

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

BETWEEN:

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

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PART I – OVERVIEW

1. This Motion is made by KPMG Inc. (“**KPMG**”), in its capacity as court-appointed liquidator (the “**Liquidator**”) of Maple Bank GmbH (“**Maple Bank**”) for an Order, among other things:

- (a) if necessary, abridging the time for service of the approving the Sixteenth Report of the Liquidator dated February 28, 2024 (the “**Sixteenth Report**”), including the appendices thereto, and dispensing with the requirement for any further service thereof;
- (b) approving the Liquidator’s fees for the period of August 1, 2017 through December 31, 2023 in the amount of \$2,499,831.24;

- (c) approving the fees of the Liquidator’s counsel, Borden Ladner Gervais LLP (“**BLG**”), for the period of August 1, 2017 to January 31, 2024 in the amount of \$1,575,661.66; and
- (d) granting such other relief as counsel may advise and this Court may permit.

PART II – FACTS

A. Liquidation of Maple Bank

2. Maple Bank GmbH (“**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* (an “**Authorized Foreign Bank**”). In Germany, Maple Bank is subject to regulation by the Federal Financial Supervisory Authority (“**BaFin**”). As an Authorized Foreign Bank, Maple Bank was regulated with respect to its business in Canada (the “**Toronto Branch**”) by the Office of the Superintendent of Financial Institutions (“**OSFI**”).

3. As more fully described in the Liquidator’s first report to this Court dated March 2, 2016 (the “**First Report**”), in the period leading up to the commencement of the *Winding-up and Restructuring Act* (“**WURA**”) proceeding, the Toronto Branch had three major lines of business: (i) the origination and securitization of real property mortgages in Canada; (ii) structured secured lending; and (iii) security financing transactions (collectively, the “**Business**”).

4. The emergence of significant German tax claims against Maple Bank and the resulting indebtedness of Maple Bank led to:

- (a) BaFin imposing a moratorium on Maple Bank’s business activities, which caused Maple Bank to cease business and institute insolvency proceedings in Germany;
- (b) The appointment of a German insolvency administrator (the “**GIA**”) over Maple Bank;
- (c) The issuance of default notices and the termination of agreements by financial institutions that were counterparties to financial contracts (primarily swaps and hedging instruments) with the Toronto Branch in respect of their dealings with Maple Bank’s Business in Canada;

- (d) Canada Mortgage and Housing Corporation, after the issuance of a default notice to Maple Bank, taking control of the mortgage-backed securities business of the Toronto Branch and the corresponding mortgage pools (totaling approximately \$3.5 billion); and
- (e) OSFI issuing orders under section 619 of the *Bank Act* for the taking of control of the assets of Maple Bank in respect of the Business.

5. The events described above prompted OSFI to request that the Attorney General of Canada seek a winding-up order pursuant to section 10.1 of the WURA in respect of the Business. On February 16, 2016, Regional Senior Justice Morawetz of the Ontario Superior Court of Justice [Commercial List] (the “**Court**”) granted an order (the “**Winding-Up Order**”) to, among other things, (i) wind-up the Business; and (ii) appoint KPMG Inc. (“**KPMG**”) as liquidator (the “**Liquidator**”) of the Business and of the assets of Maple Bank as defined in section 618 of the *Bank Act* (the “**Assets**”).

6. The Liquidator has, under the supervision of the Court, subsequently realized upon substantially all of the Assets, run a claims process and paid all of the liabilities of the Toronto Branch, and made four interim distributions to the GIA. The only remaining substantive issues the Liquidator is dealing with are the receipt of a refund from the Canada Revenue Agency (the “**CRA**”) related to various tax appeals and the GIA’s request that the records of the Toronto Branch and Maple Securities Canada Limited (“**MSCL**”) be transferred to it in Germany. The Liquidator’s activities for the period up to August 20, 2021, and various Court Orders requested in connection thereto, are outlined in reports of the Liquidator numbered One through Fifteen, which are available on the Liquidator’s website at <http://www.kpmg.com/ca/maplebank>.

B. Fees and Disbursements of the Liquidator and its Counsel

7. Pursuant to an Order dated June 8, 2016, the Court appointed Jonathan Wigley of Gardiner Roberts LLP as Independent Cost Counsel (the “**ICC**”) to review the fees and disbursements of

the Liquidator and its counsel (then Gowlings WLG, now BLG) (the “**Professional Fees**”) and to report to the Court with respect to the fairness and reasonableness of such fees.¹

8. By Orders dated March 10, 2017, and September 26, 2017, the Court approved Professional Fees through July 31, 2017.²

9. Due to the unexpected death of Mr. Wigley, on March 2, 2020, the Court issued an Order appointing Alex Ilchenko of Pallett Valo LLP (as he then was) as the ICC.³

10. On August 16, 2021, Mr. Ilchenko was sworn in as a Bankruptcy Registrar for Toronto. As a result of this appointment, Associate Judge Ilchenko was unable to continue as ICC.⁴

11. On August 26, 2021, the Court granted an order authorizing Associate Judge Ilchenko, in his capacity as Registrar, to complete his review and assessment of the Professional Fees.⁵ Such review and assessment are the subject of the within motion.

PART III – LAW AND ARGUMENT

A. Approval of Fees and Disbursements of the Liquidator and BLG

12. Pursuant to paragraphs 20 and 21 of the Winding-Up Order and section 42(1) of the WURA, the Liquidator and BLG shall be paid their reasonable fees and disbursements upon passing their accounts on referral to the Court.⁶

13. In exercising its discretion to approve the fees of a liquidator and its counsel, the Court should consider whether the remunerations and disbursements incurred were fair and reasonable in consideration of the following:

[...] the nature, extent and value of the assets handled, the complications and difficulties encountered, the degree of assistance provided by the company, its officers or its employees, the time spent, the receiver's knowledge, experience and skill, the diligence

¹ Order of Senior Justice Morawetz, dated June 8, 2016, Sixteenth Report of the Liquidator, dated February 28, 2024 (“**Sixteenth Report**”), Appendix A.

² Order of Senior Justice Morawetz, dated March 10, 2017, Sixteenth Report, Appendix B; Order of Senior Justice Morawetz, dated September 26, 2017, Sixteenth Report, Appendix C.

³ Order of Senior Justice Morawetz, dated September 26, 2017, Sixteenth Report, Appendix C.

⁴ Order of Senior Justice Morawetz, dated March 2, 2020, Sixteenth Report, Appendix D.

⁵ Order of Chief Justice Morawetz, dated August 16, 2021, Sixteenth Report, Appendix E.

⁶ Section 42(1), *Winding Up and Restructuring Act*, RSC 1985, c W-11, Schedule B.

and thoroughness displayed, the responsibilities assumed, the result of the receiver's efforts, and the cost of comparable services when performed in a prudent and economical manner.⁷

14. Further factors set out in *Bank of Nova Scotia v. Diemer* include, among other things:

- (a) the principle of proportionality; "there must be practical and reasonable limits to the amounts awarded and those amounts should bear some reasonable connection to the amount that should reasonably have been contemplated";
- (b) the Court ought not to second guess the amount of time claimed "unless it is clearly excessive or overreaching";
- (c) the Courts should award the costs on a more "holistic manner"; and
- (d) an order appointing the receiver and/or counsel "at standard rates" does not detract from the requirement of proportionality vis-à-vis the size of the estate and the matter's complexity.⁸

15. In order to be reasonable, a liquidation need not be administered as inexpensively as possible. Rather, in determining whether fees are reasonable, the Court shall take into account the effectiveness of the liquidator:

While sufficient fees should be paid to induce competent persons to serve as receivers, receiverships should be administered as economically as reasonably possible. Reasonably is emphasized. It should not be based on any cut rate procedures or cutting corners and it must relate to the circumstances. It should not be the expensive foreign sports model; but neither should it be the battered used car which keeps its driver worried about whether he will make his destination without a breakdown.⁹ [Citations omitted]

16. Accordingly, the Court ought to approach its assessment of fees with a degree of deference unless there is cause for concern:

⁷ *Confectionately Yours, Inc. (Re Bakemates International Inc.)*, 2002 CanLII 45059 (Ont. C.A.), Book of Authorities ("BOA"), Tab 1 at para. 45 [*"Confectionately Yours"*], citing *Federal Business Development Bank v. Belyea and Fowler*, 1983 CanLII 4086 (N.B. C.A.), BOA, Tab 2 at para. 9.

⁸ *Bank of Nova Scotia v. Diemer*, 2014 ONSC 365, BOA, Tab 3 at para. 19.

⁹ *Confectionately Yours* at para. 49.

In reviewing a claim for costs, the Court does not undertake a line by line analysis of the hours claimed, and should not second-guess the amount claimed, unless it is clearly excessive or overreaching. It considers what is reasonable in the circumstances and, taking into account all the relevant factors, awards costs in a global *fashion*.¹⁰

17. Where chartered accountants are retained to perform the duties of a receiver-manager (or similar), “there is no reason why they should not get paid at the going rate they charge all of their clients for the services they render.”¹¹ In the present context, the comments Deputy Registrar Wellbum in *Re G.A. Ross Hearing Instruments Inc.* are informative:

Where the hourly rate charged by the trustee is the usual rate charged by the accounting firm of which the trustee is a member and is also comparable to the hourly rates charged by other large accounting firms, and the bankruptcy is complicated, a trustee may charge fees on an hourly basis in accordance with its usual rates. In that case, the debtor had previously sold hearing aids and related equipment and while the trustee was forced to deal with some litigation and the company principal was rather uncooperative, the trustee was primarily tasked with handling landlord claims for unpaid rent and the estate was liquidated for roughly \$200,000. [Emphasis added]

18. The Deputy Registrar concluded that "given the complexity of this insolvency, it was not unreasonable for this firm of accountants to act as the trustee and to charge their time at their usual rates." The Toronto Branch liquidation is far more complicated than that in *Ross*. With respect to legal accounts, the above commentary is equally applicable.

19. On a motion seeking approval of fees, the motion record ought to include detailed records of the work performed by the professionals who rendered services:

As for the procedure that applies to the passing of the accounts, *Bennett* indicates at p. 460 that there is no prescribed process. Nonetheless, the case law provides some requirements for the

¹⁰ *David v. TransAmerica Life Canada*, 2016 ONSC 1777, BOA, Tab 4 at para. 22.

¹¹ *Prairie Palace Motel v. Carlson*, 1980 CarswellSask 25 (Q.B.), BOA, Tab 5 at para. 6.

substance or content of the accounts. The accounts must disclose in detail the name of each person who rendered services, the dates on which the services were rendered, the time expended each day, the rate charged and the total charges for each of the categories of services rendered. The accounts should be in a form that can be easily understood by those affected by the receivership (or by the judicial officer required to assess the accounts) so that such person can determine the amount of time spent by the receiver's employees (and others that the receiver may have hired) in respect to the various discrete aspects of the receivership. [Citations omitted; emphasis added]¹²

20. There is no doubt that the Liquidator and its counsel have provided docketing information in an appropriate form.

21. While the above cases deal with receiverships, this jurisprudence has been applied in the context of liquidation. In *MNP Ltée. v. Armorer*, this Court relied upon the aforementioned decisions in *Belyea* and *Confectionately Yours* to determine that the liquidator's fees were reasonable and approved such fees accordingly.¹³


22. The Liquidator respectfully submits that the Professional Fees, as detailed in the Report, should be approved.

PART IV – ORDER REQUESTED

23. The Liquidator requests that this Court issue an Order substantially in the form attached at Schedule C.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

April 18, 2024



Alex MacFarlane / Nick Hollard
Lawyers for KPMG Inc.

¹² *Confectionately Yours* at para. 37.

¹³ *MNP Ltée. v. Armorer*, 2017 ONSC 6268, BOA, Tab 6 at paras. 49-52.

SCHEDULE “A” – AUTHORITIES CITED

1. *Confectionately Yours, Inc. (Re Bakemates International Inc.)*, 2002 CanLII 45059 (Ont. C.A.)
2. *Federal Business Development Bank v. Belyea and Fowler*, 1983 CanLII 4086 (N.B. C.A.)
3. *Bank of Nova Scotia v. Diemer*, 2014 ONSC 365
4. *David v. TransAmerica Life Canada*, 2016 ONSC 1777
5. *Prairie Palace Motel v. Carlson*, 1980 CarswellSask 25 (Q.B.)
6. *MNP Ltée. v. Armorner*, 2017 ONSC 6268

SCHEDULE “B” – LEGISLATION CITED

Winding Up and Restructuring Act, RSC 1985, c W-11

Section 42(1)

Remuneration

42 (1) A liquidator shall be paid such salary or remuneration, by way of percentage or otherwise, as the court directs, on such notice to the creditors, contributors, shareholders or members as the court orders.

SCHEDULE "C" – ORDER

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE) THURSDAY, THE 25TH
)
ASSOCIATE JUSTICE ILCHENKO) DAY OF APRIL, 2024

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

ORDER
(Fee Approval)

THIS MOTION, made by KPMG Inc., in its capacity as court-appointed liquidator (the “**Liquidator**”) of Maple Bank GmbH’s (“**Maple Bank**”) business and assets in Canada (the “**Toronto Branch**”), was heard this day by videoconference.

ON READING the Notice of Motion of the Liquidator returnable April 25, 2024; the Sixteenth Report of the Liquidator dated February 28, 2024 (the “**Sixteenth Report**”); the Affidavit of Bevan Brooksbank sworn February 27, 2024 (the “**BLG Fee Affidavit**”); the affidavit of Nicholas Brearton sworn February 27, 2024 (the “**Liquidator’s Fee Affidavit**”); and the Order of Chief Justice Morawetz dated June 8, 2016 (the “**ICC Order**”) and on hearing the submissions of counsel for the Liquidator, no one appearing for any other person on the service list, although properly served as appears from the affidavit of service of Adriana Gasparini, filed.

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and Motion Record is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

CAPTITALIZED TERMS

2. **THIS COURT ORDERS** that capitalized terms not defined herein shall have the meanings ascribed thereto in the Sixteenth Report.

APPROVAL OF FEES AND DISBURSEMENTS

3. **THIS COURT ORDERS** that the fees and disbursements of the Liquidator, as described in the Sixteenth Report and as set out in the Liquidator’s Fee Affidavit, be and are hereby approved.

4. **THIS COURT ORDERS** that the fees and disbursements of the Liquidator’s legal counsel, Borden Ladner Gervais LLP (“**BLG**”), as described in the Sixteenth Report and as set out in the BLG Fee Affidavit, be and are hereby approved.

5. **THIS COURT ORDERS** that the Liquidator be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.

IN THE MATTER OF MAPLE BANK GmbH
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AND IN THE MATTER OF THE *BANK ACT*, S.C. 1991, C.46, AS AMENDED

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

PROCEEDING COMMENCED AT TORONTO

**ORDER
(FEE APPROVAL AND DISTRIBUTION)**

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business in Canada of Maple Bank GmbH

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

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