

CITATION: Maple Bank GmbH (Re), 2016 ONSC 1181
COURT FILE NO.: CV-16-11290-00CL
DATE: 2016-02-17

**ONTARIO SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

RE: 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

BEFORE: Regional Senior Justice Morawetz

COUNSEL: J.J. Lucki for the Attorney General of Canada

A.L. MacFarlane, M. Karabus and T. Gertner for KPMG Inc., Proposed
Liquidator

M. Konyukhova for the German Insolvency Administrator

E. Pleet for Paul Lishman

**HEARD
and ENDORSED:** February 16, 2016

REASONS: February 17, 2016

ENDORSEMENT

[1] This Application was brought by the Attorney General of Canada (“Attorney General”), at the request of the Superintendent of Financial Institutions (the “Superintendent”) 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) 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.

[2] The Application was not opposed.

A. Overview

[3] 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”).

- [4] 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, 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.
- [5] The Superintendent has 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.
- [6] 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.
- [7] Maple Bank is not authorized to accept deposits from Canadian sources, but is not prohibited from accepting wholesale deposits from foreign institutional investors.
- [8] 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.
- [9] According to Mr. Paul Laverty, Director in the Deposit-Taking Group (Toronto) of OFSI, 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.

- [10] On February 6, 2016, 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.
- [11] 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.
- [12] 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.
- [13] 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.
- [14] In light of the actions taken by BaFin, and Maple Bank's admission of insolvency and consent to BaFin's insolvency proceedings, Mr. Laverty stated that the Superintendent decided grounds existed under subsections 619(2)(a) and (g) of the *Bank Act* for 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.

- [15] 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*.
- [16] 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.
- [17] Having regard to all of the foregoing developments and circumstances, Mr. Lavery stated that the Superintendent determined 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 subsections provide:

“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.”

- [18] 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 requested information regarding Maple Bank’s business in Canada. KPMG responded with the information it had available.
- [19] On 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.
- [20] Mr. Laverty stated that 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 for a winding-up order in respect of Maple Bank’s business in Canada under section 10.1 of the *WURA*.

B. Issues

- [21] 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*.

C. Analysis

- [22] 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.

- [23] Part XII.1 of the *Bank Act* includes, in sections 618 through 627, various provisions regarding “Supervisory Intervention” in respect of authorized foreign banks by the Superintendent of Financial Institutions.
- [24] 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 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”.
- [25] 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.
- [26] Counsel to the Superintendent submits that it is apparent in the circumstances of this case that the Superintendent has ample basis to reasonably form the opinions referred to in section 619(2).
- [27] Counsel further submits that consistent with the nature of the Superintendent’s function and responsibilities, considerable deference should be accorded to the Superintendent’s judgment and discretionary decisions. Further, Courts have 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. (*See Attorney General of Canada v. Cardinal Insurance Co.*, (1982) 39 O.R. (2d) 204 (H.C.) and *Canada (Attorney General) v. Security Home Mortgage Co.*, [1996] A.J. No. 1015 (Q.B.)
- [28] Counsel further submits that under subsection 619(1) of the *Bank Act*, the 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, counsel submits that 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).

[29] In addition, section 621 of the *Bank Act* authorizes 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).

[30] Having taken control of the assets of Maple Bank under subsection 619(1)(b), counsel submits 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*.

[31] Section 10.1 establishes two categories of grounds upon which the court may make a winding-up order in respect of an authorized foreign bank.

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

[32] In this case, based on the Superintendent's opinion set out in unchallenged affidavit of Mr. Laverty and Maple Bank's admission of insolvency, the grounds upon which the Superintendent took control of the assets under subsection 619(1)(b) of the *Bank Act* included the grounds in subsection 619(2)(a) and (g) of the *Bank Act*.

[33] In my view, based on the evidence, it is both just and equitable to make a winding-up order in these circumstances. 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.

- [34] 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.
- [35] These circumstances, given the complexity of the business of Maple Bank in Canada, and given KPMG's involvement in assisting the Superintendent in taking control of assets, in my view it is appropriate to appoint KPMG as Liquidator and to 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.
- [36] Finally, I expect that there will be ongoing communication as between the German insolvency administrator and the Liquidator. It should be noted that this order is without prejudice to the right of any party to raise any issue relative to the application of this order or these proceedings to (i) assets of Maple Bank in respect of Maple Banks business in Canada which are not situate in Canada or (ii) assets of Maple Bank which are not in respect of Maple Banks business in Canada which are situated in Canada. With respect to (ii), any such dispute shall be subject to an order of this court.



Regional Senior Justice G.B. Morawetz

Date: February 17, 2016