the interest.

***Bank Act* S.C. 1991, c. 46**

foreign bank, subject to section 12, means an entity incorporated or formed by or under the laws of a country other than Canada that

(a) is a bank according to the laws of any foreign country where it carries on business,

(b) carries on a business in any foreign country that, if carried on in Canada, would be, wholly or to a significant extent, the business of banking,

(c) engages, directly or indirectly, in the business of providing financial services and employs, to identify or describe its business, a name that includes the word “bank”, “banque”, “banking” or “bancaire”, either alone or in combination with other words, or any word or words in any language other than English or French corresponding generally thereto,

(d) engages in the business of lending money and accepting deposit liabilities transferable by cheque or other instrument,

(e) engages, directly or indirectly, in the business of providing financial services and is affiliated with another foreign bank,

(f) controls another foreign bank, or

(g) is a foreign institution, other than a foreign bank within the meaning of any of paragraphs (a) to (f), that controls a bank incorporated or formed under this Act,

but does not include a subsidiary of a bank named in Schedule I as that Schedule read immediately before the day section 184 of the Financial Consumer Agency of Canada Act comes into force, unless the Minister has specified that subsection 378(1) no longer applies to the bank; (banque étrangère)

Supervisory Intervention

Meaning of assets

618 For the purposes of sections 619 to 627, assets, in relation to an authorized foreign bank, means

(a) any asset in respect of its business in Canada, including the assets referred to in subsection 582(1) and section 617 and the assets under its administration; and

(b) any other asset in Canada of the authorized foreign bank.

Court File No. CV-16-11290-00CL

IN THE MATTER OF THE MAPLE BANK GMBH
AND IN THE MATTER OF THE *WINDING-UP AND RESTRUCTURING ACT,*R.S.C. 1985, C.W-11, AS AMENDED
AND IN THE MATTER OF THE *BANK ACT,* S.C. 1991, C.46, AS AMENDED

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDINGS COMMENCED AT TORONTO

FACTUM OF THE LIQUIDATOR
(Amended and Restated Data Custodian Order and Fifth Interim Distribution Order)

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