

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

MAPLE BANK GmbH

Respondent

APPLICANT'S FACTUM

APPLICANT'S FACTUM

PART I – THE APPLICATION

1. This is an Application brought by the Attorney General of Canada (“Attorney General”), at the request of the Superintendent of Financial Institutions (the “Superintendent”) made under section 621 of the *Bank Act*, S.C. 1991, c.46, as amended (the “*Bank Act*”) for:
 - (a) an order under section 10.1 of the *Winding-up and Restructuring Act*, R.S.C., 1985, c. W-11, as amended (the “*WURA*”) for the winding up of the business in Canada of the respondent Maple Bank, GmbH (“Maple Bank”) and for the liquidation of its assets as defined in section 618 of the *Bank Act*;
 - (b) in connection with such winding-up order, an order under section 23 of the *WURA* appointing KPMG Inc. (KPMG) as liquidator of the estate and effects of Maple Bank or, alternatively, provisionally appointing KPMG as liquidator under section 28 of the *WURA* and provisionally granting KPMG all of the powers of a liquidator pending further order of the Court, and providing directions under section 28 of the *WURA* regarding the manner, form and length of notice to be given in respect of the proposed final appointment of KPMG as liquidator;
 - (c) an order restraining further proceedings, in any action, suit or proceeding against Maple Bank, pursuant to Section 17 (and Section 154) of the *WURA*;
 - (d) an order that the time for service of the Notice of Application and the Application Record is hereby abridged and validated, including without limitation pursuant to section 12(2) of *WURA*, so that this Application is properly returnable today and hereby dispenses with further service thereof, including without limitation, the notice requirements of section 26 of *WURA*
 - (e) related relief in connection with the requested winding up order and appointment of a liquidator, as set out in the draft order attached to the Notice of Application.

Notice of Application, Application Record, Tab 1

PART II – STATEMENT OF FACTS

A. Overview

2. Maple Bank is a Canadian owned German bank, and is also an “authorized foreign bank” in Canada under section 2 and Part XII.1 of the *Bank Act*. As a German bank, Maple Bank is subject to regulation in Germany by the Federal Financial Supervisory Authority (“BaFin”). As an authorized foreign bank under the *Bank Act*, Maple Bank is regulated, with respect to its business in Canada, by the Office of the Superintendent of Financial Institutions (“OSFI”).

**Affidavit of Paul Lavery sworn February 15, 2016 (“Lavery Affidavit”),
paras 2-5, Application Record, Tab 2;**

The *Bank Act*, section 2 and Part XII.1 – Authorized Foreign Banks

3. As further outlined below, the recent emergence of significant German tax claims against Maple Bank (said to arise from alleged tax evasion in Germany) and resulting over indebtedness on the part of Maple Bank has led, in fairly short order, to Maple Bank admitting its insolvency, to BaFin issuing a “Moratorium” order essentially requiring Maple Bank to cease business and then instituting insolvency proceedings in Germany appointing an insolvency administrator, to various financial institutions issuing default notices and terminating agreements in respect of their dealings with Maple Bank’s business in Canada, and to the Superintendent issuing orders under section 619 of the *Bank Act* for taking control of the assets of Maple Bank in Canada and in respect of its business in Canada.

Lavery Affidavit, Application Record, Tab 2

4. The Superintendent has now asked the Attorney General of Canada, pursuant section 621 of the *Bank Act*, to seek a winding up order under section 10.1 of the *WURA* in respect of Maple Bank’s business in Canada. A winding up order and appointment a liquidator are now promptly needed in order to safeguard the integrity, fairness and efficacy of the necessary winding up of Maple Bank’s business in Canada, and particularly to protect creditors in respect of the business in Canada.

Laverty Affidavit, Application Record, Tab 2

B. Maple Bank in Canada

5. Since June 1999, as a result of amendments made at that time to the *Bank Act*, and concurrent amendments to the *WURA*, foreign banks have been allowed to apply for permission to establish branch operations in Canada, and, if permission is granted, to carry on business in Canada as authorized foreign banks, subject to any terms and conditions imposed and the provisions of those statutes.

**The *Bank Act*, Part XII.1 – Authorized Foreign Banks;
The *WURA*, Part II – Authorized Foreign Banks**

6. In February, 2001, Maple Bank received permission from the Secretary of State (International Financial Institutions) to establish a branch to carry on business in Canada as an authorized foreign bank under Part XII.1 and Schedule III of the *Bank Act*. Maple Bank then received authorization in April, 2001 to commence and carry on business in Canada as an authorized foreign bank through an order of the Superintendent known as an Order to Commence and Carry on Business. As a consequence, the business in Canada of Maple Bank is regulated by the Superintendent.

Laverty Affidavit, para 5, Application Record, Tab 2

7. Maple Bank's primary business activities in Canada are the securitization of mortgage receivables, fixed income trading, structured finance and securities finance. In addition, some wholesale deposits raised in Germany are booked on the Maple Bank's Canadian balance sheet.

Laverty Affidavit, para 6, Application Record, Tab 2

8. Under the terms of the order of the Superintendent referred to in paragraph 6 above, Maple Bank was not authorized to accept deposits from Canadian sources, but was not prohibited from accepting wholesale deposits from foreign institutional investors. Maple Bank currently holds about \$700 million CAD in wholesale deposits. Those deposits appear to be protected under the *German Deposit Guarantee Act* up to €100,000 per depositor, and may be subject to further protection, if they are eligible deposits under a Deposit Protection

Fund of the Association of German Banks, up to a limit of 20% of the Maple Bank's capital per depositor.

Lavery Affidavit, paras 7-8, Application Record, Tab 2

9. At December 31, 2015, Maple Bank's Canadian Branch reported total assets of \$5.3 billion and total liabilities of \$4.8 billion, of which \$563 million were wholesale deposits. At December 31, 2015, the Maple Bank had unencumbered assets on deposit with a Canadian financial institution totalling approximately \$469 million.

Lavery Affidavit, para 9, Application Record, Tab 2

C. Events leading to the Superintendent taking control of the assets of Maple Bank

10. In September 2015, German authorities commenced an investigation of Maple Bank for alleged tax evasion. As a result, Maple Bank was placed on OSFI's Watch List in December 2015. Maple Bank tried to reach a settlement with German authorities with respect to its tax liabilities, but German authorities turned down a settlement offer from Maple Bank in relation to its taxes owing.

Lavery Affidavit, para 10, Application Record, Tab 2

11. On February 6, 2016, Maple Bank's German Regulator, the Federal Financial Supervisory Authority ("BaFin") imposed a moratorium on Maple Bank's business activities, including its operations in Canada (the "Moratorium"), on the basis of over-indebtedness on Maple Bank's balance sheet taking into consideration German tax liabilities. The Moratorium placed a ban on disposals and payments for Maple Bank, ordered that Maple Bank be closed for business with customers, and prohibited the institution from receiving payments not intended for payment of debts towards it.

Lavery Affidavit, paras 11-13, Application Record, Tab 2

12. Maple Bank's principal officer of the Canadian branch, Mr. Paul Lishman, advised OSFI that Maple Bank's operations were severely constrained by the Moratorium. In the days immediately following imposition of the Moratorium, numerous financial institutions such

as Canadian Imperial Bank of Commerce, Royal Bank of Canada, Bank of Montreal, as well as CMHC, delivered default notices to Maple Bank and terminated their agreements with Maple Bank as a result of the Moratorium.

Laverty Affidavit, para 12, Application Record, Tab 2

13. During the period February 8 -9, 2016, OSFI advised Maple Bank of OSFI's intention to make, and then proceeded to make, variations to the Order to Commence and Carry on Business, under which Maple Bank had been operating in Canada, to add restrictions prohibiting Maple Bank, without the Superintendent's prior approval, from moving to a foreign jurisdiction any assets in Canada, and from transferring (except pursuant to existing employment contracts) any of its assets in Canada or in respect of its business in Canada if the value of the assets transferred exceeded \$25,000. OSFI's correspondence to Maple Bank referred to "OSFI's assessment that the Branch's overall financial viability is in serious doubt given the potential insolvency of Maple Bank GmbH Frankfurt." Maple Bank was given an opportunity to make representations regarding the proposed variations to the OSFI Order. Maple Bank advised that it was not making representations in that regard.

Laverty Affidavit, para 14, Application Record, Tab 2

14. On February 9, 2016, Maple Bank advised BaFin of its impending insolvency and gave its consent to BaFin to initiate liquidation proceedings in respect of Maple Bank in Germany. OSFI learned of this development on February 9, 2016. BaFin subsequently commenced insolvency proceedings in Germany in respect of Maple Bank on February 10, 2016.

Laverty Affidavit, para 16-18, Application Record, Tab 2

- D. **Temporary Control of Assets by the Superintendent under subsection 619(1)(a) of the *Bank Act***
15. In light of the actions taken by BaFin, and Maple Bank's admission of insolvency and consent to BaFin's insolvency proceedings, the Superintendent decided grounds existed under subsections 619(2)(a) and (g) of the *Bank Act* for the by the Superintendent to take control of Maple Bank's assets in Canada and assets in respect of its business in Canada,

and that such step was necessary to protect the depositors and creditors of Maple Bank in relation to its business in Canada. (References by OSFI to the objective of protecting depositors are intended to address circumstances prior to any impacts of any applicable deposit insurance).

Lavery Affidavit, para 19, Application Record, Tab 2

16. Accordingly, on February 10, 2016, the Superintendent took control of those assets of Maple Bank for a period not exceeding sixteen days pursuant to 619(1)(a) of the *Bank Act*, on the basis of the grounds set out in subsections 619(2)(a) and (g) of the *Bank Act*.

Lavery Affidavit, para 20 and Exhibit P, Application Record, Tab 2

E. The Appointment of a German Insolvency Administrator

17. On February 11, 2016, BaFin informed OSFI that, in the German insolvency proceedings, the German court had appointed an insolvency administrator of Maple Bank, and had assigned to the insolvency administrator the right of disposal of current and future assets of Maple Bank.

Lavery Affidavit, para 21 and Exhibit M, Application Record, Tab 2

F. Continued Control of the Assets by the Superintendent under subsection 619(1)(b) of the Bank Act

18. Having regard to all of the foregoing developments and circumstances, the Superintendent determined that it was reasonable to conclude that grounds existed for extending the Superintendent's control of the relevant assets of Maple Bank under subsection 619(1)(b) of the *Bank Act*. On February 12, 2016, the Superintendent provided notice to Maple Bank of his intention to continue the control of the assets beyond the initial sixteen day period pursuant to subsection 619(1)(b)(ii) of the *Bank Act*, based on the grounds set out in subsections 619(2)(a), (b) and (g). Those cited subsections provided:

“619(2) Control by the Superintendent under subsection (1) may be taken in respect of an authorized foreign bank where

- (a) *the authorized foreign bank has failed to pay its liabilities or, in the opinion of the Superintendent, will not be able to pay its liabilities as they become due and payable;*
- (b) *the authorized foreign bank in respect of its business in Canada has failed to pay its liabilities or, in the opinion of the Superintendent, will not be able to pay its liabilities as they become due and payable;*
- ...
- (g) *in the opinion of the Superintendent, any other state of affairs exists in respect of the authorized foreign bank that may be materially prejudicial to the interests of the authorized foreign bank's depositors or creditors in respect of its business in Canada... Including where proceedings under a law relating to bankruptcy or insolvency have been commenced in Canada or elsewhere in respect of the authorized foreign bank or its holding body corporate."*

Section 619(2) of the *Bank Act*

19. The Superintendent's notice of February 12, 2016 gave Maple Bank the opportunity to make written representations in respect of the Superintendent's proposed course of action (as contemplated by section 619(3) of the *Bank Act*), requiring in the circumstances that any representations be submitted by 9:00 AM on February 15, 2016.

Laverty Affidavit, para 23, Application Record, Tab 2

20. Since issuance of that notice, Canadian counsel for the German insolvency administrator has communicated with KPMG (who the Superintendent appointed on February 12, 2016 as the Superintendent's representative to assist in taking control of the relevant assets of Maple Bank). Canadian counsel for the German insolvency administrator first requested various information regarding Maple Bank's business in Canada. KPMG responded with the information it had available. Canadian counsel for the German insolvency administrator then requested an extension of the time fixed by the Superintendent for representations concerning his notice of February 12, 2016. The stated reason for the extension request was to seek additional information from KPMG, including information about depositors of the Canadian branch of Maple Bank. KPMG responded, providing some available financial information, and pointing out that the information sought with

respect to the depositors of the Canadian branch was already available to the German insolvency administrator.

Laverty Affidavit, para 24-25, Application Record, Tab 2

21. On the morning of February 15, 2016, Canadian counsel for the German insolvency administrator delivered written submissions to the Superintendent in respect of the Superintendent's Notice of February 12, 2016.

Laverty Affidavit, Exhibit "X", Application Record, Tab 2

22. Following careful consideration of those representations, the Superintendent decided later on February 15, 2016 to continue its control of assets pursuant to subsection 619(1)(b)(ii) of the *Bank Act* and to request, pursuant to section 621 of the *Bank Act*, that the Attorney General of Canada apply to the Ontario Superior Court of Justice for a winding up order in respect of Maple Bank's business in Canada under section 10.1 of the *WURA*.

Laverty Affidavit, para 29, Application Record, Tab 2

PART III – ISSUES

23. The principal issues on this Application are whether a winding up order should be made under the *WURA* in respect of Maple Bank's business in Canada and whether a Liquidator should accordingly be appointed with respect to Maple Bank's assets as defined in section 618 of the *Bank Act*.

PART IV - LAW

A. The statutory scheme relating to authorized foreign banks

24. The *Bank Act* and the *WURA*, together, provide a complete and comprehensive code governing the establishment, operation, regulation, supervisory intervention, and insolvency and liquidation of authorized foreign banks. This comprehensive statutory scheme governing authorized foreign banks was created through coordinated amendments introduced into both the *Bank Act* and the *WURA* in 1999.

**The *Bank Act*, Part XII.1 – Authorized Foreign Banks;
The *WURA*, Part II – Authorized Foreign Banks**

25. The intended comprehensiveness and exhaustiveness of the insolvency and liquidation related provisions of the *Bank Act* and the *WURA* in relation to authorized foreign banks is confirmed by the express exclusion of authorized foreign banks from other insolvency related statutes, such as the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, (the “*BIA*”) and the *Companies Creditor Arrangement Act* (the “*CCAA*”). Under the *BIA*, authorized foreign banks are expressly excluded from the definition of “corporation” in section 2, and therefore from the definitions of “person” and “bankrupt” in section 2. Under the *CCAA*, authorized foreign banks are expressly excluded from the definition of “company” in section 2.

**Section 2 of the *BIA*;
Section 2 of the *CCAA***

B. The principally relevant provisions of the *Bank Act* and their application

26. Section 2 of the *Bank Act* defines an “authorized foreign bank” to mean “a foreign bank that is the subject of an order under subsection 524(1).” Maple Bank was the subject of such an order permitting it to establish a branch in Canada to carry on business in Canada, and is accordingly listed in Schedule III of the *Bank Act* as an authorized foreign bank. As an authorized foreign bank, Maple Bank is governed by the provisions of Part XII.1 of the *Bank Act*.

Section 2, Part XII.1, and Schedule III of the *Bank Act*

27. Part XII.1 of the *Bank Act* includes, in sections 618 through 627, various express provisions regarding “Supervisory Intervention” in respect of authorized foreign banks by the Superintendent of Financial Institutions.

Sections 618-627 of the *Bank Act*

28. Section 619 of the *Bank Act* gives the Superintendent broad discretionary authority to take control of the “assets” of an authorized foreign bank. Such “assets” are defined as follows

in section 618 of the *Bank Act* to include both any asset of the authorized foreign bank “in respect of its business in Canada”, and “any other asset in Canada”:

“618 For the purposes of sections 619 two 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.”*

Section 618 of the *Bank Act*

29. The grounds for exercise of the Superintendent’s discretionary authority under subsection 619(2) include grounds which are expressly based upon the Superintendent’s “opinion” as to certain matters. The discretionary grounds outlined in subsection 619(2) include the following subsections cited in the Superintendent’s notice to Maple Bank of February 12, 2016:

“(2) Control by the Superintendent under subsection (1) may be taken in respect of an authorized foreign bank where

- (a) the authorized foreign bank has failed to pay its liabilities or, in the opinion of the Superintendent, will not be able to pay its liabilities as they become due and payable;*
- (b) the authorized foreign bank in respect of its business in Canada has failed to pay its liabilities or, in the opinion of the Superintendent, will not be able to pay its liabilities as they become due and payable;*

...

- (g) in the opinion of the Superintendent, any other state of affairs exists in respect of the authorized foreign bank that may be materially prejudicial to the interests of the authorized foreign bank’s depositors or creditors in respect of its business in Canada ... Including where proceedings under a law relating to bankruptcy or insolvency have been commenced in Canada or elsewhere in respect of the authorized foreign bank or its holding body corporate.”.*

Subsection 619(2) of the *Bank Act*

30. It is respectfully submitted that it is apparent in the circumstances of this case that the Superintendent had ample basis to reasonably form the opinions referred to in the foregoing provisions, and therefore to determine that it was appropriate to take control of the assets of Maple Bank.
31. In any event, consistent with the nature of the Superintendent's function and responsibilities, considerable deference should be accorded to the Superintendent's judgment and discretionary decisions. The Courts have thus been reluctant to question decisions made by the Superintendent or Minister exercising their supervisory powers to take control. In particular, where the governmental authority needed only to form a certain belief in order to intervene in a company's affairs, the Court was of the view that it should only consider if there was arbitrariness in the exercise of discretion and that there was sufficient evidence to form that belief.

Attorney General of Canada v. Cardinal Insurance Co., (1982) 39 O.R. (2d) 204 (H.C.);
Canada (Attorney General) v. Security Home Mortgage Co., [1996] A.J. No. 1015 (Q.B.)

32. Under subsection 619(1) of the *Bank Act*, the foregoing opinions and grounds in subsection 619(2) authorized the Superintendent to either take control of the assets for a period not exceeding 16 days (subsection 619(1)(a)), or take or extend control of the assets for a longer period (unless the Minister of Finance advised that it was not in the public interest to do so). Accordingly, the Superintendent was clearly authorized both to initially take control of the assets for a period not exceeding 16 days under subsection 619(1)(a), as the Superintendent did pursuant to notice dated February 10, 2016, and to then to continue control beyond 16 days under subsection 619(1)(b).

Subsection 619(1) of the *Bank Act*

33. Section 621 of the *Bank Act* then expressly authorized the Superintendent to apply for a winding up order in respect of an authorized foreign bank under section 10.1 of the *WURA* where the Superintendent had control of the assets pursuant to subsection 619(1)(b):

“621. The Superintendent may, at any time before the receipt of a request under section 622 to relinquish control of the assets of an authorized bank, request the Attorney General of Canada to apply for a winding-up order under section 10.1 of the Winding-up and Restructuring Act in respect of the authorized foreign bank, where the assets of the authorized foreign bank are under the control of the Superintendent pursuant to subparagraph 619(1)(b)(i) or (ii)”

Section 621 of the *Bank Act*

34. Accordingly, having taken control of the assets of Maple Bank under subsection 619(1)(b), the Superintendent was clearly authorized under 621 of the *Bank Act* to ask the Attorney General to apply for a winding-up order under section 10.1 of the *WURA*.

Subsection 619(1)(b) and section 621 of the *Bank Act*

C. The principally relevant provisions of the *WURA* and their application

35. Consistent with the provisions on the *Bank Act*, subsection 6(2) of the *WURA* clarifies that the application of the *WURA* to an authorized foreign bank “only applies to the winding-up of its business in Canada” and to the “liquidation of its assets”. Section 2 of the *WURA* then defines “assets” in respect of an authorized foreign bank to mean “assets within the meaning of section 618 of the *Bank Act*, which section is reproduced above.

Section 2 and subsection 6(2) of the *WURA*

36. Section 10.1 of the *WURA*, to which reference is expressly directed by section 621 of the *Bank Act*, includes the following provisions relating to the winding up of authorized foreign banks.

“10.1 Where the Superintendent . . . in the case of an authorized foreign bank, has taken control of its assets under subparagraph 619(1)(b) of the Bank Act, a Court may make a winding-up order in respect of the . . . authorized foreign bank ... if the Court is of the opinion that for any reason it is just and equitable that the . . . authorized foreign bank... should be wound up or if, in the case of

...

(a.1) an authorized foreign bank, the control of its assets was taken on a ground referred to in paragraph 619(2)(a), (b), (d) or (f) of the Bank Act.”

Sections 10.1 and 11(d) of the *WURA*

37. Section 10.1 thus establishes two categories of grounds upon which a winding up order may be made in respect of an authorized foreign bank.

(a) First, section 10.1 expressly authorizes a winding up order whenever control of the assets of the authorized foreign bank is taken on a ground referred to in any of subsections 619(2)(a), (b), (d) or (f) of the *Bank Act*.

(b) Second, section 10.1 also authorizes a winding up order if the Court is of the opinion that, for any reason, it is just and equitable.

**Subparagraphs 619(1)(b) (i) or (ii) and 619(2)(a) and (b) of the *Bank Act*;
Subsections 10.1 (1) and (a.1) of the *WURA***

38. In this case, as previously outlined, the grounds upon which the Superintendent took control of the assets under subsection 619(1)(b) of the *Bank Act* included the grounds in subsections 619(2)(a) and (b) of the *Bank Act*. Accordingly, the making of a winding-up order in respect of Maple Bank's business in Canada is fully warranted on this statutorily prescribed basis.

39. While section 10.1 uses the word "may" in respect of the Court's authority to make winding up orders on either of these two categories of grounds, it is submitted that the stipulation of precise statutory grounds in subsection 10.1(a.1), in addition to the general "just and equitable" grounds in the opening words of section 10.1, suggests a legislative intention to leave the Court with a more much more limited discretion under subsection 10.1(a.1) than is conferred pursuant to the just and equitable grounds. It is respectfully submitted that there is no reason in the circumstances of this case for the Court to decline issuing a winding up order where the circumstances fit squarely into the grounds expressly prescribed in section 10.1(a.1).

Sullivan, R. *Sullivan on the Construction of Statutes*, 5th ed. (LexisNexis, 2008)

Cote, P. *The Interpretation of Legislation in Canada*, 4th ed. (Carswell, 2011)

40. Indeed, it is respectfully submitted that, in the circumstances of this case, a winding up order in respect of Maple Bank is fully warranted as well of the grounds that a winding up

is just and equitable. Given the admitted insolvency of Maple Bank and the appointment of a German insolvency administrator over Maple Bank, a continuation of the operations of a Canadian branch is neither operationally nor legally viable. The only practicable alternative under the statutory regime applicable to authorized foreign banks is the making of a winding up order and appointment of a liquidator.

41. Moreover, the rapidly deteriorating circumstances of Maple Bank, including in respect of its Canadian business, require that a winding up order be issued promptly to maximize potential realizations for, and protect the interests of, all creditors in relation to the Canadian business.
42. The existence of the German insolvency proceeding does not provide any basis for disregarding the Canadian regulatory regime applicable to the regulation and winding up of authorized foreign banks. The clear Canadian statutory regime with respect to authorized foreign banks is that such foreign banks, although regulated in the foreign jurisdiction where they are based, must nevertheless, if they seek to carry on business in Canada, submit to Canadian regulation and supervision, in respect of their business in Canada, in the interests of protecting depositors and creditors relating to the Canadian business. Accordingly, the existence of a foreign regulator, and foreign insolvency proceedings initiated by the foreign regulator cannot, as a matter of principle, obviate the need for Canadian winding up orders in circumstances expressly called for under Canadian statutes specifically directed at authorized foreign banks.

***Canada (Attorney General) v. Reliance Insurance Co.*, [2007] 87 O.R. (3d) 42 (S.C.J.) at para 24**

43. If, as the German insolvency administrator appears to observe is the case here, the effect of the statutorily mandated regulation of the Canadian business of an authorized foreign bank results in creditors of the Canadian business being relatively better positioned to weather an insolvency than other creditors, that should be recognized as the intended result of the governing Canadian regulatory regime properly serving its intended purpose. It is not a reason to refrain from, or delay, the prompt appointment of a Canadian Liquidator to continue to protect the interests of the creditors of the Canadian business in accordance

with the Canadian statutory regime governing authorized foreign banks choosing to do business in Canada.

D. The Court Has Power to Appoint the Liquidator and Authorize its Exercise of Powers

44. Once a winding-up order has been made, the *WURA* also permits the Court to appoint a liquidator, or provisionally appoint liquidator, of the estate and effects of a company, and confers various powers and duties on the liquidator. For example, the Court may appoint inspectors to assist and advise the Liquidator, and it may grant orders approving the Liquidator to, *inter alia*:

- (a) draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the company;
- (b) enter into an agreement with any compensation association;
- (c) exercise any of the powers conferred by the *Winding-up Act*, without the sanction or intervention of the Court; and
- (d) pay liabilities relating to the portion of the business being carried on, where the payment is considered desirable for the retention of goodwill and enhancement of value to the estate of the company.

Sections 23(1), 28, 33, 35, 39, 41, 161(11) and 162 of *WURA*

45. The *WURA* confers the authority upon the liquidator to take any reasonable action to complete the liquidation. The powers are wide, and should not be interpreted as being merely technical or administrative.

***Canada Deposit Insurance Corp. v. Canadian Commercial Bank* [2000] A.J. No. 765 (Q.B.) citing *Kansa General International Insurance Co. (liquidator of) v. Maska U.S. Inc.*, [1998] Q.J. No. 1410 (C.A.).**

46. In the present circumstances, given the complexity of the business of Maple Bank in Canada, and given KPGM's involvement in assisting the Superintendent in taking control of assets, it is submitted that this Court should appoint KPMG as Liquidator and authorize

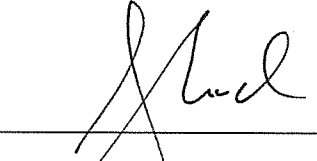
KPMG to exercise the powers set out in the draft order annexed to the Notice of Application. KPMG has given its consent to this appointment.

PART V – ORDER SOUGHT

47. The Attorney General seeks an order:

- (a) an order under section 10.1 of the *Winding-up and Restructuring Act*, R.S.C., 1985, c. W-11, as amended (the “*WURA*”) for the winding up of the business in Canada of the respondent Maple Bank, GmbH (“Maple Bank”) and for the liquidation of its assets as defined in section 618 of the *Bank Act*;
- (b) in connection with such winding-up order, an order under section 23 of the *WURA* appointing KPMG Inc. (KPMG) as liquidator of the estate and effects of Maple Bank or, alternatively, provisionally appointing KPMG as liquidator under section 28 of the *WURA* and provisionally granting KPMG all of the powers of a liquidator pending further order of the Court, and providing directions under section 28 of the *WURA* regarding the manner, form and length of notice to be given in respect of the proposed final appointment of KPMG as liquidator;
- (c) an order restraining further proceedings, in any action, suit or proceeding against Maple Bank, pursuant to Section 17 (and Section 154) of the *WURA*;
- (d) an order that the time for service of the Notice of Application and the Application Record is hereby abridged and validated, including without limitation pursuant to section 12(2) of *WURA*, so that this Application is properly returnable today and hereby dispenses with further service thereof, including without limitation, the prescribed notice requirements of section 26 of *WURA*
- (e) related relief in connection with the requested winding up order and appointment of a liquidator, as set out in the draft order attached to the Notice of Application. .

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of February, 2016:

A handwritten signature in black ink, appearing to read 'J. Lucki', is written over a horizontal line.

John J. Lucki
Department of Justice Canada
Ontario Regional Office
The Exchange Tower
130 King Street West
Suite 3400, Box 36
Toronto, Ontario M5X 1K6

Tel: (416) 973-5402
Fax: (416) 973-0809
Email: john.lucki@justice.gc.ca

Law Society No. 24123B

Solicitor for the Applicant
The Attorney General of Canada

SCHEDULE "A" – LIST OF AUTHORITIES

Table of Cases

1. *Attorney General of Canada v. Cardinal Insurance Co.*, (1982) 39 O.R. (2d) 204 (H.C.)
2. *Canada (Attorney General) v. Reliance Insurance Co.*, [2007] 87 O.R. (3d) 42 (S.C.J.)
3. *Canada (Attorney General) v. Security Home Mortgage Co.*, [1996] A.J. No. 1015 (Q.B.)
4. *Canada Deposit Insurance Corp. v. Canadian Commercial Bank* [2000] A.J. No. 765 (Q.B.)

Secondary Sources

5. Cote, P. *The Interpretation of Legislation in Canada*, 3rd Ed. (Carswell, 2000)
6. Sullivan, R. *Statutory Interpretation* (Irwin Law, 1997)

SCHEDULE “B” – TEXT OF STATUTES, REGULATIONS & BY - LAWS

1. BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c B-3, s 69

Definitions

2. In this Act,

...

“corporation” means a company or legal person that is incorporated by or under an Act of Parliament or of the legislature of a province, an incorporated company, wherever incorporated, that is authorized to carry on business in Canada or has an office or property in Canada or an income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the Bank Act, insurance companies, trust companies, loan companies or railway companies;

2. BANK ACT, S.C. 1991, c.46

Definitions

2. In this Act,

...

“authorized foreign bank” means a foreign bank that is the subject of an order under subsection 524(1);

...

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.

Superintendent may take control

619. (1) Subject to this Act, where any of the circumstances described in subsection (2) exist in respect of an authorized foreign bank or the business in Canada of an authorized foreign bank, the Superintendent may

- (a) take control, for a period not exceeding sixteen days, of the assets of the authorized foreign bank; or
- (b) unless the Minister advises the Superintendent that the Minister is of the opinion that it is not in the public interest to do so,
 - (i) take control, for a period exceeding sixteen days, of the assets of the authorized foreign bank, or
 - (ii) where control of assets has been taken under paragraph (a), continue the control beyond the sixteen days referred to in that paragraph.

Circumstances for taking control

(2) Control by the Superintendent under subsection (1) may be taken in respect of an authorized foreign bank where

- (a) the authorized foreign bank has failed to pay its liabilities or, in the opinion of the Superintendent, will not be able to pay its liabilities as they become due and payable;
- (b) the authorized foreign bank in respect of its business in Canada has failed to pay its liabilities or, in the opinion of the Superintendent, will not be able to pay its liabilities as they become due and payable;
- (c) [Repealed, 2001, c. 9, s. 170]
- (d) the assets of the authorized foreign bank in relation to its business in Canada are not, in the opinion of the Superintendent, sufficient to give adequate protection to the depositors and creditors of the authorized foreign bank in respect of its business in Canada;
- (e) an asset appearing on the books or records of the authorized foreign bank in respect of its business in Canada or held under its administration is not, in the opinion of the Superintendent, satisfactorily accounted for;
- (f) the authorized foreign bank has failed to comply with an order of the Superintendent under section 617; or
- (g) in the opinion of the Superintendent, any other state of affairs exists in respect of the authorized foreign bank that may be materially prejudicial to the interests of the authorized foreign bank's depositors or creditors in respect of its business in Canada or to those of the owners of any assets under the authorized foreign bank's administration in respect of its business in Canada, including where proceedings under a law relating to bankruptcy or insolvency have been commenced in Canada or elsewhere in respect of the authorized foreign bank or its holding body corporate.

Notice of proposed action

(3) The Superintendent shall notify an authorized foreign bank of any action proposed to be taken in respect of it under paragraph (1)(b) and of its right to make written representations to

the Superintendent within the time specified in the notice, not exceeding ten days after it receives the notice.

Objectives of Superintendent

(4) Where, pursuant to subsection (1), the Superintendent has control of the assets of an authorized foreign bank, the Superintendent may do all things necessary or expedient to protect the rights and interests of the depositors and creditors of the authorized foreign bank in respect of its business in Canada.

Powers of Superintendent

(5) Where, pursuant to subsection (1), the Superintendent has control of the assets of an authorized foreign bank,

(a) neither the authorized foreign bank nor any person acting on its behalf shall deal in any way with any of the assets without the prior approval of the Superintendent or a representative designated by the Superintendent; and

(b) no person acting on behalf of the authorized foreign bank shall have access to any cash or securities held in Canada by the authorized foreign bank without the prior approval of the Superintendent or a representative designated by the Superintendent.

Persons to assist

(6) Where the Superintendent takes control of the assets of an authorized foreign bank under subparagraph (1)(b)(i) or (ii), the Superintendent may appoint one or more persons to assist in the control of the assets.

Expiration of control

620. Control by the Superintendent under subsection 619(1) of the assets of an authorized foreign bank expires on the day on which a notice by the Superintendent is sent to the principal officer of the authorized foreign bank stating that the Superintendent is of the opinion that the circumstances leading to the taking of control of the assets by the Superintendent have been substantially rectified and that the authorized foreign bank can resume control of its assets.

Superintendent may request winding-up

621. The Superintendent may, at any time before the receipt of a request under section 622 to relinquish control of the assets of an authorized foreign bank, request the Attorney General of Canada to apply for a winding-up order under section 10.1 of the Winding-up and Restructuring Act in respect of the authorized foreign bank, where the assets of the authorized foreign bank are under the control of the Superintendent pursuant to subparagraph 619(1)(b)(i) or (ii).

Requirement to relinquish control

622. Where no action has been taken by the Superintendent under section 621 and, after thirty days following the taking of control by the Superintendent under subsection 619(1) of the

assets of an authorized foreign bank, the Superintendent receives from the principal officer of the authorized foreign bank a notice in writing requesting the Superintendent to relinquish control, the Superintendent must, not later than twelve days after receipt of the notice,

(a) comply with the request; or

(b) request the Attorney General of Canada to apply for a winding-up order under section 10.1 of the Winding-up and Restructuring Act in respect of the authorized foreign bank.

Advisory committee

623. The Superintendent may appoint a committee of not more than six members to advise the Superintendent in respect of the assets and all other matters pertinent to the duties and responsibilities of the Superintendent in exercising control of the assets. The committee shall be appointed from among the banks and authorized foreign banks that are subject to an assessment under section 23 of the Office of the Superintendent of Financial Institutions Act and required to share in the expenses resulting from the taking of control of the assets of the authorized foreign bank under subsection 619(1).

Expenses payable by authorized foreign bank

624. (1) Where control of the assets of an authorized foreign bank has been taken under subparagraph 619(1)(b)(i) or (ii) and the control expires or is relinquished under section 620 or paragraph 622(a), the Superintendent may direct that the authorized foreign bank be liable for repayment of all or part of the expenses resulting from the taking of control of the assets and assessed against and paid by other authorized foreign banks and by banks under section 23 of the Office of the Superintendent of Financial Institutions Act, together with any interest in respect of the expenses at any rate that is specified by the Superintendent.

Debt due to Her Majesty

(2) Where any direction is made under subsection (1), the amount for which the authorized foreign bank is liable is a debt due to Her Majesty in right of Canada payable on demand and is recoverable in the Federal Court or any other court of competent jurisdiction.

Priority of claim in liquidation

625. In the case of the winding-up of the business in Canada of an authorized foreign bank, the expenses resulting from the taking of control of the assets of the authorized foreign bank under subsection 619(1) and assessed against and paid by other authorized foreign banks and by banks under section 23 of the Office of the Superintendent of Financial Institutions Act and interest in respect of the expenses at any rate that is specified by the Superintendent, constitute a claim of Her Majesty in right of Canada against the assets of the authorized foreign bank that ranks after any claim referred to in paragraph 627(1)(d).

Application of assessment

626. Any amount recovered under section 624 or 625 shall be applied to reduce the total amount of expenses incurred for or in connection with the administration of this Act.

Order of priority for payment of claims

627. (1) Subject to sections 72 and 94 of the Winding-up and Restructuring Act, where a winding-up order under that Act is made in respect of an authorized foreign bank,

(a) the payment of any amount due to Her Majesty in right of Canada, in trust or otherwise, in respect of the business in Canada of the authorized foreign bank is a first charge on the assets of the authorized foreign bank;

(b) the payment of any amount due to Her Majesty in right of a province, in trust or otherwise, in respect of the business in Canada of the authorized foreign bank is a second charge on the assets of the authorized foreign bank;

(c) the payment of the deposit liabilities of the authorized foreign bank and all other liabilities of the authorized foreign bank in respect of its business in Canada, except the liabilities referred to in paragraph (d) and section 625, is a third charge on the assets of the authorized foreign bank; and

(d) the payment of any fines and penalties for which the authorized foreign bank is liable in respect of its business in Canada is a last charge on the assets of the authorized foreign bank.

Priority not affected

(2) Nothing in subsection (1) prejudices or affects the priority of any holder of any security interest in any property of an authorized foreign bank.

Priorities

(3) Priorities within each of paragraphs (1)(a) to (d) shall be determined in accordance with the laws governing priorities and, where applicable, by the terms of the liabilities referred to in those paragraphs.

3. COMPANIES' CREDITORS ARRANGEMENT ACT, RSC 1985, c C-36

Definitions

2. (1) In this Act,

...

“company” means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the Bank Act, railway or telegraph

companies, insurance companies and companies to which the Trust and Loan Companies Act applies;

4. WINDING-UP AND RESTRUCTURING ACT, R.S.C., 1985, c. W-11

Definitions

2. (1) In this Act,

...

“assets” means

(a) in respect of a foreign insurance company, the assets in Canada, within the meaning of subsection 2(1) of the Insurance Companies Act, of the foreign insurance company together with its other assets held in Canada under the control of its chief agent, within the meaning of section 571 of that Act, including all amounts received or receivable in respect of its insurance business in Canada, and

(b) in respect of an authorized foreign bank, assets within the meaning of section 618 of the Bank Act;

“authorized foreign bank” has the same meaning as in section 2 of the Bank Act;

...

Application

...

Application to authorized foreign banks

(2) In its application to an authorized foreign bank, this Act only applies to the winding-up of its business in Canada and to the liquidation of its assets, and any reference to the winding-up of a company or to the winding-up of the business of a company is deemed, in relation to an authorized foreign bank, to be a reference to the winding-up of the business in Canada of the authorized foreign bank and to include the liquidation of the assets of the authorized foreign bank.

...

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.

Other winding-up circumstances

10.1 Where the Superintendent has taken control of a financial institution or of the assets of a financial institution pursuant to paragraph 648(1)(b) of the Bank Act, paragraph 442(1)(b) of the Cooperative Credit Associations Act, paragraph 679(1)(b) of the Insurance Companies Act or paragraph 510(1)(b) of the Trust and Loan Companies Act or, in the case of an authorized foreign bank, has taken control of its assets pursuant to paragraph 619(1)(b) of the Bank Act or, in the case of a foreign insurance company, has taken control of its assets under subparagraph 679(1)(b)(i) or (ii) of the Insurance Companies Act, a court may make a winding-up order in respect of the financial institution, authorized foreign bank or insurance business in Canada of the foreign insurance company if the court is of the opinion that for any reason it is just and equitable that the financial institution, authorized foreign bank or insurance business in Canada of the foreign insurance company should be wound up or if, in the case of

- (a) a bank to which the Bank Act applies, the control was taken on a ground referred to in paragraph 648(1.1)(a), (c), (e) or (f) of that Act;
 - (a.1) an authorized foreign bank, control of its assets was taken on a ground referred to in paragraph 619(2)(a), (b), (d) or (f) of the Bank Act;
- (b) a company to which the Trust and Loan Companies Act applies, the control was taken on a ground referred to in paragraph 510(1.1)(a), (c), (e) or (f) of that Act;
- (c) an insurance company to which the Insurance Companies Act applies, other than a foreign insurance company, the control was taken on a ground referred to in paragraph 679(1.1)(a), (c), (e) or (f) of that Act;

(d) a foreign insurance company to which the Insurance Companies Act applies, the control of its assets was taken on a ground referred to in paragraph 679(1.2)(a), (c) or (e) of that Act; or

(e) an association to which the Cooperative Credit Associations Act applies, the control was taken on a ground referred to in paragraph 442(1.1)(a), (c), (e) or (f) of that Act.

...

Liquidator

23. (1) A court, in making a winding-up order in respect of a company, may appoint a liquidator or more than one liquidator of the estate and effects of the company.

...

Provisional liquidator

28. A court may, on the presentation of a petition for a winding-up order or at any time thereafter and before the first appointment of a liquidator, appoint provisionally a liquidator of the estate and effects of the company and may limit and restrict his powers by the order appointing him.

...

Duties after appointment

33. A liquidator, on his appointment, shall take into his custody or under his control all the property, effects and choses in action to which the company is or appears to be entitled, and shall perform such duties with reference to winding-up the business of the company as are imposed by

Liquidator to prepare statement

34. A liquidator shall, within 120 days after appointment, prepare a statement of the assets, debts and liabilities of the company and of the value of those assets as shown by the books and records of the company.

Powers

35. (1) A liquidator may, with the approval of the court, and on such previous notice to the creditors, contributories, shareholders or members of the company as the court orders,

(a) bring or defend any action, suit or prosecution or other legal proceeding, civil or criminal, in his own name as liquidator or in the name or on behalf of the company, as the case may be;

(b) carry on the business of the company so far as is necessary to the beneficial winding-up of the company;

- (c) sell the real and personal property, effects and choses in action of the company, by public auction or private contract, and transfer the whole thereof to any person or company, or sell them in parcels for such consideration as may be approved by the court;
- (d) do all acts and execute, in the name and on behalf of the company, all deeds, receipts and other documents, and for that purpose use, when necessary, the seal of the company;
- (e) prove, rank, claim and draw dividends in the matter of the bankruptcy, insolvency or sequestration of any contributory, for any sum due the company from the contributory, and take and receive dividends in respect of the sum in the matter of the bankruptcy, insolvency or sequestration, as a separate debt due from that contributory and rateably with the other separate creditors;
- (f) draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the company;
- (g) raise on the security of the assets of the company any requisite sum or sums of money;
- (h) do and execute all such other things as are necessary for winding-up the affairs of the company and distributing its assets; and
- (i) enter into an agreement with any compensation association designated by order of the Minister of Finance pursuant to section 449 or 591 of the Insurance Companies Act in order to facilitate the payment of claims to policyholders and the preservation of the value of the estate.

Agreement provisions

(1.1) An agreement referred to in paragraph (1)(i) may include provisions setting out the priority for repayment to the compensation association of amounts advanced by it to a company in accordance with the agreement.

Company liable

(2) The drawing, accepting, making or endorsing of every bill of exchange or promissory note mentioned in subsection (1), on behalf of the company, has the same effect, with respect to the liability of the company, as if the bill or note had been drawn, accepted, made or endorsed by or on behalf of the company in the course of the carrying on of its business.

No delivery of assets needed

(3) No delivery of the whole or of any part of the assets of the company is necessary to give a lien to any person taking security on the assets of the company.

...

Court may provide as to powers

39. A court may provide, by any order subsequent to a winding-up order, that a liquidator may exercise any of the powers conferred on him by this Act, without the sanction or intervention of the court.

...

Inspectors

41. A court may appoint, at any time when found advisable, one or more inspectors, whose duty it is to assist and advise a liquidator in the liquidation of a company.

...

If no liquidator

48. If at any time no liquidator has been appointed to wind up the business of a company, all the property of the company shall be deemed to be in the custody of the court.

...

PART II

AUTHORIZED FOREIGN BANKS

Application of Part

150. This Part applies only to the winding-up of the business in Canada of authorized foreign banks and to the liquidation of their assets.

Notice

151. (1) In their application to an authorized foreign bank, section 26 and subsections 35(1) and 42(1) are to be read as if notice is required to be given to the authorized foreign bank, its creditors and persons who hold security on any of its assets.

Exception

(2) Notice need not be given to persons referred to in subsection (1) who hold security on any of the assets of an authorized foreign bank unless they can be located using information contained in the books and records in Canada of the authorized foreign bank and those books and records are accessible by or under the control of, where section 26 applies, the petitioner for the winding-up order and, where subsection 35(1) or 42(1) applies, the liquidator.

Duties after appointment

152. A liquidator, on appointment in respect of an authorized foreign bank, shall take into custody or under control all the assets of the authorized foreign bank, and shall perform the duties that are imposed by the court or by this Act with reference to

- (a) the winding-up of the business in Canada of the authorized foreign bank; and
- (b) the liquidation of the assets of the authorized foreign bank.

Authorized foreign bank to cease business

153. From the time of the making of a winding-up order in respect of an authorized foreign bank, it shall cease to carry on its business in Canada or deal in any way with its assets, except in so far as is, in the opinion of the liquidator, required for the beneficial winding-up of its business in Canada and liquidation of its assets.

Effect of winding-up order

154. After a winding-up order is made in respect of an authorized foreign bank, no suit, action or other proceeding may be proceeded with or commenced against the authorized foreign bank in respect of its business in Canada or of its assets, except with the leave of the court and subject to the terms, if any, that the court imposes.

Execution, etc.

155. Every attachment, sequestration, distress or execution put in force against the assets of the authorized foreign bank after the making of a winding-up order in respect of it is void.

Liquidator to prepare statement

156. A liquidator shall, within 120 days after appointment in respect of an authorized foreign bank, prepare a statement of

- (a) the assets, debts and liabilities of the authorized foreign bank in respect of its business in Canada and of the value of those assets as shown by the books and records of the authorized foreign bank; and
- (b) the assets of the authorized foreign bank, other than those in respect of its business in Canada, and the value of the assets as shown by the books and records of the authorized foreign bank or, where the books and records are not available, an estimated value of the assets.

What debts may be proved

157. (1) When the business in Canada of an authorized foreign bank is being wound up and its assets are being liquidated under this Act, only debts and claims against the authorized foreign bank in respect of its business in Canada in existence at the commencement of the winding-up, certain or contingent, matured or not, and liquidated or unliquidated, are admissible to proof and, subject to subsection (2), the amount of any claim admissible to proof is the unpaid debt or other liability of the authorized foreign bank in respect of its business in Canada outstanding or accrued at the commencement of the winding-up.

Uncertain claims valued

(2) In case of any claim subject to any contingency or for unliquidated damages or which for any other reason does not bear a certain value, the court shall determine the value of the claim and the amount for which it shall rank.

Law of set-off to apply

158. The law of set-off, as administered by the courts, whether of law or equity, applies, in the same manner and to the same extent as if the business in Canada of the authorized foreign bank was not being wound up under this Act, only to

- (a) claims by creditors of the authorized foreign bank in respect of its business in Canada; and
- (b) proceedings for the recovery of debts due or accruing due to an authorized foreign bank in respect of its business in Canada at the commencement of the winding-up.

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.

Transfer to foreign liquidator

158.2 Where an authorized foreign bank is in liquidation in the jurisdiction in which its head office is situated or where it principally carries on business, the Superintendent may, if the Superintendent deems it advisable and in the interests of the creditors of the authorized foreign bank, authorize the liquidator, subject to the approval of the court, to transfer the assets of the authorized foreign bank to the liquidator in that jurisdiction.

Right of action not debarred

158.3 Subject to this Act, where the assets of an authorized foreign bank are not sufficient to cover in full all claims referred to in paragraphs 158.1(1)(a) to (c), the creditors are not barred from any recourse they have, either in law or equity, except in respect of the share, if any, received in the distribution of the assets.

...

Order of priority for payment of claims

161. (1) Subject to this Act, claims shall be paid in the following order of priority:

...

Payment of liabilities

(11) Notwithstanding anything in this section, the liquidator may, in carrying on the business of the company pursuant to paragraph 35(1)(b), with the approval of the court, pay liabilities relating to the portion of the business being carried on, where the payment is considered desirable for the retention of goodwill and enhancement of value to the estate of the company.

...

Transfer and reinsurance of policies by liquidator

162. (1) The liquidator may, with the approval of the court and without the consent of the policyholders, arrange for the transfer or reinsurance of

(a) all or a portion of the policies of the company, in the case of a company other than a foreign company, or

(b) all or a portion of the policies in respect of a foreign company's insurance business in Canada in a company, society, foreign company or provincial company within the meaning of subsection 2(1) of the Insurance Companies Act or an insurance company incorporated by or under an Act of a legislature of a province and authorized under the laws of the province to issue policies of the class being transferred or reinsured, if the terms of the transfer or reinsurance are, in the opinion of the court having regard to the priorities set out in this Part, fair and equitable to

(c) the policyholders whose policies are being transferred or reinsured,

(d) the estate of the company as a whole, and

(e) the remaining policyholders of the company.

Transfer and reinsurance of policies by liquidator

(2) The liquidator may, with the approval of the court and without the consent of the policyholders, arrange for the transfer or reinsurance of all or a portion of the policies of the company, other than policies in respect of its insurance business in Canada, in any body corporate if the terms of the transfer or reinsurance are, in the opinion of the court, having regard to the priorities set out in this Part, fair and equitable to

(a) the policyholders whose policies are being transferred or reinsured;

(b) the estate of the company as a whole; and

(c) the remaining policyholders of the company.

Transfer or reinsurance is in lieu of claim on policy

(3) The transfer or reinsurance of policies referred to in subsections (1) and (2) shall be in lieu of the claim for the value of those policies computed as provided in section 163.

Mortgage insurance policies

(4) The liquidator of a company, society or foreign company within the meaning of subsection 2(1) of the Insurance Companies Act may, with the approval of the court and the consent of the Canada Mortgage and Housing Corporation, and without the consent of the policyholders, arrange for the transfer to that corporation of all or a portion of the company's, society's or foreign company's policies of mortgage insurance, or arrange for the reinsurance of all or a portion of those policies by that corporation.

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

Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

FACTUM

John J. Lucki

Department of Justice Canada
Ontario Regional Office, The Exchange Tower
130 King Street West
Suite 3400, Box 36
Toronto, Ontario M5X 1K6

Tel: (416) 973-5402

Fax: (416) 973-0809

Email: john.lucki@justice.gc.ca

Law Society No. 24123B

Solicitor for the Applicant
The Attorney General of Canada