

**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

**FACTUM OF THE LIQUIDATOR KPMG INC.
(Motion returnable December 13, 2017)**

December 12, 2017

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PART I - OVERVIEW

1. On February 16, 2016 (the “**Winding-Up Date**”), the Ontario Superior Court of Justice (Commercial List) (the “**Court**”), upon the application of the Attorney General of Canada granted 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 (the “**Toronto Branch Assets**”).
2. Since the granting of the Winding-Up Order, a Claims Procedure (as defined below) has been implemented in accordance with the a claims procedure order dated June 8, 2016 (the “**Claims Procedure Order**”). In addition, on March 20, 2017 the Court authorized the Liquidator to make a partial and interim distribution (the “**First Interim Distribution**”) to the German Insolvency Administrator (the “**GIA**”) from the estimated surplus (the “**Estimated Surplus**”) as realized from the sale of the Business and Assets of the Toronto Branch of Maple Bank (the “**Toronto Branch**”). Furthermore, on September 25, 2017, the Court authorized the Liquidator to make a second partial and interim distribution (the “**Second Interim Distribution**”) to the GIA from the Estimated Surplus as realized from the sale of the Business and Assets of the Toronto Branch.
3. This factum is filed in support of a motion by the Liquidator for an order, *inter alia*, authorizing and directing the Liquidator to make a further interim distribution to the GIA of a portion of the Estimated Surplus, in the amount of \$5 million CAD and € 3,550,812.18 (the “**Third Interim Distribution**”) on or after December 19, 2017.
4. In addition, the Liquidator seeks an order for approval of an Order providing for the production and transfer to the GIA of information and data in the possession of the Toronto Branch and the Liquidator (the “**Data Transfer Order**”).
5. In short, and as further elaborated below, several compelling factors support the granting of an order for the Third Interim Distribution and the Data Transfer Order:

i) as set out in the Thirteenth Report of the Liquidator, and corresponding Confidential Supplement, the requested Third Interim Distribution to the GIA is from the Estimated Surplus, and the estimated reserves as established by the Liquidator (the “**Estimated Reserve**”) are adequate to cover all existing unresolved claims and any future potential claims that may be made against the Toronto Branch;

ii) on account of the Estimated Reserve, the Third Interim Distribution will not prejudice the interests of any of the creditors of the Toronto Branch, and all creditors of the Toronto Branch would have been duly notified of the intended distribution through the Notice of Distribution as published on December 8, 2017;

iii) the Third Interim Distribution will constitute a transfer to another insolvency administrator (the GIA), for the benefit of the creditors of the German Estate, and in furtherance of the policy objective of complementing and accommodating insolvency proceedings in foreign jurisdictions in order to preserve and maximize value for the benefit of all creditors of Maple Bank; and

iv) the Data Transfer Order is in aid of the activities of the GIA to fulfill its statutory or other legal duties under German law including with respect to compliance and disclosure obligations to tax authorities, banking authorities or German prosecutors, and investigation of potentially improper conduct within Maple Bank and its various affiliates. To the extent that personal information is implicated, and any expectation of privacy exists in respect of same, it will be protected by (i) German privacy law, which provides similar protections to those of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 (“**PIPEDA**”), and in some cases, more stringent protections; and (ii) the non-public nature of the GIA proceedings.

6. KPMG accordingly requests that the Third Interim Distribution and Data Transfer Orders be granted.

PART II - FACTS

7. The facts with respect to this Motion are briefly outlined herein. They are more fully set out in the thirteenth report of the Liquidator dated December 8, 2017 (the “**Thirteenth Report**”)

and the corresponding confidential supplement (the “**Confidential Supplement**”). Capitalized terms used and not otherwise defined have the same meanings as set out in the Thirteenth Report. Unless otherwise indicated, all references to monetary amounts herein are denominated in Canadian dollars (CAD).

Background

8. 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**”).

Thirteenth Report of the Liquidator dated December 8, 2017 (the “Thirteenth Report”), para 1, Motion Record, Tab 2

9. In February of 2016 the emergence of, *inter alia*, significant German tax claims led to the appointment of a German insolvency administrator (the “**GIA**”) over Maple Bank. 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 (the “**Winding-up Proceedings**”).

Thirteenth Report, paras 2-4, Motion Record, Tab 2

10. 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 ring fence the Toronto Branch Assets for the benefit of the creditors of Toronto Branch.

Winding-up Order, Appendix “A” to the Thirteenth Report, Motion Record, Tab 2A

11. 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.

Winding-up Order, Appendix "A" to the Thirteenth Report, Motion Record, Tab 2A

The Claims Procedure Order

12. On June 8, 2016, the Court issued a claims procedure order (the "**Claims Procedure Order**"), with the aim of facilitating a timely determination of the existence and amount of any Claims against the Toronto Branch. Under the Claims Procedure Order, creditors were requested to prove their Claims against the Toronto Branch by delivering a completed Proof of Claim form (and supporting documentation) to the Liquidator by September 19, 2016 (the "**Claims Submission Date**").

Twelfth Report, paras 7, 18 Appendix "C" to the Thirteenth Report, Motion Record, Tab 2C

13. In accordance with the Claims Procedure Order, by June 15, 2016, the Claims Procedure Order had been posted on the Liquidator's website, a Claims package was mailed to every known creditor of the Toronto Branch and notice of the Claims Procedure was published.

Twelfth Report, para 7, Appendix "C" to the Thirteenth Report, Motion Record, Tab 2C

14. The Claims Procedure Order resulted in the Liquidator receiving 60 Proofs of Claim totalling approximately \$1.59 billion, including a Proof of Claim submitted by the GIA on behalf of Maple Bank totaling \$791.33 million (the "**GIA Claim**") as well as other operational funding that was provided to the Toronto Branch by Maple Bank from Germany.

Thirteenth Report, para 35, Motion Record, Tab 2

The Distribution Order

15. On November 25, 2016, the Court issued an order authorizing the Liquidator to make a distribution to creditors of the Toronto Branch with proven claims under the Claims Procedure (the “**Distribution Order**”). In accordance with the Distribution Order, on December 9, 2016 the Liquidator paid proven claims in the total value of approximately \$686.8 million.

Twelfth Report, para 39, Appendix “C” to the Thirteenth Report, Motion Record, Tab 2C

16. The Liquidator reached an agreement with the GIA with respect to the GIA Claim whereby the GIA Claim, to the extent that it is valid, would be reduced to the extent of any distribution made to the GIA. The GIA also agreed that such corresponding portion of the GIA Claim would be extinguished and released by such distribution. In addition, the remaining portion of the GIA Claim, to the extent that it is valid, after taking into account any interim distribution, would be capped at an amount (which amount may from time to time increase or decrease) that results in the Toronto Branch having assets in excess of its liabilities, so that Creditors with Proven Claims would receive 100 per cent of their Claims plus interest in accordance with the *WURA*.

Thirteenth Report, para 35, Motion Record, Tab 2

The Initial Interim Distribution Order

17. Following the filing of the Liquidator’s Tenth Report, on January 27, 2017, the Court issued the Principal Officers Additional Claims Order (the “**Principal Officers Additional Claims Order**”) setting February 28, 2017 as the claims bar date (the “**Principal Officers Claims Bar Date**”), and also issued a Representative Counsel Order for counsel to represent Non-Executive Employees of the Toronto Branch.

Principal Officers Additional Claims Order, Appendix “B” to the Thirteenth Report, Motion Record, Tab 2B

18. The Principal Officers Claims Bar Date has expired, and no claims have been received by the Liquidator in accordance with the Principal Officers Additional Claims Order.

Thirteenth Report, para 78, Motion Record, Tab 2

19. On March 10, 2017, the Liquidator filed its Eleventh Report pursuant to which the Liquidator: (i) provided an updated statement of receipts and disbursements for the period ending February 28, 2017; (ii) provided an update on the Claims Procedure; (iii) reported on the Estimated Surplus available for distribution to GIA; (iv) requested that the Court approve the First Interim Distribution to the GIA; and, (v) requested that the Court approve the notice of distribution as published on March 3, 2017.

Thirteenth Report, para 17, Motion Record, Tab 2

20. On March 20, 2017, the Court granted an Order which, *inter alia*, authorized the Liquidator to make a First Interim Distribution in the amount of up to \$660.6 million to the GIA from the Estimated Surplus (the “**First Interim Distribution Order**”).

Thirteenth Report, para 39, Exhibit “C” to the Thirteenth Report, Motion Record, Tab 2

21. In accordance with the First Interim Distribution Order, on March 14, 2017 the Liquidator paid approximately \$658 million to the GIA.

Thirteenth Report, para 40, Exhibit “C” to the Thirteenth Report,, Motion Record, Tab 2

The Second Interim Distribution Order

22. On September 25, 2017, the Liquidator filed its Twelfth Report pursuant to which the Liquidator: (i) provided an updated statement of receipts and disbursements for the period ending August 31, 2017; (ii) provided an update on the Claims Procedure; (iii) reported on the Estimated Surplus available for distribution to GIA; (iv) requested that the Court approve the settlement of the claim of Radius Financial Inc. (the “**Radius Settlement**”) and the settlement of the claim of Global One Financial Inc. (the “**Global One Settlement**”); (v) requested that the Court approve the Second Interim Distribution to the GIA; and, (vi) requested that the Court approve the notice of distribution as published on September 15, 2017.

Twelfth Report, Appendix “C” to the Thirteenth Report, Motion Record, Tab 2C

23. On September 26, 2017, the Court granted an Order which, *inter alia*, authorized the Liquidator to make a Second Interim Distribution in the amount of \$91.4 million to the GIA from the Estimated Surplus (the “**Second Interim Distribution Order**”).

Second Interim Distribution Order, Appendix “D” to the Thirteenth Report, Motion Record, Tab 2D

Thirteenth Report and Requested Interim Distribution

24. To date, the Liquidator has disbursed approximately \$1.46 billion from the proceeds of the Toronto Branch liquidation to satisfy the proven Claims of all but one creditor.

Thirteenth Report, para 34, Motion Record, Tab 2

25. Further to the Executives Disputed Claims Amounts, as defined and described in the Twelfth Report, the Liquidator executed minutes of settlement with each of the Executives in late October 2017. The contents of the settlement agreements, and aggregate value of same, are set out in the Confidential Settlement. The settlements are not conditional on the approval of the Court, yet the Liquidator is seeking approval of its activities in settling the Executives Disputed Claims Amounts.

Thirteenth Report, paras 37-43, Motion Record, Tab 2

26. The remaining unresolved Claim consists of that advanced by Canada Revenue Agency (the “**CRA**”), amounting to approximately \$11.9 million. In addition, the Liquidator is holding \$8 million related to potential corporate income tax owing to CRA associated with tax returns filed by the Liquidator covering the period October 1, 2015 to February 15, 2016 and post Winding-up date (the “**Potential CRA Remittance and Liability**”).

Thirteenth Report, paras 44, 45, Motion Record, Tab 2

27. Consequently, the total Unresolved Claim and Potential CRA Remittance and Liability total approximately \$19.9 million. The Liquidator has established an appropriate reserve in the amount of \$44.8 million (the “**Estimated Reserve**”) to provide for, *inter alia*, the Unresolved Claim and possible future claims (the “**Future Potential Claims**”).

Thirteenth Report, para 72, Motion Record, Tab 2

28. As at October 31, 2017, the Toronto Branch held approximately \$49.9 million in cash and cash equivalents, which total excludes a contract settlement with Credit Suisse, which resulted in a payment of € 3,550,812.18 to Maple Bank (the “**Credit Suisse Settlement Amount**”). The GIA is in possession of the Credit Suite Settlement Amount, which can be distributed to the GIA without affecting the Estimated Reserve.

Thirteenth Report, paras 72, 75, Motion Record, Tab 2

29. The realization process for all of the Assets of the Toronto Branch is complete, with the only remaining anticipated realization consisting of interest income on invested funds.

Thirteenth Report, para 48, Motion Record, Tab 2

30. The Liquidator recommends in the Thirteenth Report that the Court approve the Third Interim Distribution on the basis, *inter alia*, that: (i) the Asset realization process is complete and the Liquidator is currently holding cash or equivalents in excess of \$49.9 million (ii) the Estimated Reserve of \$44.8 million is adequate to cover the existing Unresolved Claim and any Future Potential Claims to July 31, 2018, and (iii) a portion of the Estimated Surplus available for distribution to the GIA is approximately \$5 million.

Thirteenth Report, para 46, Motion Record, Tab 2

31. The Thirteenth Report also describes, and seeks the Court’s approval of the transfer and sharing of certain Toronto Branch and Maple Bank affiliate information and data by the Liquidator to the GIA. This is set out in greater detail below.

Thirteenth Report, para 46, Motion Record, Tab 2

32. On December 8, 2017 the Liquidator posted a Notice of Distribution notifying any creditors of the Toronto Branch of the Third Interim Distribution in the national edition of *The Globe and Mail* and international edition of *The Financial Times*.

Notice of Distribution to Creditors, Appendix “E” to the Thirteenth Report, Motion Record, Tab 2E

The Interests of Toronto Branch Creditors and the GIA

33. As a consequence of the Estimated Reserve, the Third Interim Distribution will not prejudice the interests of any creditors of the Toronto Branch.

Thirteenth Report, para 78, Motion Record, Tab 2

34. In light of the GIA's stated objective of making a distribution to creditors of Maple Bank in Germany as soon as practicable, the Liquidator worked with the GIA in order to implement a distribution process in Canada that will ensure that appropriate Reserves will be maintained by the Liquidator in order to pay, in full, the Proven Claims of creditors of the Toronto Branch, while facilitating a prompt distribution to the GIA of the available funds remaining after the establishment of the Estimated Reserve. To this end, the Liquidator, in consultation with the GIA, has developed the proposed Third Interim Distribution.

Thirteenth Report, para 78, Motion Record, Tab 2

35. The Third Interim Distribution will be, in essence, a transfer to another insolvency administrator for the benefit of the creditors of the German Estate.

Thirteenth Report, para 78, Motion Record, Tab 2

36. Moreover, the Third Interim Distribution will permit the creditors of the German Estate to receive a distribution in a timely manner, and be afforded a treatment more consistent with that received by creditors of the Toronto Branch.

Thirteenth Report, para 78, Motion Record, Tab 2

37. A timely interim distribution will also eliminate, as soon as practicable, the exchange rate risk between the Canadian dollar and the Euro, given that the GIA will have to distribute such funds from the Third Interim Distribution to Maple Bank creditors in Euros.

Twelfth Report of the Liquidator dated September 19, 2017, para 116, Appendix "C" to the Thirteenth Report Motion Record, Tab 2C

38. The GIA and the Liquidator have sought to reconcile and mitigate the operational and practical aspects of any conflicts that may exist between the respective Winding-up proceedings

of the Toronto branch and the German insolvency proceedings; this is exemplified by the request by the Liquidator that the Court approve the Third Interim Distribution.

Thirteenth Report, para 78, Motion Record, Tab 2

39. The GIA, pursuant to the applicable German statute, represents the participants in the German insolvency proceeding, and in particular those creditors that were not able to participate in the Canadian Winding-Up Proceeding. Since all creditors in the Canadian Winding-Up Proceeding have or will receive payment of their Proven Claims, in full with interest, it is important that the creditors in the German insolvency proceeding not be unreasonably and unnecessarily prejudiced in receiving a partial recovery of their proven claims.

Thirteenth Report, para 78, Motion Record, Tab 2

The Data Transfer Order

40. The GIA has requested that the Liquidator provide it with a copy of all Toronto Branch record, documents, emails, and other data (the “Data”) which is in the power, possession or control of the Liquidator, including all data related to Maple Bank and its Affiliates (as defined in the Thirteenth Report) that is stored at four Canadian storage facilities or held on computer tapes in the possession of KPMG or Ernst & Young. The GIA will subsequently transfer this Data from Canada to Germany.

Thirteenth Report, para 46, Motion Record, Tab 2

Affidavit of Charlotte Schildt, sworn December 7, 2017 (the “Schildt Affidavit”) at para 8, Motion Record, Tab 3

41. The basis of the GIA’s request, as understood by the Liquidator, is to allow the GIA to fulfill its statutory or other legal duties under German law including with respect to a) the collection, safeguarding and assessment of information of the insolvent parties; b) satisfaction of tax filings, annual returns and other compliance and disclosure obligations to tax authorities, banking authorities or German prosecutors; c) investigation of potentially improper conduct within Maple Bank and Affiliates with respect to liability, damage, claw back and repayment claims, and d) obligations to cooperate with, and respond to, the tax authorities and German prosecutors with respect to their investigations. The Liquidator has also been advised by the

GIA that a criminal and tax investigation has been commenced in Germany in relation to former directors, supervisory board members, officers and former employees of Maple Bank involving allegations of serious tax evasion and money-laundering.

Thirteenth Report, para 47, Motion Record, Tab 2

Schildt Affidavit, paras 3-8, Motion Record, Tab 3

42. Following the closure of the Toronto Branch's office effective December 31, 2016, the Liquidator made arrangements to ship physical records located at the office to a third party operated record storage facility located in Scarborough that had previous been used by the Toronto Branch (the "**RecordXpress Facility**") and, when that facility became full, to a third party operated record storage facility in the Greater Toronto Area (the "**Recall Facility**"). In the case of digital records, the Liquidator made arrangements with Maple Securities Canada Limited ("**MSCL**") to have access to the Toronto Branch's records that had been backed up on a server located at an offsite disaster recovery center located in Mississauga, Ontario and operated by SunGard (the "**SunGard Facility**"). The arrangement to have a daily back up performed by MSCL of the Toronto Branch's records was in place prior to the Winding Up Date. The Liquidator also arranged, in conjunction with MSCL, to have a copy made of the data stored on the servers located at the Toronto Branch's office as at the time of office's closure, which computer tape is stored at Ernst & Young's downtown Toronto office (the "**EY Facility**"). Finally, in addition to the above, the Toronto Branch's records also include certain physical records stored at a third party storage facility in Brampton (the "**Iron Mountain Facility**") and a copy of data stored on the servers located at the Toronto Branch's office as at the Winding Up Date, which computer tape is stored at KPMG's Toronto office (the "**KPMG Facility**").

Thirteenth Report, para 48, Motion Record, Tab 2

Schildt Affidavit, paras 9-11, Motion Record, Tab 3

43. In evaluating the GIA's request for a copy of the books and records of the Toronto Branch, the Liquidator has identified the following issues:

- i) The Toronto Branch is not a separate legal entity but rather a branch of Maple Bank;

ii) The Toronto Branch's records are comingled with those of Maple Bank and its various Affiliates, and it is not practical, and likely not possible, to segregate, by legal entity the digital records maintained on the SunGard Server, or the computer tapes located at the EY Facility and the KPMG Facility. The Maple Bank Group had a common IT system, with many of the significant business functions using common software and databases. In addition, the volume of digital data involved is enormous. In the case of physical records stored at the various facilities, the cost of segregating the records would be prohibitive, given the volume of records involved;

iii) The Toronto Branch's records contain personnel information of both former employees and mortgagors and immigrant investors whose mortgages / loans were either securitized through the NHA MBS program (under which the Toronto Branch was an Approved Issuer) or indirectly financed by the Toronto Branch; and

iv) The Data received by the GIA will be transferred to Germany.

Thirteenth Report, para 50, Motion Record, Tab 2

44. The Toronto Branch's records contain personal information associated with its former employees, though this data is thought to be a small portion of the total. The personal data is of two types; that related to the Toronto Branch, such as employee personnel files and payroll information, and that associated with the employee's personal life.

Thirteenth Report, para 54, Motion Record, Tab 2

45. The Toronto Branch had a Computer Network Internet Usage Policy, and Email Policy (collectively the "**Policies**") which, as described in greater detail in the Thirteenth Report, expressly indicated that employees would possess no expectation of privacy in subject information, content and files. The Policies were made available to employees and posted on the company website, but no formal consent to the Policies was obtained.

Appendixes "G" and "H" to the Thirteenth Report, para 55, Motion Record, Tab 2G and 2H

46. The Toronto Branch's records contain personal information associated with approximately 13,500 individual mortgagors. This includes proof of income, banking details,

and payment history of mortgagors. The mortgages were originated by third parties, subsequently purchased by the Toronto Branch and, with only a few exceptions, thereafter securitized through the NHA MBS program (as the Toronto Branch was an Approved Issuer).

Thirteenth Report, para 57, Motion Record, Tab 2

47. The records of the Toronto Branch also contain the personal information associated with approximately 440 borrowers under the Immigrant Investor Program (“IIP”). A number of financial institutions are in the business of providing loans (each an “**Immigrant Investor Loan**”) to immigrant investors. The Toronto Branch in turn provided financing to such financial institutions that provided loans to borrowers to invest with Citizenship and Immigration Canada (“CIC”) or IQ Immigrants Investissuers Inc. (“IQII”). As part of these financings, the Toronto Branch obtained copies of the loan applications associated with each Immigrant Investor Loan, which applications contain personal information (e.g. banking information) of the borrower.

Thirteenth Report, para 59, Motion Record, Tab 2

48. In the event the Data Transfer Order is granted, the Liquidator anticipates taking the following steps to transfer the Toronto Branch Data:

- i) Assigning to the GIA the storage contract associated with the Recall Facility, and providing to the GIA all the physical records located at the facility. These records will include Data of the Toronto Branch, and data of Maple Bank and Affiliates;
- ii) Authorizing MSCL to create a copy of the Data stored on the SunGard Server and providing a copy to the GIA. This copy will include Data of the Toronto Branch, and data of Maple Bank and Affiliates;
- iii) Authorizing MSCL to provide to the GIA all of the physical records located at the RecordXpress Facility and the Iron Mountain Facility. This will include Data of the Toronto Branch, and data of Maple Bank and Affiliates;
- iv) Assigning to the GIA any rights the Toronto Branch has to access the Data; and

v) To the extent technically feasible, providing to the GIA a copy of the computer tape located at the KPMG Facility. This copy will include Data of the Toronto Branch, and data of Maple Bank and Affiliates;

Thirteenth Report, para 65, Motion Record, Tab 2

49. It is also understood by the Liquidator that MSCL will take steps to assign to the GIA the storage contracts associated with the RecordExpress, Iron Mountain, and SunGard Facilities, and to assign any software and technical equipment required to access the SunGard server and the tape at the E&Y Facility.

Thirteenth Report, para 65, Motion Record, Tab 2

50. On December 7, 2017 the Liquidator served its notice of motion, followed by the Thirteenth Report and the affidavit Charlotte Schildt in support of the requested Third Interim Distribution Order and Data Transfer Order.

PART III - ISSUES

51. The issues to be determined by the Court on this motion are whether it is appropriate for the Court to (i) approve the Third Interim Distribution, (ii) grant the Data Transfer Order, and (ii) grant a Sealing Order over the Confidential Supplement.

PART IV - LAW

52. 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.

Coopérants, Mutual Life Insurance Society (Liquidator of) v. Dubois, [1996] 1 S.C.R. 900, 1996 CarswellQue 369 at paras 36-37, Liquidator Brief of Authorities (the "BOA"), Tab 1

Re Maple Bank GmbH, 2017 ONSC 2536 (Commercial List), 2017 CarswellOnt 6220 ("Maple Bank") at para 24, BOA Tab 2

53. 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.

Sections 75-77 of the Winding-up and Restructuring Act, R.S.C., 1985, c.W-11

Maple Bank supra, at para 25, BOA Tab 2

54. 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.

Maple Bank supra, at paras 26, 27, BOA Tab 2

Canada (Attorney General) v. Confederation Life Insurance Co., 2002 CarswellOnt 3681 (S.C.J.) (Commercial List) at para 4, BOA Tab 3

55. 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

(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.

Section 158.1 of the *Winding-up and Restructuring Act*, R.S.C., 1985, c.W-11

56. 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.

***Maple Bank, supra*, at paras 29, 31, 37, 38, BOA Tab 2**

57. The guiding factors set out in the April 27, 2017 Endorsement of Regional Senior Justice Morawetz released in support of the granting of the First Interim Distribution are of equal, if not heightened relevance, to the present motion for approval of the Third Interim Distribution. As set out below, each factor favours the approval of Third Interim Distribution sought by the Liquidator on this motion.

A) No Prejudice to the Toronto Branch creditors

58. Central to the granting of the First Interim Distribution 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.

(...)

***Maple Bank supra*, at paras 34, 37, BOA Tab 2**

59. As outlined in the Thirteenth Report, the total Unresolved Claims, and the Potential CRA Remittance and Liability, total approximately \$19.9 million. The Liquidator has established, in consultation with the GIA, an appropriate and conservative Estimated Reserve in the amount of \$44.8 million to provide for, *inter alia*, the Unresolved Claim and Future Potential Claims.

Thirteenth Report, paras 68, 69, Motion Record, Tab 2

60. The Liquidator can now predict with certainty the universe of Claims that may be made against the Toronto Branch, including in respect of contingent claims currently filed and not proven. The passing of the Principal Officers Claims Bar Date without the Liquidator having received any Claims filed against the Principal Officers of the Toronto Branch also provides further certainty with respect to the quantum of any potential indemnity claims that the Principal Officers may have against the Toronto Branch.

Thirteenth Report, paras 78, Motion Record, Tab 2

61. As at October 31, 2017 the Toronto Branch held approximately \$49.9 million in cash and cash equivalents. The realization process for all of the Assets of the Toronto Branch is complete, with the only remaining anticipated realization consisting of interest income on invested funds. In light of the maintained Estimated Reserve, the Estimated Surplus at the present time is approximately \$5.1 million.

Thirteenth Report, paras 72, 78, Motion Record, Tab 2

62. It is on the basis of the above salient facts that the Liquidator recommends in the Thirteenth Report that the Court approve the Third Interim Distribution. The Estimated Reserve (in the amount of \$44.8 million) is adequate to cover the existing Unresolved Claim and any Future Potential Claims to July 31, 2018, and the Estimated Surplus is accordingly available for distribution to the GIA.

Thirteenth Report, para 72, Motion Record, Tab 2

63. Sufficient notice has also been provided to any Toronto Branch creditors. On December 8, 2017 the Liquidator posted a Notice of Distribution notifying creditors of the Third Interim Distribution in the national edition of *The Globe and Mail* and international edition of *The Financial Times*.

Notice of Distribution to Creditors, Appendix "E" to the Thirteenth Report, Motion Record, Tab 2E

64. Consequently, and in keeping with the approach, as endorsed by granting of the First Interim Distribution Order, the proposed Third Interim Distribution will not be prejudicial to the remaining creditors of the Toronto Branch.

B) An Interim Distribution to the GIA is Equitable

65. 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. The following comments in the April 27, 2017 Reasons are apt:

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.

Maple Bank, supra, at para 35, BOA Tab 2

66. As noted above, the Third Interim Distribution will not lead to any prejudice to the Toronto Branch's creditors. The failure to approve the distribution, however, would continue to expose creditors in Germany to delay and to considerable foreign exchange risks on the amounts that would eventually be distributed to them.

Thirteenth Report, para 78, Motion Record, Tab 2

67. The Third Interim Distribution will be, in essence, a transfer to another insolvency administrator for the benefit of the creditors of the German Estate.

Thirteenth Report, para 78, Motion Record, Tab 2

68. In the context of cross border insolvency proceedings the Court has also recognized, as a matter of policy, that where possible Canadian Courts should complement, coordinate and accommodate insolvency proceedings in foreign jurisdictions in order to preserve and maximize value for the benefit of all creditors.

Re United Air Lines Inc., 2003 CarswellOnt 2786 (S.C.J.) (Commercial List) at para 1, BOA, Tab 4

Re Matlack Inc., 2001 CarswellOnt 1830 (S.C.J.) (Commercial List) at para 3, BOA, Tab 5

69. 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.

Re MtGox Co., 2014 ONSC 5811 (Commercial List), 2014 CarswellOnt 13871 at paras 10-12, BOA, Tab 6

70. In light of the GIA's stated objective of making a distribution to creditors of Maple Bank in Germany as soon as practicable, the Liquidator worked with the GIA in order to implement a distribution process in Canada that will ensure that appropriate reserves will be maintained by the Liquidator, while facilitating a prompt distribution to the GIA of the available funds remaining after the establishment of the Estimated Reserve.

Thirteenth Report, para 78, Motion Record, Tab 2

71. The GIA represents the participants in the German insolvency proceeding, and in particular those creditors that were not able to participate in the Canadian Winding-Up Proceeding. Since all creditors in the Canadian Winding-Up Proceeding have or will receive payment of their Proven Claims, in full with interest, it is important that the creditors in the German insolvency proceeding not be unreasonably and unnecessarily prejudiced in receiving a partial recovery of their proven claims.

Twelfth Report of the Liquidator dated September 19, 2017, para 115, Appendix "C" to the Thirteenth Report Motion Record, Tab 2C

72. 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.

Maple Bank supra, at para 36, BOA Tab 2

73. The Third Interim Distribution is appropriate in the context of these proceedings because (i) no creditors of the Toronto Branch will suffer prejudice as a result of the Third Interim Distribution, as the Toronto Branch has a significant surplus and the Liquidator has calculated

that it will be able to maintain adequate reserves, and (ii) the Third Interim Distribution is in accordance with the recognized stated objective of the Courts in Canada to, where possible, assist with and accommodate insolvency proceedings in a foreign jurisdiction, in order to maximize value for the benefit of all affected creditors.

C) The Confidential Supplement Contains Commercially Sensitive Confidential Information

74. The Executives minutes of settlement are attached as appendices to the Confidential Supplement to the Thirteenth Report (the “**Confidential Appendices**”). The Confidential Supplement summarizes the Confidential Appendices.

75. The Confidential Appendices contain express confidentiality protections in order to protect the personal financial information of the Executives. Importantly, the Confidential Supplement also contains sensitive information, including the terms of settlement, and the consideration received by each of the Executives.

Sierra Club of Canada v. Canada (Minister of Finance), 2002 SCC 41, 2002 CarswellNat 822 (“*Sierra Club*”) at paras 53, 54, BOA, Tab 7

Section 137(2), *Courts of Justice Act*, R.S.O. 1990, C.43

Thirteenth Report, para 40, Motion Record, Tab 2

76. A sealing order is necessary to prevent a serious risk to the important commercial interests of the settlement parties, and reasonable alternative measures will not prevent that risk.

Sierra Club supra, at paras 53, 54, BOA, Tab 7

77. The salutary effects of the requested sealing order outweigh any deleterious effects, such as an impingement on public access to court proceedings, as the sensitive confidential information contained in the Confidential Supplement, including the Confidential Appendices, is ancillary to the issues before the Court relating to the request made by the Liquidator that its activities be approved with regard to the settlement that it has entered into with the Executives.

Sierra Club supra, at paras 53, 54, BOA, Tab 7

D) The Data Transfer Order is Necessary and Appropriate

78. *PIPEDA* sets out rules for how private-sector federally regulated entities and businesses collect, use and disclose personal information. In general, personal information may not be collected, used or disclosed without the knowledge and consent of the individual. The Liquidator is appointed under *WURA* with respect to the Toronto Branch, an authorized foreign bank, accordingly the Liquidator is subject to the applicable provisions of *PIPEDA*.

Office of the Privacy Commissioner (“OPC”) *PIPEDA* Case Summary #2006-336,
BOA, Tab 8

Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5
 (“*PIPEDA*”)

79. Personal information is broadly defined under *PIPEDA* to constitute information about an “identifiable individual.” As a limited exception, information that employees have created at work such as emails or analysis may constitute “work product”, and be collected, used or disclosed absent individual consent. Whether such information may be deemed work product will depend on contextual factors, such as how and why the information was produced, how it was used, and industry practices (the “**Work Product Exception**”).

Sections 7(1)(b.2), (2)(b.2) and (3)(e.2), *PIPEDA*

80. *PIPEDA* authorizes organizations to disclose personal information absent individual consent under certain circumstances detailed in section 7(3). To the extent that the Data contains, in part, personal information that is not otherwise caught by the Work Product Exception, the Liquidator relies on section 7(3) (the “**Government Exception**”). In short, this exception to the consent requirement is directed at disclosure to government institutions to, *inter alia*, enforce a law or aid in carrying out an investigation. The relevant provisions of *PIPEDA* are set out below:

Disclosure without knowledge or consent

7.(3) For the purpose of clause 4.3 of Schedule 1, and despite the note that accompanies that clause, an organization may disclose personal information without the knowledge or consent of the individual only if the disclosure is

(...)

(c.1) made to a government institution or part of a government institution that has made a request for the information, identified its lawful authority to obtain the information and indicated that

(...)

(ii) the disclosure is requested for the purpose of enforcing any law of Canada, a province or a foreign jurisdiction, carrying out an investigation relating to the enforcement of any such law or gathering intelligence for the purpose of enforcing any such law

Section 7(3)(c.1), *PIPEDA*

81. The term “government institution” is not defined in *PIPEDA*, yet the above provision expressly references disclosure in aid of enforcement, and investigation, in a foreign jurisdiction. The Office of the Privacy Commissioner (“**OPC**”) has articulated the view that a company holding information in Canada pertaining to Canadian residents is not required to provide information to a foreign government in response to a court order issued abroad. Former Toronto Branch employees would accordingly lose this protection on the transfer of Data to Germany. As elaborated upon below, however, it is submitted that a Canadian Court may validly issue an Order providing for the disclosure and transfer of information in aid of an enforcement or investigation proceeding of a foreign government institution.

OPC, Privacy Commissioner’s 2004 Annual Report on the Personal Information Protection and Electronic Documents Act (October 6, 2005), at p 16, BOA Tab 9

Thirteenth Report, at para 61, Motion Record, Tab 2

82. Recent decisions of the OPC have confirmed that individuals should be notified if their personal information will be transferred to and/or stored in a foreign country, and that such information will be subject to foreign laws and potentially disclosed to foreign authorities.

OPC *PIPEDA* Case Summary #2008-394, BOA Tab 10

OPC *PIPEDA* Case Summary #2006-365, BOA Tab 11

OPC *PIPEDA* Case Summary #2006-313, BOA Tab 12

83. As more fully described in the chart attached as Appendix “I” to the Thirteenth Report, protections under German law for personal information, including requests for information from government authorities, are comparable to that provided by *PIPEDA*. In fact, in several areas German law is more stringent, such as (i) the application of privacy law to non-commercial

activities, (ii) narrower employee, Work Product, and Government exceptions to the consent requirement, and (iii) more rigorous cross-border transfer and breach notification requirements.

Appendix "I" to the Thirteenth Report, at para 61, Motion Record, Tab 2

84. Section 7(3)(c) permits disclosure absent individual knowledge or consent in order to comply with an Order made by a Court to compel the production of information. By way of example, the Winding-up Order itself provided for the disclosure of personal information per section 7(3)(c) of *PIPEDA* to prospective purchasers and bidders for the sale of certain Assets of the Toronto Branch.

Section 7(3)(c), *PIPEDA*

85. The Data Transfer Order follows as a corollary from paragraphs 8(a) and 9(a) of the Winding-Up Order, which 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.

Winding-up Order, Appendix "A" to the Thirteenth Report, Motion Record, Tab 2A

86. It is submitted that the requested Data Transfer Order is justified, in light of the following considerations:

i) it is believed that a large majority of the Data consists of work-related emails and documents, and thus would be deemed work product;

Schildt Affidavit, at para 18, Motion Record, Tab 3

Thirteenth Report, at para 55, Motion Record, Tab 2

ii) by virtue of the Policies, employees possessed a diminished, if any, expectation of privacy with respect to their Data;

Schildt Affidavit, at para 18, Motion Record, Tab 3

iii) current and former employees have been provided notice of the relief requested on the present motion, as they had not previously provided written consent to the proposed transfer of Data to a foreign jurisdiction;

Thirteenth Report, at paras 55-60, 78, Motion Record, Tab 2

iv) the requested Data Transfer Order is in aid of the activities of the GIA to fulfill its statutory or other legal duties under German law including with respect to compliance and disclosure obligations to tax authorities, banking authorities or German prosecutors, and investigation of potentially improper conduct within Maple Bank and its Affiliates;

Schildt Affidavit, at para 8, Motion Record, Tab 3

Thirteenth Report, at para 47, Motion Record, Tab 2

v) to the extent that personal information is implicated, and any expectation of privacy exists in respect of same, it will be adequately protected by German privacy law which provides a similar, and in some cases more stringent, level of protection to *PIPEDA*, as well as the non-public nature of the GIA proceedings, as more fully described in the Schildt Affidavit and chart appended to the Thirteenth Report;

Schildt Affidavit, at paras 21-24, Motion Record, Tab 3

Thirteenth Report, at para 61, Motion Record, Tab 2

vi) a case-by-case review and any segregation or allocation, with respect to the Toronto Branch or other Maple Bank entities, would be prohibitively expensive and time consuming, and likely impossible in practice;

Schildt Affidavit, at paras 25-30, Motion Record, Tab 3

vii) the Liquidator has not provided notice to the mortgagors or borrowers for whom the Toronto Branch possesses personal information, due to the fact that this will create confusion as a result of their lack of knowledge of the involvement of the Toronto Branch with the mortgages and financial instruments. While the Data may contain customer information related to the mortgage loans and immigrant investor loans, such Data is not central to the GIA request and if it can be efficiently excluded from the Data Sharing Order, the GIA will not object to such exclusion;

Schildt Affidavit, at paras 19, 20, Motion Record, Tab 3

Thirteenth Report, at paras 57-60, Motion Record, Tab 2

84. Accordingly, the granting of the Data Transfer Order will accord with the terms of the Winding-Up Order, privacy law protections, and principles of comity for the proper administration of the Maple Bank estate.

Schildt Affidavit, at paras 12, 13, Motion Record, Tab 3

Thirteenth Report, at paras 46, 47, 61, Motion Record, Tab 2

PARV V - RELIEF

87. For the reasons set out above, the Liquidator requests that the Court grant the relief requested in the Third Interim Distribution Order and the Data Transfer 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 12th day of December 2017



Alex MacFarlane / Bevan Brooksbank

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

SCHEDULE "A"

1. *Coopérants, Mutual Life Insurance Society (Liquidator of) v. Dubois*, [1996] 1 S.C.R. 900, 1996 CarswellQue 369
2. *Re Maple Bank GmbH*, 2017 ONSC 2536 (Commercial List), 2017 CarswellOnt 6220
3. *Canada (Attorney General) v. Confederation Life Insurance Co.*, 2002 CarswellOnt 3681 (S.C.J.) (Commercial List)
4. *Re United Air Lines Inc.*, 2003 CarswellOnt 2786 (S.C.J.) (Commercial List)
5. *Re Matlack Inc.*, 2001 CarswellOnt 1830 (S.C.J.) (Commercial List)
6. *Re MtGox Co.*, 2014 ONSC 5811 (Commercial List), 2014 CarswellOnt 13871
7. *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, 2002 CarswellNat 822
8. Office of the Privacy Commissioner ("OPC") PIPEDA Case Summary #2006-336
9. OPC, *Privacy Commissioner's 2004 Annual Report on the Personal Information Protection and Electronic Documents Act* (October 6, 2005)
10. OPC PIPEDA Case Summary #2008-394
11. OPC PIPEDA Case Summary #2006-365
12. OPC PIPEDA Case Summary #2006-313

SCHEDULE "B"

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

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.

Distribution of assets

76 (1) After the notices required by sections 74 and 75 have been given, the respective times specified in the notices have expired and all claims of which proof has been required by due notice in writing by the liquidator in that behalf have been allowed or disallowed by the court in whole or in part, the liquidator may distribute the assets of the company or any part of those assets among the persons entitled to them and without reference to any claim against the company, or, in the case of an authorized foreign bank, against the authorized foreign bank in respect of its business in Canada, that has not then been sent to the liquidator.

Claims not sent in

(2) The liquidator is not liable to any person whose claim has not been sent in at the time of distributing the assets or part thereof under subsection (1) for the assets or part thereof so distributed.

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.

Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5

Collection without knowledge or consent

7 (1) For the purpose of clause 4.3 of Schedule 1, and despite the note that accompanies that clause, an organization may collect personal information without the knowledge or consent of the individual only if

- (a) the collection is clearly in the interests of the individual and consent cannot be obtained in a timely way;
- (b) it is reasonable to expect that the collection with the knowledge or consent of the individual would compromise the availability or the accuracy of the information and the collection is reasonable for purposes related to investigating a breach of an agreement or a contravention of the laws of Canada or a province;
 - (b.1) it is contained in a witness statement and the collection is necessary to assess, process or settle an insurance claim;
 - (b.2) it was produced by the individual in the course of their employment, business or profession and the collection is consistent with the purposes for which the information was produced;
- (c) the collection is solely for journalistic, artistic or literary purposes;
- (d) the information is publicly available and is specified by the regulations; or
- (e) the collection is made for the purpose of making a disclosure
 - (i) under subparagraph (3)(c.1)(i) or (d)(ii), or
 - (ii) that is required by law.

Use without knowledge or consent

(2) For the purpose of clause 4.3 of Schedule 1, and despite the note that accompanies that clause, an organization may, without the knowledge or consent of the individual, use personal information only if

- (a) in the course of its activities, the organization becomes aware of information that it has reasonable grounds to believe could be useful in the investigation of a contravention of the laws of Canada, a province or a foreign jurisdiction that has been, is being or is about to be committed, and the information is used for the purpose of investigating that contravention;
- (b) it is used for the purpose of acting in respect of an emergency that threatens the life, health or security of an individual;
 - (b.1) the information is contained in a witness statement and the use is necessary to assess, process or settle an insurance claim;

(b.2) the information was produced by the individual in the course of their employment, business or profession and the use is consistent with the purposes for which the information was produced;

(c) it is used for statistical, or scholarly study or research, purposes that cannot be achieved without using the information, the information is used in a manner that will ensure its confidentiality, it is impracticable to obtain consent and the organization informs the Commissioner of the use before the information is used;

(c.1) it is publicly available and is specified by the regulations; or

(d) it was collected under paragraph (1)(a), (b) or (e).

Disclosure without knowledge or consent

(3) For the purpose of clause 4.3 of Schedule 1, and despite the note that accompanies that clause, an organization may disclose personal information without the knowledge or consent of the individual only if the disclosure is

(a) made to, in the Province of Quebec, an advocate or notary or, in any other province, a barrister or solicitor who is representing the organization;

(b) for the purpose of collecting a debt owed by the individual to the organization;

(c) required to comply with a subpoena or warrant issued or an order made by a court, person or body with jurisdiction to compel the production of information, or to comply with rules of court relating to the production of records;

(c.1) made to a government institution or part of a government institution that has made a request for the information, identified its lawful authority to obtain the information and indicated that

(i) it suspects that the information relates to national security, the defence of Canada or the conduct of international affairs,

(ii) the disclosure is requested for the purpose of enforcing any law of Canada, a province or a foreign jurisdiction, carrying out an investigation relating to the enforcement of any such law or gathering intelligence for the purpose of enforcing any such law,

(iii) the disclosure is requested for the purpose of administering any law of Canada or a province, or

(iv) the disclosure is requested for the purpose of communicating with the next of kin or authorized representative of an injured, ill or deceased individual;

(c.2) made to the government institution mentioned in section 7 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* as required by that section;

(d) made on the initiative of the organization to a government institution or a part of a government institution and the organization

(i) has reasonable grounds to believe that the information relates to a contravention of the laws of Canada, a province or a foreign jurisdiction that has been, is being or is about to be committed, or

(ii) suspects that the information relates to national security, the defence of Canada or the conduct of international affairs;

(d.1) made to another organization and is reasonable for the purposes of investigating a breach of an agreement or a contravention of the laws of Canada or a province that has been, is being or is about to be committed and it is reasonable to expect that disclosure with the knowledge or consent of the individual would compromise the investigation;

(d.2) made to another organization and is reasonable for the purposes of detecting or suppressing fraud or of preventing fraud that is likely to be committed and it is reasonable to expect that the disclosure with the knowledge or consent of the individual would compromise the ability to prevent, detect or suppress the fraud;

(d.3) made on the initiative of the organization to a government institution, a part of a government institution or the individual's next of kin or authorized representative and

(i) the organization has reasonable grounds to believe that the individual has been, is or may be the victim of financial abuse,

(ii) the disclosure is made solely for purposes related to preventing or investigating the abuse, and

(iii) it is reasonable to expect that disclosure with the knowledge or consent of the individual would compromise the ability to prevent or investigate the abuse;

(d.4) necessary to identify the individual who is injured, ill or deceased, made to a government institution, a part of a government institution or the individual's next of kin or authorized representative and, if the individual is alive, the organization informs that individual in writing without delay of the disclosure;

(e) made to a person who needs the information because of an emergency that threatens the life, health or security of an individual and, if the individual whom the information is about is alive, the organization informs that individual in writing without delay of the disclosure;

(e.1) of information that is contained in a witness statement and the disclosure is necessary to assess, process or settle an insurance claim;

(e.2) of information that was produced by the individual in the course of their employment, business or profession and the disclosure is consistent with the purposes for which the information was produced;

(f) for statistical, or scholarly study or research, purposes that cannot be achieved without disclosing the information, it is impracticable to obtain consent and the organization informs the Commissioner of the disclosure before the information is disclosed;

(g) made to an institution whose functions include the conservation of records of historic or archival importance, and the disclosure is made for the purpose of such conservation;

(h) made after the earlier of

(i) one hundred years after the record containing the information was created,
and

(ii) twenty years after the death of the individual whom the information is
about;

(h.1) of information that is publicly available and is specified by the regulations; or

(h.2) [Repealed, 2015, c. 32, s. 6]

(i) required by law.

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

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

PROCEEDING COMMENCED AT TORONTO

FACTUM OF THE LIQUIDATOR KPMG INC.
(Motion returnable December 13, 2017)

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business in Canada of Maple Bank GmbH and its assets