

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
- COMMERCIAL LIST**

**IN THE MATTER OF NORTHUMBERLAND  
GENERAL INSURANCE COMPANY;**

**AND IN THE MATTER OF THE  
CANADIAN AND BRITISH INSURANCE COMPANIES ACT,  
R.S.C. 1970, c. I-15, as amended;**

**AND IN THE MATTER OF THE  
WINDING-UP ACT, R.S.C. 1970, c.W-10, as amended.**

**BETWEEN:**

**THE ATTORNEY GENERAL OF CANADA**

**Applicant**

**- and -**

**NORTHUMBERLAND GENERAL INSURANCE COMPANY**

**Respondent**

**REPORT DATED JUNE 10, 2011  
(Motion for Advice and Directions in respect of  
Post-Liquidation Interest, and Preliminary Motion for  
Appointment of Representative Counsel and Directions for Service)**

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**I. THE MOTIONS**

1. This Report is filed in support of two motions by PricewaterhouseCoopers Inc. ("PwC Inc."), permanent liquidator (the "**Liquidator**") of Northumberland General Insurance Company ("**Northumberland**").
2. The main motion (the "**Post-liquidation Interest Motion**") is for advice and directions with respect to the payment from surplus assets of post-liquidation interest on claims

in the estate of Northumberland. The preliminary motion (the “**Preliminary Directions Motion**”) is a motion for the appointment of representative counsel and directions for service in respect of the Post-liquidation Interest Motion.

3. The Liquidator may file a further Report or Reports as advisable and as may be appropriate in light of any responding materials that may be delivered.

4. The Liquidator has been advised by its counsel in respect of legal issues arising in respect of the application of the surplus to payment of post-liquidation interest in the Northumberland winding-up. The Liquidator’s counsel has prepared a memorandum (“**Goodmans Memorandum**”) explaining these issues for the benefit of the Court, which is attached (with Appendices) as Schedule “A”.

## **II. BACKGROUND**

### **A. The Company**

5. Northumberland was a property and casualty insurance company, licensed to do business in Canada under federal legislation. Northumberland was engaged in the underwriting of, among other products, significant liability insurance policies. These include many policies with “long-tail” coverage (where exposures may not be manifest until long after the expiry of the policy term) and complex coverage including asbestos, alcohol, tobacco and environmental exposures.

6. Northumberland also carried on business in New York State, commencing in the late 1970’s with the sale of policies to persons resident in the United States of America on an “excess and surplus lines” basis. As required by New York law, Northumberland deposited

funds in trust for the protection of policyholders and beneficiaries resident in the United States of America (the “**Regulation 41 Trust Funds**”). In January 1983, Northumberland opened a branch in the State of New York (“**U.S. Branch**”) and deposited further assets for the protection of policyholders of the U.S. Branch.

7. Attached as Schedule “B” is a copy of the Report dated May 10, 2010 (without Schedules) in support of a motion herein that was returnable May 20, 2010, and which sets out further background information with respect to Northumberland.

**B. The Liquidation and Appointment Orders**

*Canada*

8. By Orders of this Court made July 24, 1985, Northumberland was ordered wound-up pursuant to what is now the *Winding-up and Restructuring Act* (the “**WURA**”) and the Superintendent of Insurance (Canada) was appointed provisional liquidator of Northumberland. Copies of these two Orders are attached as Schedules “C” and “D” respectively.

9. The Superintendent of Insurance appointed Coopers & Lybrand Limited (now PwC Inc.) as his Agent to conduct the liquidation. By Order of this Court dated October 8, 1987, the Superintendent of Insurance was replaced as provisional liquidator of Northumberland by the Superintendent of Financial Institutions.

10. By Order dated May 20, 2010, this Court discharged the Superintendent and appointed PwC Inc. as Liquidator. A copy of the May 20, 2010 Order is attached as Schedule “E”. A copy of the May 20, 2010 Endorsement by the Honourable Madame Justice Pepall (with an unofficial typed version) is attached as Schedule “F”.

**C. Representative Counsel**

11. By Orders made June 24, 1993, September 20, 1993 and January 16, 2003:

- (a) Mr. Ronald N. Robertson, Q.C. was appointed as representative counsel on behalf of the **“Included Policyholders”**, being those policyholders of Northumberland other than the beneficiaries of the Regulation 41 Trust Funds and the U.S. Branch policyholders;
- (b) Mr. James H. Grout was appointed as representative counsel on behalf of the **“Included Ordinary Creditors”**, being the ordinary creditors of Northumberland other than the U.S. Branch ordinary creditors; and
- (c) Mr. Lyndon A. J. Barnes was appointed as representative counsel on behalf of the Canadian property and casualty insurance industry.

These appointments were made with respect to a motion to determine certain issues with respect to priorities in the winding-up. Copies of these Orders are attached as Schedule “G”, “H” and “I” respectively.

12. Pursuant to the May 20, 2010 Order (Schedule “E” hereto):

- (a) the terms of the appointments of representative counsel for the Included Ordinary Creditors and the Included Policyholders were extended to authorize them to represent the interests of their respective classes of parties in connection with the liquidation until further Order of the Court; and

- (b) Lyndon A. J. Barnes was discharged from his duties as representative counsel for the Assessed Insurance Companies.

**D. Interim Distributions to Date in the Winding-up of Northumberland**

***The “Duality Decision”***

- 13. There are two types of policy claims under the Northumberland policies:
  - (a) claims for indemnity for property or liability losses covered by policies (“**Policy Loss Claims**”), and
  - (b) claims for refunds of premium paid for policies that were cancelled early (“**Unearned Premium Claims**”).
- 14. As discussed in the Goodmans Memorandum, the governing statutory priority provision at the commencement of the winding-up ranked Policy Loss Claims and Unearned Premium Claims equally. However, there was ambiguity as to the priority where a policyholder held “dual claims” under a policy: i.e. both a Policy Loss Claim and an Unearned Premium Claim. This ambiguity was resolved by the ruling of Mr. Justice Saunders in 1988 (“**Duality Decision**”) that held that, in a case of a policyholder having “dual claims” under a policy, the Policy Loss Claim ranked in priority to the Unearned Premium Claim, so that a “dual” policyholder did not have priority over ordinary creditors for both claims but could still assert the Unearned Premium Claim as an ordinary creditor claim.<sup>1</sup>

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<sup>1</sup> In some cases where a policyholder had “dual claims” under a policy, the Unearned Premium Claim was in an amount higher than the Policy Loss Claim. In fairness to such policyholders the lower-valued Policy Loss Claim was treated as the subordinate claim (i.e., as an ordinary claim) for the purposes of making the distributions. This effectively recognized the more favourable treatment that such a policyholder would effect by withdrawing the Policy Loss Claim as the priority claim in such cases.

*Policyholders' Claims*

15. With the duality issue resolved, on November 1, 1989 this Court approved the payment of a first interim dividend of 15¢ on the dollar on policyholder claims.

16. On December 7, 1990, this Court approved the payment of a second interim dividend of 25¢ on the dollar on policyholder claims.

17. On September 9, 1994, this Court approved the payment of a third interim dividend of 60¢ on the dollar on policyholder claims, bringing the cumulative distributions to 100¢ on the dollar on the principal amount of policyholder claims.<sup>2</sup>

*Other Claims*

18. By Order dated October 1, 1996, this Court approved the payment of a fourth interim dividend, being 100¢ on the dollar of the claims of:

(a) the ordinary claims<sup>3</sup>; and

(b) Her Majesty in respect of the principal amount of the industry-funded liquidation expenses to March 31, 1996.

19. By Order dated February 13, 2003, this Court approved the payment of a fifth interim dividend as follows:

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<sup>2</sup> As matters developed in the Northumberland winding-up, then, the duality issue ultimately became moot for the purposes of paying the principal amount of policy claims, since there were sufficient assets to pay all Policy Loss Claims and Unearned Premium Claims at 100¢ on the dollar.

<sup>3</sup> Including the lower-valued of the Policy Loss Claim and Unearned Premium Claim where there were dual claims under a policy.



- (a) payment to Her Majesty in respect of further industry-funded liquidation expenses, plus interest thereon at the rate that was specified by the Superintendent pursuant to the *WURA*; and
- (b) payment of an amount equal to a “flat” 5%<sup>4</sup> of the amount of the policyholder claims and ordinary claims.

20. By the May 20, 2010 Order (Schedule “E”), this Court approved the payment of a sixth interim distribution as follows:

- (a) payment to Her Majesty in respect of the remaining industry-funded liquidation expenses, plus interest thereon; and
- (b) payment to the Office of the Superintendent of Financial Institutions, for amounts in respect of the liquidation.

***Summary of Distributions to Date***

21. As a consequence of the payments made on allowed claims pursuant to the authorized dividends described above:

- (a) 3,845 Policy Loss Claims, with a total value of \$88.9 million<sup>5</sup>, have been paid;
- (b) 48,183 policy Unearned Premium Claims, with a total value of \$18.2 million, have been paid;
- (c) 181 ordinary claims, with a total value of \$5.0 million, have been paid;

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<sup>4</sup> This was equivalent to approximately 0.3% *per annum* calculated from the date of commencement of the liquidation.

<sup>5</sup> Amounts expressed in “million” in this report are rounded.

- (d) Her Majesty has been paid \$42.9 million in respect of industry-funded liquidation expenses, plus interest thereon of \$30.2 million;
- (e) \$5.4 million has been paid on account of post-liquidation interest on the claims described in (a) , (b) and (c) above; and
- (f) the Office of the Superintendent of Financial Institutions has been paid \$0.2 million in respect of the liquidation<sup>6</sup>.

### **III. FINANCIAL STATUS OF THE ESTATE**

#### **A. Assets**

22. The assets of the Northumberland estate as at April 30, 2011 consist of cash or near cash in the amount of \$51.0 million. The majority of reinsurance has now been collected, including through commutation of reinsurance treaties. The estate maintains a contingent interest in any surplus in the conservation proceedings of the Regulation 41 Claims. However, as a conservative measure the Liquidator is not, at this time, ascribing a value to this contingent interest.

#### **B. Liabilities**

23. At the commencement of this liquidation, the books and records of Northumberland reflected Policy Loss Claims known to Northumberland with a claim value in excess of \$100 million.

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<sup>6</sup> In the case of the Policy Loss Claims, the Unearned Premium Claims, the ordinary claims and the “flat” post-liquidation interest payment, these amounts include a total of \$5.4 million where the claimants cannot be found and for which a reserve has been set up, as described below.

24. In addition to the known Policy Loss Claims reflected in the books and records of Northumberland, 190 policyholders filed 403 contingent claims, having an aggregate claimed value of approximately \$9 billion. These contingent claims related to potential occurrences during the respective policy periods for which claims had not yet been reported.

25. Over the course of the liquidation, all but 17 of the filed contingent claims were withdrawn or settled, with these 17 remaining contingent claims ("**Remaining Contingent Claims**") having a total claimed value of \$13.5 million.

26. To permit distributions on settled claims while still maintaining appropriate reserves for the remaining unsettled claims and the filed contingent claims, the Liquidator retained services of a firm of consulting actuaries – Towers Watson – to perform actuarial projections of the policy liabilities. Towers Watson and its predecessor companies have performed reviews at least as frequently as annually since 1989. The Liquidator has made the recommendations for all interim distributions relying both on the opinion of Towers Watson and its own internal reviews.

27. The outstanding policy liability and reserves as at April 30, 2011 are comprised of:

- (a) unclaimed dividends of \$5.4 million for claimants who cannot be located;
- (b) outstanding loss reserve of \$5.7 million; and
- (c) a contingent reserve of \$15.0 million to cover the ultimate resolution of the Remaining Contingent Claims, any other adverse claim development and any future administrative costs in excess of income received from funds invested.

28. With respect to the outstanding loss reserve, in addition to Towers Watson the Liquidator has retained an experienced claims consultant as needed in establishing this reserve, which includes a factor for both related adjusting and defence costs, and a provision for adverse development. The contingent reserve exceeds the value of the Remaining Contingent Claims. Accordingly, the Liquidator views the loss reserve and the contingent reserve as conservative.

**C. Surplus**

29. After deducting the amounts discussed above from the cash held by the Liquidator, there is a surplus currently available for distribution of approximately \$24.9 million, as more particularly set out in Schedule "J".

**IV. THE POST-LIQUIDATION INTEREST ISSUE**

30. As set out in the Goodmans Memorandum (Schedule "A"), in the event of there ultimately being a surplus of assets over the amount of allowed claims in a winding-up, post-liquidation interest was potentially payable at common law from the surplus. However, until amendments that came into force in 1996 the *WURA* was silent on the issue of post-liquidation interest. The 1996 amendments added subsection 95(2), which provides:

(2) Any surplus referred to in subsection (1) shall first be applied 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.

31. As set out more fully in the Goodmans Memorandum, the construction and application of the concluding words "according to their priority" in subsection 95(2) is ambiguous in the context of the Northumberland winding-up. There has not yet been any jurisprudence as to the effect of these words. It is not clear if the priority provision in place at

the commencement of the liquidation (defined in the Goodmans Memorandum as the “**Original Priority Provision**”) or the later priority provision (defined in the Goodmans Memorandum as the “**1987 Priority Provision**”) applies for the purposes of subsection 95(2). If the 1987 Priority Provision applies, then the holders of Policy Loss Claims (the “**Policy Loss Claimants**”) will have priority for post-liquidation interest. If the Original Priority Provision applies, then the holders of Unearned Premium Claims (“**Unearned Premium Claimants**”) and the Policy Loss Claimants rank *pari passu* in their entitlement to post-liquidation interest, subject to the treatment of the two claims in a “dual claims” situation.

32. The resolution of the ambiguity is important because it will have an impact on the timing and question of payment of post-liquidation interest to the affected policyholders, as set out in the next section. The Court’s advice and direction is therefore respectfully sought with respect to which priority provision applies (and the applicability of the Duality Decision). In particular, the Liquidator respectfully submits the following questions for the advice and directions of this Court, by way of the Post-liquidation Interest Motion:

- Question 1: Does Subsection 95(2) of the *WURA* apply to the winding-up of Northumberland so that interest on allowed claims is payable pursuant to subsection 95(2) of the *WURA*, on the methodology and basis directed by this Court in its Judgment dated July 14, 2009 in the winding-up of the insurance business in Canada of Reliance Insurance Company?
- Question 2: If the answer to Question 1 is yes, is the surplus payable first on account of payment in full of post-liquidation interest on claims of Policy Loss Claimants, and then, to the extent of any remaining surplus, on account of post-liquidation interest on claims of Unearned Premium Claimants, or is it instead payable *pari passu* to both Policy Loss Claimants and Unearned Premium Claimants? Further, in the case of a policyholder who is both a Policy Loss Claimant and an Unearned Premium Claimant under the same policy, in what priority is post-liquidation interest payable?

Question 3: If the answer to Question 1 is no, is post-liquidation interest payable in the winding-up of Northumberland on allowed claims on some basis other than subsection 95(2) of the *WURA* and, if so, on what basis?

33. As noted above, there is a surplus currently available for distribution of approximately \$25 million. Upon the disposition of the Post-liquidation Interest Motion the Liquidator expects to recommend that a distribution of approximately \$25 million be authorized on account of post-liquidation interest. The exact amount will depend on a number of factors, including the financial status of the estate at that time, the decision of the Court on the Post-liquidation Interest Motion, and the timing of such decision.

34. The Liquidator has prepared calculations of the post-liquidation interest that would be payable at June 30, 2011 to the Policy Loss Claimants and the Unearned Premium Claimants using the calculation methodology in *Reliance* (as referenced in the Goodmans memorandum), in order to provide an indication of the significance of the matters to be determined in the Post-liquidation Interest Motion. These calculations have been prepared for each policyholder. The total amounts of post-liquidation interest payable on this basis to the Policy Loss Claimants and the Unearned Premium Claimants are approximately \$25 million and \$13 million respectively.

35. If the 1987 Priority Provision applies to a payment under subsection 95(2), with the Policy Loss Claimants having priority, then a distribution of approximately \$25 million would constitute payment of 100 cents on the dollar on the post-liquidation interest payable on the Policy Loss Claims. No amounts would be available from such distribution in respect of the post-liquidation interest payable on the Unearned Premium Claims.

36. If the Original Priority Provision applies, a distribution of \$25 million on account of post-liquidation interest on the Priority Loss Claims and the Unearned Premium Claims, on a *pari passu* basis, would constitute an interim distribution of approximately 68 cents on the dollar on the post-liquidation interest payable.<sup>7</sup>

37. The Liquidator has prepared, for each of the ten largest Priority Loss Claimants and the ten largest Unearned Premium Claimants, a schedule itemising the post-liquidation interest on each claim forming part of their total claims, the total post-liquidation interest, and the total dollar amount that they could expect to receive should a distribution of \$25 million in respect of post-liquidation interest as of June 30, 2011 ultimately be authorized. This has been done under each of the two alternative priority scenarios set out in the Goodmans Memorandum. The Liquidator proposes to provide to these claimants their individual schedules with the notice of the Post-liquidation Interest Motion, to assist them in understanding the financial impact to them of the outcome of the Post-liquidation Interest Motion. The Liquidator also proposes to provide such schedule to any other policyholder who so requests from the Liquidator.

38. While it is anticipated that further amounts will ultimately become available for distribution in respect of post-liquidation interest, it is not possible at this time to estimate either the quantum or timing of such distribution(s).

39. As noted above, in February 2003 this Court awarded in its fifth interim distribution a “flat” amount on account of post-liquidation interest. This will be taken into account in the calculation of any post-liquidation interest entitlement, consistent with the calculation methodology in *Reliance*.

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<sup>7</sup> For this calculation, in “dual claims” situations the post-liquidation interest on the lower of the two claims has been treated as subordinate to the post-liquidation interest on the higher of the two claims.

**V. RECOMMENDATIONS FOR THE APPOINTMENT OF  
REPRESENTATIVE COUNSEL AND DIRECTIONS FOR SERVICE**

*Affected Classes*

40. The *WURA* authorizes the Court's nomination and appointment of representative counsel to represent a class where appropriate. In this case, the Liquidator respectfully recommends the appointment of counsel specifically to represent, as classes, the Policy Loss Claimants and the Unearned Premium Claimants on the Post-liquidation Interest Motion.

41. As set out in the Goodmans Memorandum, claims of the ordinary creditors rank subsequent to both Policy Loss Claims and Unearned Premium Claims under either the Original Priority Provision or the 1987 Priority Provision. Accordingly, ordinary creditors are not affected by the priorities issue to be determined on the Post-liquidation Interest Motion.

*Representative Counsel*

42. The Liquidator recommends the appointment of Mr. Grout, currently appointed counsel for the Included Ordinary Creditors in respect of the liquidation, to represent the Unearned Premium Claimants on the Post-liquidation Interest Motion. Mr. Grout's familiarity with the winding-up and the statutory context will lend efficiency to the task of representing the Unearned Premium Claimants on the Post-liquidation Interest Motion. The Liquidator is of the view that Mr. Grout's ongoing role as counsel for the Included Ordinary Creditors class does not conflict with being appointed for the Unearned Premium Claimants on the Post-liquidation Interest Motion, since the Included Ordinary Creditors are not affected by the Post-liquidation Interest Motion.



43. In January 2011, Mr. Robertson, who had represented the Included Policyholders as a class in the winding-up, passed away. The Liquidator does not anticipate any further need for the Included Policyholders as a class to have representative counsel.

44. The Liquidator recommends the appointment of Mr. Edmond Lamek, a member of the late Mr. Robertson's firm, as representative counsel for the Policy Loss Claimants for the purposes of the Post-liquidation Interest Motion. Although the class that Mr. Robertson represented included both the Unearned Premium Claimants and the Policy Loss Claimants, the Liquidator is of the view that no conflict arises: Mr. Lamek did not act on Mr. Robertson's brief, and that brief did not involve a determination of the post-liquidation interest priority issues.

45. The proposed representative counsel have agreed to act in such capacity if appointed by this Honourable Court.

*Proposed Notice*

46. In light of the large number of policyholders, the Liquidator proposes to give notice of the Post-liquidation Interest Motion:

- (a) within 10 days of the Order requested herein (the "Preliminary Directions Order"), to the representative counsel appointed in connection with the Post-liquidation Interest Motion, the 10 Policy Loss Claimants and the 10 Unearned Premium Claimants with the highest total value of policy loss claims and unearned premium claims, respectively, as identified by the Liquidator<sup>8</sup>, the Remaining Contingent Claimants and those parties currently appearing on the service list for the winding-up proceedings as maintained by the Liquidator's

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<sup>8</sup> A claimant may be in both such categories.

counsel, by sending by prepaid ordinary mail or by delivering by courier a copy of the Preliminary Directions Order and the Liquidator's Motion Record in support of the Post-liquidation Interest Motion, and:

- (i) in the case of the said 10 Policy Loss Claimants and 10 Unearned Premium Claimants, a letter substantially in the form of Schedule "K" attached, to their last known address according to the books and records of Northumberland;
  - (ii) in the case of the Remaining Contingent Claimants, a letter substantially in the form of Schedule "L" attached, to their last known address according to the books and records of Northumberland;
- (b) within 15 days of this Order, to all other affected persons, by publication of:
- (i) a notice, substantially in the form attached as Schedule "M", in the national edition of *The Globe and Mail* (the "English Newspaper Notice");
  - (ii) a French-language translation of the English Newspaper Notice in *La Presse* (the "French Newspaper Notice"); and
  - (iii) the English Newspaper Notice, the French Newspaper Notice, the Notice of Motion for the Post-liquidation Interest Motion, the Preliminary Directions Order and the Report on the internet website maintained by the Liquidator.

47. The Liquidator respectfully recommends the foregoing appointment of representative counsel and the proposed service and public notice of the Post-liquidation Interest

Motion, and is of the view that this will result in the fair and full submission to this Court on the issues arising in the Post-liquidation Interest Motion and in the proper representation of the affected interests.

**VI. RECOMMENDATION**

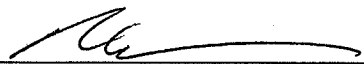
48. The Liquidator therefore respectfully recommends that an Order be granted as sought on the Preliminary Directions Motion.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED,**

**PRICEWATERHOUSECOOPERS INC.,**  
Liquidator of NORTHUMBERLAND  
GENERAL INSURANCE COMPANY

Date: June 10, 2011

Per:

  
\_\_\_\_\_  
Robert T. Chapman  
Senior Vice-President

## **SCHEDULE "A"**

June 1, 2011

**FILE NO: 85-2881**

**SUBJECT:** Post-liquidation Interest Priority Issues in the Winding-up of Northumberland General Insurance Company ("Northumberland")

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## **I. INTRODUCTION**

We set out below our discussion of the statutory provisions in respect of the applicable priority for post-liquidation interest ("PLI") as among policyholder claimants with loss claims ("Policy Loss Claimants"), policyholder claimants with unearned premium claims ("Unearned Premium Claimants") and ordinary creditor claimants ("Ordinary Creditors"), in the winding-up of Northumberland.

## **II. APPENDICES**

We attach the following Appendices:

Appendix A - Section 162, *Winding-up Act*, R.S.C. 1970, c.W-10 ("**Original Priority Provision**").

Appendix B - Section 52, S.C. 1987, c.26, amending the Original Priority Provision: proclaimed in force July 3, 1987 by SI/87-145 ("**1987 Priority Provision**").

Appendix C - Section 749, S.C. 1991, c. 47, amending subsection 161(2): brought into force June 1, 1992 by SI 92-91.

Appendix D - Sections 95, 159.1 and 161, *Winding-up and Restructuring Act*, R.S.C. 1985, c.W-11, enacted by S.C. 1996, c.6.: brought into force June 28, 1996 by SI/96-58.

Appendix E - *Canada (Attorney General) v. Northumberland General Insurance Co.*, 1988 Carswell Ont 139 (the "**Duality Decision**").

Appendix F - *Attorney General (Canada) v. Reliance Insurance Company*, 2009 CanLII 37915 (ON S.C.) ("**Reliance**").

Appendix G - *Order of the Honourable Mr. Justice C. Campbell, made July 14, 2009, in the Reliance Insurance Company – Canadian Branch winding-up*

Appendix H - *Attorney General (Canada) v. Confederation Trust Company*, 2003 CanLII 18103 (ON S.C.) ("**Confederation Trust**").

### III. DISCUSSION

#### A. *The Statutory Provisions*

##### *The Governing Statute*

The winding-up of Northumberland is governed by the *Winding-up and Restructuring Act*, R.S.C. 1985, c.W-11 ("*WURA*"), which was named the *Winding-up Act* at the commencement of the winding-up on July 24, 1985.

##### *Parts I and III*

Part III of the *WURA* applies exclusively to the winding-up of insurance companies. Part I applies to all winding-ups, but, by virtue of Section 9, Part I is subject to Part III in the case of an insurance company winding-up. Section 9 provides:

9. In the case of insurance companies, the provisions of this Part are subject to the provisions of Part III.

##### *Section 95 – The PLI Provision*

Section 95 of the *WURA*, contained in Part I, provides:

95. (1) The court shall distribute among the persons entitled thereto any surplus that remains after the satisfaction of the debts and liabilities of the company and the winding-up charges, costs and expenses, and unless otherwise provided by law or by the Act, charter or instrument of incorporation of the company, any property or assets remaining after the satisfaction shall be distributed among the members or shareholders according to their rights and interests in the company.

(2) Any surplus referred to in subsection (1) shall first be applied 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. [Emphasis added.]

Subsection 95(2) was enacted as part of significant amendments to Part I and Part III that came into force on June 28, 1996 ("**1996 Amendments**"). Until then there had been no PLI provision in the statute, however at common law PLI could be awarded in the case of a surplus of assets.

There was no transition provision enacted with respect to subsection 95(2).

##### *The Policyholder Priority Provisions*

###### (i) Original Priority Provision

When Northumberland was ordered to be wound-up in 1985, the Original Priority Provision (set out at Appendix A) was the governing priority provision. The Original Priority Provision ranked Policy

Loss Claimants and Unearned Premium Claimants equally. However, there was ambiguity as to the ranking in the case where a policyholder held *both* types of claims (or “dual claims”) under a policy. This was resolved by the Duality Decision (at Appendix E), which held that where a policyholder had dual claims the policy loss claim ranked in priority to the unearned premium claim.<sup>1</sup>

(ii) 1987 Priority Provision

The 1987 Priority Provision (at Appendix B) amended the Original Priority Provision, and provided that Policy Loss Claimants ranked prior to Unearned Premium Claimants.<sup>2</sup> The 1987 Priority Provision came into force July 3, 1987.

By virtue of a transition provision (contained in Appendix B), the 1987 Priority Provision was stated to apply only in respect of a winding-up commenced on or after July 3, 1987.<sup>3</sup>

*Transition Provision in the 1996 Amendments*

As noted, the 1996 Amendments came into force on June 28, 1996. Subsection 159.1(2), (set out in Appendix D) was part of the 1996 Amendments, and provides:

159.1(2) This Part applies only in respect of applications for winding-up orders that are made after the date of coming into force of this subsection, and **applications for winding-up orders that were made on or before that date shall be dealt with in accordance with the provisions of this Part as they read immediately before that date.** [Emphasis added.]

***B. The Relevant Claimants for the PLI Issue***

In the case of Northumberland, the Liquidator has confirmed that there is a surplus within the meaning of subsection 95(2) of the *WURA*, and that three groups of claimants qualify for the payment of PLI from the surplus:

- The Policy Loss Claimants;
- The Unearned Premium Claimants; and
- Ordinary creditors.

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<sup>1</sup> As set out in the Liquidator’s Report, in the case of a dual claim where the Policy Loss Claim was the lower-valued claim, it has been treated as the subordinate claim, effectively recognizing the more favorable treatment that such a policyholder would effect by withdrawing the Policy Loss Claim as the priority claim.

<sup>2</sup> There had also been a minor (but irrelevant, for the present purposes) amendment to the wording of the Original Priority Provision, before the amendment that enacted the 1987 Priority Provision.

<sup>3</sup> This explains why the Duality Decision in *Northumberland* rested on the Original Priority Provision, even though it was rendered after the 1987 Priority Provision came into effect.

***C. Issues Arising from the Statutory Provisions***

***Issue No. 1: Does subsection 95(2) Apply to the Northumberland Winding-up?***

***(i) Applicability of Subsection 95(2) to an Insurance Company Winding-up***

The first question that arises is whether subsection 95(2) (being in Part I) applies to a winding-up of an insurance company governed by Part III, since Part I is “subject to” Part III, and Part III is silent as to post-liquidation interest.

It has been held by the Superior Court of Justice in *Reliance* that subsection 95(2) applies to a winding-up under Part III, notwithstanding that subsection 95(2) is contained in Part I and not in Part III of the *WURA*. *Reliance* was in the context of a winding-up of a Canadian branch of a foreign insurance company, as opposed to a Canadian insurance company, however there appears to be no principled basis to distinguish the decision from the Northumberland situation on this basis.<sup>4</sup>

***(ii) Timing***

Although *Reliance* confirms that subsection 95(2) applies in a winding-up under Part III, there was no transition issue there since that winding-up commenced after subsection 95(2) came into force. The Northumberland winding-up, by contrast, was commenced in 1985, well *before* subsection 95(2) came into force on June 28, 1996. As noted above, the *WURA* does not contain a transition provision stating whether the amendments to Part I in the 1996 Amendments (including subsection 95(2)) apply to a winding-up commenced before June 28, 1996. Accordingly, the question arises whether subsection 95(2) applies to a winding-up commenced before it came into force.

It has been held by the Superior Court of Justice in *Confederation Trust* that subsection 95(2) does in fact apply to an ongoing winding-up which had been commenced before subsection 95(2) came into force. *Confederation Trust* dealt with a winding-up of a trust company (as opposed to an insurance company), however there appears to be no principled basis to distinguish the decision from the Northumberland situation, especially since *Reliance* later confirmed the applicability of subsection 95(2) to a winding-up under Part III.

***(iii) Conclusion***

In our view, given *Reliance* and *Confederation Trust*, subsection 95(2) applies in the liquidation of Northumberland so that PLI would be payable under subsection 95(2) on the allowed claims of Policy Loss Claimants, Unearned Premium Claimants and Ordinary Creditors, “according to their priority”.

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<sup>4</sup> *Reliance* also determined the commencement date and methodology for the calculation of PLI under subsection 95(2), in the unique context of a property and casualty insurance business, as reflected in Appendices “F” and “G”. In our view *Reliance* methodology is equally applicable to the Northumberland winding-up.



***Issue No. 2: What is the Priority for Policy Loss Claimants, Unearned Premium Claimants and Ordinary Creditors, for the Purposes of Subsection 95(2)?***

***(i) Which Policyholder Priority Provision Applies – the Original Priority Provision or the 1987 Priority Provision?***

For the purposes of determining priorities for the purposes of subsection 95(2), the question is which priority provision applies: the Original Priority Provision (with Policy Loss Claimants and Unearned Premium Claimants ranking equally)<sup>5</sup>, or the 1987 Priority Provision (with Policy Loss Claimants ranking in priority to Unearned Premium Claimants)?

As noted, the 1987 Priority Provision came into force after the commencement of the Northumberland winding-up. That provision expressly did not apply to a winding-up commenced before its coming into force, by virtue of subsection 52(2) of its enacting statute (set out in Appendix B):

52(2) Subparagraph 161(1)(c)(i) of the said Act, as enacted by subsection (1), shall apply only in respect of the winding-up of the business of a company that commences on or after the day that subparagraph comes into force. [Emphasis added]

At first instance, then, it appears that the 1987 Priority Provision would not apply to the Northumberland winding-up, and that the Original Priority Provision would apply to determine the priorities for the purpose of a subsection 95(2) PLI distribution today. However, as noted above, s. 159.1 in Part III of the *WURA*, enacted in the 1996 Amendments, provides that applications for winding-up orders made on or before June 28, 1996 (like the Northumberland winding-up) shall be dealt with in accordance with the provisions of Part III “as they read immediately before” June 28, 1996. Since the transition provision (quoted above) for the 1987 Priority Provision did not itself become part of the *WURA*, the priority provision in Part III as it read “immediately before” June 28, 1996 is arguably the 1987 Priority Provision, which ranked Policy Loss Claimants in priority to Unearned Premium Claimants.

In brief, the transition provision enacted in 1987 suggests that the 1987 Priority Provision was not to apply to a winding-up commenced before its coming into force, but the wording of subsection 159.1(2) arguably “overrides” the 1987 transition provision so that the 1987 Priority Provision would apply. There is, accordingly, an ambiguity as to whether the 1987 Priority Provision applies.

The resolution of this ambiguity is necessary for the correct application of subsection 95(2) in the Northumberland winding-up.

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<sup>5</sup> Subject to the qualification in the Duality Decision where there are dual claims.

(ii) *The Subordinate Ranking of Ordinary Creditors*

Whatever the resolution of the priority issue between Policy Loss Claimants and Unearned Premium Claimants, under subsection 162(2) of the Original Priority Provision (at Appendix A), ordinary creditors rank subsequent to both Policy Loss Claimants and Unearned Premium Claimants. This subsection (renumbered 161(2)) was amended, effective June 1, 1992 (see Appendix C), and again in the 1996 Amendments (see Appendix D), but it has consistently provided for the postponement of claims of ordinary creditors.

Although subsection 161(2) does not literally prescribe the “priority” ranking, *per se*, for ordinary creditors, in that it can technically be characterized as a “postponement” provision, the only purposive approach to its construction must recognize that in substance and effect it provides that ordinary creditors have a lower priority than all policy claims. This is the effect that is apparent to the editors of *Bankruptcy and Insolvency Law of Canada* in describing the effect of a similar “postponement” provision in the *Bankruptcy and Insolvency Act* (“*BIA*”):

Section 140.1 [of the *BIA*] specifies that a creditor is not entitled to a dividend in respect of an equity claim until all claims that are not equity claims have been satisfied. The provision will place shareholders at the bottom of the priorities list.<sup>6</sup>

In a similar vein, the Duality Decision held that in certain cases a policyholder’s unearned premium claim “is postponed” but it may still be asserted in the estate with the policyholder “only losing his priority”.<sup>7</sup> It is evident that Saunders, J. considered the notion of a postponement as equivalent to ranking subsequent in priority.

Accordingly, the resolution of the ambiguity as to which priority provision applies for the purposes of subsection 95(2) in the Northumberland winding-up does not affect the ordinary creditors since they rank subsequent to both Policy Loss Claimants and Unearned Premium Claimants in any event.

**IV. QUESTIONS FOR THE ADVICE AND DIRECTION OF THE COURT**

In our view, the Court’s answers to the following questions will confirm the applicability of subsection 95(2) to the Northumberland winding-up, as well as resolve the ambiguity arising in respect of the phrase “according to their priority” in subsection 95(2):

Question 1: Does Subsection 95(2) of the *Winding-up and Restructuring Act* (the “*WURA*”) apply to the winding-up of Northumberland so that interest on

<sup>6</sup> L.W. Houlden & G.B. Morawetz, *Bankruptcy and Insolvency Law of Canada*, loose-leaf, 4<sup>th</sup> ed (Toronto, Ont: Thomson Reuters) at 5-296. This approach is shared by the authors of a leading text, who refer to the postponement of claims under the *BIA* as “[i]n the sense, “subordinate” or “hypochirography” – a reverse priority: John D. Honsberger & Vern DaRe, *Bankruptcy in Canada*, 4<sup>th</sup> ed (Aurora: Canada Law Book, 2009) at 431, n 91.

<sup>7</sup> Duality Decision, at para. 54.

allowed claims is payable pursuant to subsection 95(2) of the *WURA*, on the methodology and basis directed by this Court in its Judgment dated July 14, 2009 in the winding-up of the insurance business in Canada of Reliance Insurance Company?

Question 2:

If the answer to Question 1 is yes, is the surplus payable first on account of payment in full of post-liquidation interest on claims of Policy Loss Claimants, and then, to the extent of any remaining surplus, on account of post-liquidation interest on claims of Unearned Premium Claimants, or is it instead payable *pari passu* to both Policy Loss Claimants and Unearned Premium Claimants? Further, in the case of a policyholder who is both a Policy Loss Claimant and an Unearned Premium Claimant under the same policy, in what priority is post-liquidation interest payable?

Question 3:

If the answer to Question 1 is no, is post-liquidation interest payable in the winding-up of Northumberland on allowed claims on some basis other than subsection 95(2) of the *WURA* and, if so, on what basis?

## APPENDIX "A"



**REVISED STATUTES  
OF CANADA  
1970**

Proclaimed and Published under  
the authority of chapter 48  
of the Statutes of Canada, 1964-65

**VOLUME VII**

**STATUTS REVISÉS  
DU CANADA  
1970**

Proclamés et publiés en conformité  
du chapitre 48  
des Statuts du Canada de 1964-65

**VOLUME VII**



## CHAPTER W-10

An Act respecting the winding-up of insolvent companies

### SHORT TITLE

Short title

1. This Act may be cited as the *Winding-up Act*. R.S., c. 296, s. 1.

### INTERPRETATION

Definitions

"capital stock"  
«capital...»

"company"  
«compagnie»

"contributory"  
«contributeur»

"court"  
«cour»

2. In this Act

"capital stock" includes a capital stock *de jure* or *de facto*;

"company" includes any corporation subject to this Act;

"contributory" means a person liable to contribute to the assets of a company under this Act; and, in all proceedings for determining the persons who are to be deemed contributories and in all proceedings prior to the final determination of such persons, it includes any person alleged to be a contributory;

"court" means

(a) in the Province of Ontario, the Supreme Court of Ontario,

(b) in the Province of Quebec, the Superior Court,

(c) in the Province of Nova Scotia, the Supreme Court,

(d) in the Province of New Brunswick, the Supreme Court,

(e) in the Province of Manitoba, the Court of Queen's Bench,

(f) in the Province of British Columbia, the Supreme Court,

(g) in the Province of Prince Edward Island, the Supreme Court,

## CHAPITRE W-10

Loi concernant la liquidation des compagnies insolvables

### TITRE ABRÉGÉ

1. La présente loi peut être citée sous le titre: *Loi sur les liquidations*. S.R., c. 296, art. 1. Titre abrégé.

### INTERPRÉTATION

2. Dans la présente loi

«capital social» comprend un capital social de droit ou un capital social de fait;

«compagnie» comprend toute corporation assujettie à la présente loi;

«compagnie d'assurance» signifie une compagnie exerçant les opérations d'assurance, et comprend toute association non constituée en corporation ou tout échange d'interassurance réciproque, exerçant des opérations d'assurance;

«compagnie de commerce» signifie toute compagnie qui n'est pas une compagnie de chemin de fer ou de télégraphe et qui fait des opérations de commerce comme celles des apothicaires, commissaires-priseurs, banquiers, courtiers, briquetiers, constructeurs, charpentiers, voituriers, vendeurs de bêtes à cornes ou de moutons, propriétaires de diligences, teinturiers, foulons, aubergistes, cabaretiers, hôteliers, buvetiers ou tenanciers de cafés, chauffourniers, loueurs de chevaux, maraîchers, meuniers, mineurs, emballeurs, imprimeurs, carriers, courtiers d'actions, propriétaires ou constructeurs de navires, agents de change, commerçants en valeurs, fournisseurs de provisions, entreposeurs, propriétaires de quais, personnes faisant le commerce de marchandises par

Définitions

«capital social»  
«capital...»

«compagnie»  
«company»

«compagnie d'assurance»  
«insurance...»

«compagnie de commerce»  
«trading...»

Policy	(3) Without limiting the generality of its meaning "policy" in this Part includes "policy" as defined in the <i>Canadian and British Insurance Companies Act</i> and in the <i>Foreign Insurance Companies Act</i> .	(3) Sans restreindre la portée générale de sa signification, le mot «police», dans la présente Partie, comprend «police» tel que le terme est défini dans la <i>Loi sur les compagnies d'assurance canadiennes et britanniques</i> , et dans la <i>Loi sur les compagnies d'assurance étrangères</i> .	Police
Superintendent	(4) "Superintendent" means the Superintendent of Insurance within the meaning of the <i>Department of Insurance Act</i> . R.S., c. 296, s. 160.	(4) Le terme «surintendant» signifie le surintendant des assurances, au sens de la <i>Loi sur le département des assurances</i> . S.R., c. 296, art. 160.	Surintendant
When company deemed insolvent	<p>161. (1) A company shall be deemed to be insolvent if,</p> <p>(a) being any company whatever to which this Part applies, it has failed to pay any undisputed claim arising under any policy of the company, or a disputed claim after final judgment in regular course of law, for a space of ninety days after tender of a legally valid discharge and after notice of failure to pay has been given to the Minister;</p> <p>(b) being any company registered under the <i>Canadian and British Insurance Companies Act</i> or the <i>Foreign Insurance Companies Act</i>, its certificate of registry on the expiry thereof has not been renewed within thirty days after such expiry by reason of the Superintendent having made a report to the Minister that, from a statement of the affairs of the company, such company is not in a condition to meet its liabilities; or</p> <p>(c) being any company so registered, the certificate of registry has been withdrawn and has not been renewed within thirty days thereafter and it is expressly provided in the Act under which the company is registered that in such case the company shall be deemed to be insolvent and be subject to be wound up under this Act.</p>	<p>161. (1) Une compagnie est censée être insolvable, si,</p> <p>a) étant une compagnie de quelque nature que ce soit, à laquelle la présente Partie s'applique, elle n'a pas payé une réclamation non contestée découlant d'une police de la compagnie, ou une réclamation contestée, après jugement définitif obtenu par les voies juridiques régulières, durant quatre-vingt-dix jours après l'offre d'une libération légale et valable et après qu'avis de l'omission de la payer a été donné au Ministre;</p> <p>b) étant une compagnie enregistrée sous le régime de la <i>Loi sur les compagnies d'assurance canadiennes et britanniques</i>, ou sous le régime de la <i>Loi sur les compagnies d'assurance étrangères</i>, son certificat d'enregistrement n'a pas été renouvelé dans un délai de trente jours à compter de son expiration, à cause d'un rapport du surintendant au Ministre que la compagnie, d'après un état de ses affaires, n'est pas en mesure de remplir ses engagements; ou</p> <p>c) étant une compagnie ainsi enregistrée, le certificat d'enregistrement a été retiré et n'a pas été renouvelé dans un délai de trente jours à compter du retrait, et lorsque la loi sous le régime de laquelle la compagnie est enregistrée prévoit expressément que, en pareil cas, la compagnie est tenue pour insolvable et sujette à liquidation en vertu de la présente loi.</p>	Cas où la compagnie est censée insolvable
Application for a winding-up order	(2) When any company is deemed to be insolvent under this Act or any other Act of the Parliament of Canada, the Attorney General of Canada, on the request of the Minister, may apply to the court for an order that the company be wound up. R.S., c. 296, s. 161.	(2) Lorsqu'une compagnie est censée être insolvable sous le régime de la présente loi, ou de toute autre loi du Parlement du Canada, le procureur général du Canada peut, à la demande du Ministre, s'adresser à la cour pour obtenir une ordonnance de mise en liquidation de la compagnie. S.R., c. 296, art. 161.	Demande d'une ordonnance de liquidation
Order of priority for payment of claims	162. (1) Subject to this Act, claims shall	162. (1) Sous réserve des dispositions de la	Ordre de priorité pour le paiement des réclamations

be paid in the following order of priority:

- (a) firstly, costs of liquidation;
- (b) secondly, claims of preferred creditors, specified in section 72;
- (c) thirdly, claims of policyholders of the company ranking as follows:

(i) if reinsurance is not effected as hereinafter provided, claims that have arisen under the policies of the company, in accordance with the terms thereof, prior to the date of the filing of the statement of the liquidator in the Department of Insurance as hereinafter provided, less any amount previously advanced by the company on the security of the policies, and the claims of policyholders to the value of their policies computed as hereinafter provided; or

(ii) if reinsurance is effected, firstly, claims that have arisen under the policies of the company, in accordance with the terms thereof, of which notice is received by the company prior to the date the reinsurance is effected, less any amount previously advanced by the company on the security of the policies; secondly, the consideration payable for the reinsurance of policies under which no claims have arisen.

Other creditors

(2) Creditors of the company, other than policyholders, reinsurers if any, and the aforementioned preferred creditors, are entitled to receive a dividend on their claims only if the assets are more than sufficient to pay the claims specified in subsection (1).

Priority of claims of policyholders in British or foreign companies

(3) Notwithstanding anything in this Part, if the company is a British company registered under the *Canadian and British Insurance Companies Act*, or a foreign company registered under the *Foreign Insurance Companies Act*, no claim, after the payment of costs of liquidation, other than claims of the preferred creditors hereinbefore specified, holders of policies of a class of insurance for which the company was so registered, and reinsurers of such policies, if any, shall rank against the assets in Canada maintained by the company under and for the purposes of those Acts, if such assets are maintained solely for the

présente loi, les réclamations doivent être acquittées dans l'ordre de priorité suivant:

- a) premièrement, frais de liquidation;
- b) deuxièmement, réclamations des créanciers privilégiés, spécifiées à l'article 72;
- c) troisièmement, réclamations des porteurs de polices de la compagnie prenant rang comme il suit:

(i) si la réassurance n'est pas effectuée selon les prescriptions qui suivent, les réclamations qui ont découlé des polices de la compagnie, suivant les termes des polices, antérieurement à la date du dépôt de l'état du liquidateur au département des assurances, de la manière prévue ci-après, moins tout montant antérieurement avancé par la compagnie sur la garantie des polices, et les réclamations des porteurs de polices jusqu'à concurrence de la valeur de leurs polices calculée selon les prescriptions qui suivent; ou

(ii) si la réassurance est effectuée, en premier lieu, les réclamations qui ont découlé des polices de la compagnie, suivant les termes des polices, dont la compagnie a reçu avis avant la date où la réassurance est effectuée, moins tout montant antérieurement avancé par la compagnie sur la garantie des polices; en deuxième lieu, le prix à payer pour la réassurance des polices qui n'ont fait l'objet d'aucune réclamation.

(2) Les créanciers de la compagnie, autres que les porteurs de polices, les réassureurs, s'il en est, et les susdits créanciers privilégiés, n'ont le droit de toucher un dividende sur leurs réclamations que si l'actif est plus que suffisant pour couvrir les réclamations spécifiées au paragraphe (1).

Autres créanciers

(3) Par dérogation aux dispositions de la présente Partie, si la compagnie est une compagnie britannique enregistrée sous le régime de la *Loi sur les compagnies d'assurance canadiennes et britanniques*, ou une compagnie étrangère enregistrée sous le régime de la *Loi sur les compagnies d'assurance étrangères*, aucune réclamation, après le paiement des frais de liquidation, autre que les réclamations des créanciers privilégiés, spécifiées ci-dessus, des porteurs de polices d'une classe d'assurance pour laquelle la compagnie était ainsi enregistrée, et des réassureurs de ces polices, s'il en est, ne doit prendre rang à l'égard de l'actif

Priorité des réclamations des assurés dans compagnies britanniques ou étrangères



protection of policyholders in Canada; and the balance, if any, of the said assets, remaining after the said claims are paid, shall be applied by the liquidator in satisfaction of the claims of any other creditors of the company in Canada, but not including policyholders of any such company in respect of a class of insurance for which the company was not registered under either of the Acts aforesaid.

au Canada maintenu par la compagnie sous le régime et pour les fins desdites lois, si cet actif est maintenu uniquement pour la protection des porteurs de polices au Canada; et le reliquat, s'il en est, dudit actif, subsistant après le paiement desdites réclamations, doit être affecté par le liquidateur au désintéressement de tous autres créanciers de la compagnie au Canada, mais sans inclure les porteurs de polices d'une pareille compagnie à l'égard d'une classe d'assurance pour laquelle la compagnie n'était pas enregistrée sous le régime de l'une ou l'autre desdites lois.

Release of  
balance of assets  
to company

(4) The liquidator may, with the approval of the court and the Treasury Board, release to the company any balance of the assets in Canada remaining after payment of claims in the order of priority prescribed by subsection (3). R.S., c. 296, s. 162.

(4) Le liquidateur peut, avec l'approbation de la cour et du conseil du Trésor, remettre à la compagnie tout reliquat de l'actif au Canada subsistant après le paiement des réclamations, dans l'ordre de priorité prescrit au paragraphe (3). S.R., c. 296, art. 162.

Remise du  
reliquat d'actif à  
la compagnie

Reinsurance of  
contracts by  
liquidator

**163.** (1) The liquidator may, without the consent of the policyholders, arrange for the reinsurance of the policies of the company, in the case of a company other than a British or foreign company, and of its policies in Canada in the case of a British or foreign company, in some company or companies registered under the *Canadian and British Insurance Companies Act* or the *Foreign Insurance Companies Act*, and in such case the reinsurance shall be in lieu of the claim for the value of their policies computed as hereinafter provided.

**163.** (1) Le liquidateur peut, sans l'assentiment des porteurs de polices, faire un arrangement pour la réassurance des polices de la compagnie, s'il s'agit d'une compagnie autre qu'une compagnie britannique ou étrangère, et de ses polices au Canada; s'il s'agit d'une compagnie britannique ou étrangère, dans une ou plusieurs compagnies enregistrées sous le régime de la *Loi sur les compagnies d'assurance canadiennes et britanniques*, ou de la *Loi sur les compagnies d'assurance étrangères*, et en pareil cas la réassurance doit tenir lieu de la réclamation à concurrence de la valeur de ces polices calculée de la manière prescrite ci-dessous.

Réassurance des  
contrats par le  
liquidateur

Reinsurance  
may be for a  
percentage of  
sum assured

(2) Where the assets of the company are insufficient to provide for the preferred claims specified in section 72 and for claims under the policies of the company of which notice has been received by the company prior to the date of reinsurance, and for the reinsurance in full of the policies of the company, the reinsurance may be effected for such a percentage of the full amount of the policies as the said assets will secure.

(2) Si l'actif de la compagnie ne suffit pas à couvrir les créances privilégiées spécifiées à l'article 72, de même que les réclamations découlant des polices de la compagnie et dont la compagnie a reçu avis avant la date de la réassurance, ainsi que la réassurance intégrale des polices de la compagnie, la réassurance peut être effectuée sur tel quantum du plein montant des polices que ledit actif garantira.

Réassurance  
pour un  
quantum du  
plein montant

Approval of  
contracts of  
reinsurance

(3) No contract of reinsurance made in pursuance of this section becomes effective until approved by the court and by the Treasury Board. R.S., c. 296, s. 163.

(3) Nul contrat de réassurance effectué en conformité du présent article, ne devient effectif avant d'avoir été approuvé par la cour et par le conseil du Trésor. S.R., c. 296, art. 163.

Approbation des  
contrats de  
réassurance

Holders of  
unmatured  
policies to claim  
for value  
computed

**164.** (1) Where the reinsurance is not effected, holders of policies of all classes of insurance on which no claims have arisen in

**164.** (1) Si la réassurance n'est pas effectuée, les porteurs de polices de toutes classes d'assurance qui n'ont donné lieu à aucune

Les porteurs des  
polices non  
échues peuvent  
réclamer valeur  
commutative

## **APPENDIX “B”**



# **Acts of the Parliament of Canada**

Passed in the year  
1987

During the thirty-fifth  
and thirty-sixth years  
of the Reign of Her Majesty  
QUEEN ELIZABETH II

These Acts were passed during  
that portion of the Second  
Session of the Thirty-third  
Parliament that included  
the 1987 calendar year

Her Excellency the Right Honourable  
JEANNE SAUVÉ  
Governor General

# **Lois du Parlement du Canada**

adoptées en  
1987

pendant les trente-cinquième  
et trente-sixième années  
du règne de Sa Majesté  
LA REINE ELIZABETH II

au cours de la période 1987 de la  
deuxième session de la  
trente-troisième législature

Son Excellence la très honorable  
JEANNE SAUVÉ  
Gouverneur général

## 35-36 ELIZABETH II

### CHAPTER 26

An Act to amend certain Acts relating to financial institutions

[Assented to 30th June, 1987]

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

#### BANK ACT

1980-81-82-83,  
c. 40 (Part 1);  
1984, cc. 9, 30,  
40; 1985, c. 20;  
1986, cc. 26, 35

1. Section 175 of the *Bank Act* is amended by adding thereto, immediately after subsection (3) thereof, the following subsection:

Notice of  
appraisal value

“(3.1) Where an appraisal of any asset held by a bank or any of its subsidiaries has been made by the Superintendent and the value determined by the Superintendent to be the appropriate value of the asset having regard to the appraised value varies materially from the value placed by the bank or subsidiary on the asset, the Superintendent shall send to the bank, the auditors of the bank and the audit committee of the bank a written notice of the appropriate value of the asset as determined by the Superintendent.”

2. Subsection 193(7) of the said Act is repealed and the following substituted therefor:

Securities  
corporations

“(6.1) A bank may, with the prior approval of the Minister, own more than ten per cent of the shares of any class of shares of

## 35-36 ELIZABETH II

### CHAPITRE 26

Loi modifiant certaines lois concernant les institutions financières

[Sanctionnée le 30 juin 1987]

Sa Majesté, sur l'avis et avec le consentement du Sénat et de la Chambre des communes du Canada, édicte :

#### LOI SUR LES BANQUES

1980-81-82-83,  
ch. 40 (partie  
I); 1984, ch. 9,  
30, 40; 1985,  
ch. 20; 1986,  
ch. 26, 35

1. L'article 175 de la *Loi sur les banques* est modifié par insertion, après le paragraphe (3), de ce qui suit :

Avis du  
montant de  
l'évaluation

«(3.1) Lorsque le surintendant a effectué l'évaluation d'un actif détenu par une banque ou une de ses filiales et que la valeur qui est, selon sa détermination, la valeur véritable de l'actif, compte tenu du montant de l'évaluation, diffère sensiblement de la valeur attribuée à l'actif par la banque ou sa filiale, le surintendant doit envoyer à la banque, aux vérificateurs de la banque et au comité de vérification de celle-ci un avis écrit de la valeur véritable de l'actif selon cette détermination.»

2. Le paragraphe 193(7) de la même loi est abrogé et remplacé par ce qui suit :

Sociétés  
d'activités  
financières

«(6.1) Avec l'approbation préalable du ministre, une banque peut posséder plus de dix pour cent des actions appartenant à une catégorie d'actions quelconque :

(b) a matter in respect of which an appeal is provided under section 41.2 or subsection 71(6) or 73.5(2).

b) d'une question pour laquelle un appel est prévu en vertu de l'article 41.2 ou des paragraphes 71(6) ou 73.5(2).

Certificate of  
ruling appealed  
from

(3) For the purposes of an appeal under subsection (1), the Superintendent or Minister, as the case may require, shall at the request of the company or person interested give a certificate in writing setting out the ruling appealed from and the reasons therefor, which ruling is binding on the company or person unless the company or person, within fifteen days after notice of the ruling, serves on the Superintendent or Minister a notice of intention to appeal therefrom, setting out the grounds of appeal and within fifteen days thereafter files the appeal with the registrar of the Court and with due diligence prosecutes the appeal, in which case action on the ruling shall, except in the case of a ruling concerning a matter referred to in section 73.3, be suspended until the Court has rendered judgment thereon."

(3) Aux fins de l'appel prévu au paragraphe (1), le surintendant ou le ministre, selon le cas, doit, à la demande de la compagnie ou de la personne concernée, remettre un certificat énonçant la décision portée en appel et les motifs de celle-ci; la décision lie la compagnie et la personne sauf si, dans les quinze jours suivant l'avis de cette décision, elle signifie au surintendant ou au ministre un avis de son intention d'en appeler donnant les motifs de l'appel, elle dépose son appel au bureau du registraire dans les quinze jours suivants et elle donne suite à l'appel avec la diligence nécessaire, auquel cas toute mesure consécutive à la décision, sauf s'il s'agit d'une décision relative à une question visée à l'article 73.3, est suspendue jusqu'à ce que la cour se soit prononcée sur l'appel."

Certificat de  
décision en  
appel

R.S., c. W-10;  
c. 44 (1st  
Suppl.); 1972, c.  
17; 1974-75-76,  
c. 19; 1976-77,  
c. 28; 1978-79,  
c. 11; 1984, c.  
40; 1986, c. 35

#### WINDING-UP ACT

52. (1) Subparagraph 162(1)(c)(i) of the *Winding-up Act* is repealed and the following substituted therefor:

"(i) if reinsurance is not effected as hereinafter provided,

(A) firstly, any of the following claims:

(I) in the case of policies of life insurance and policies of accident and sickness insurance, claims that have arisen under those policies of the company, in accordance with the terms thereof, prior to the date of the filing of the statement of the liquidator in the Office of the Superintendent of Financial Institutions as hereinafter provided, less any amount previously advanced by the com-

#### LOI SUR LES LIQUIDATIONS

52. (1) Le sous-alinéa 162(1)c)(i) de la *Loi sur les liquidations* est abrogé et remplacé par ce qui suit :

«(i) si la réassurance n'est pas effectuée selon les prescriptions qui suivent,

(A) en premier lieu, l'une quelconque des réclamations suivantes :

(I) dans le cas des polices d'assurance-vie et des polices d'assurance contre les accidents et la maladie, les réclamations qui ont découlé desdites polices de la compagnie, suivant les termes des polices, antérieurement à la date du dépôt de l'état du liquidateur auprès du Bureau du surintendant des institutions financières, de la manière prévue

S.R., ch. W-1  
ch. 44 (1<sup>er</sup>  
suppl.); 1972,  
ch. 17;  
1974-75-76, c.  
19; 1976-77, c.  
28; 1978-79, c.  
11; 1984, ch.  
40; 1986, ch.

pany on the security of those policies, and claims of holders of policies of life insurance and policies of accident and sickness insurance to the value of those policies computed as hereinafter provided,

(II) in the case of policies of insurance other than policies of life insurance and policies of accident and sickness insurance, claims that have arisen under those policies of the company by reason of the occurrence of the event insured against, in accordance with the terms thereof, prior to the date of the filing of the statement of the liquidator in the Office of the Superintendent of Financial Institutions as hereinafter provided, less any amount previously advanced by the company on the security of those policies, and

(B) secondly, in the case of policies of insurance other than policies of life insurance and policies of accident and sickness insurance, the claims of such policy holders to the value of those policies computed as hereinafter provided or, as the case may be, claims that have arisen under those policies of the company by reason of the cancellation of such policies, in accordance with the terms thereof, prior to the date of the filing of the statement of the liquidator in the Office of the Superintendent of Financial Institutions as hereinafter provided, less any amount previously advanced by the company on the security of the policies, or”

ci-après, moins tout montant antérieurement avancé par la compagnie sur la garantie de ces polices et les réclamations des porteurs de polices d'assurance-vie et d'assurance contre les accidents et la maladie jusqu'à concurrence de la valeur de leurs polices calculée de la manière prévue ci-après,

(II) dans le cas des polices d'assurance autres que les polices d'assurance-vie et les polices d'assurance contre les accidents et la maladie, les réclamations qui ont découlé desdites polices de la compagnie en raison de la survenance d'un sinistre faisant l'objet du contrat d'assurance, suivant les termes des polices, antérieurement à la date du dépôt de l'état du liquidateur auprès du Bureau du surintendant des institutions financières, de la manière prévue ci-après, moins tout montant antérieurement avancé par la compagnie sur la garantie de ces polices, et

(B) en deuxième lieu, dans le cas des polices d'assurance autres que les polices d'assurance-vie et les polices d'assurance contre les accidents et la maladie, les réclamations des assurés jusqu'à concurrence de la valeur de leurs polices calculée de la manière prévue ci-après ou, selon le cas, les réclamations qui ont découlé de ces polices de la compagnie en raison de l'annulation de pareilles polices, suivant les termes des polices, antérieurement à la date du dépôt de l'état du liquidateur auprès du Bureau du surintendant des institutions financières, de la manière prévue ci-après, moins tout montant antérieurement avancé par la compagnie sur la garantie des polices, ou»

(2) Subparagraph 162(1)(c)(i) of the said Act, as enacted by subsection (1), shall apply

(2) Le sous-alinéa 162(1)c)(i) de la même loi, édicté par le paragraphe (1), ne s'appli-

only in respect of the winding-up of the business of a company that commences on or after the day that subparagraph comes into force.

que qu'à l'égard de la liquidation des affaires d'une compagnie qui commence au plus tôt le jour de l'entrée en vigueur de ce sous-alinéa.

**COMING INTO FORCE****ENTRÉE EN VIGUEUR**

Coming into  
force

53. This Act or any provision thereof shall come into force on a day or days to be fixed by proclamation.

53. La présente loi ou telle de ses dispositions entre en vigueur à la date ou aux dates fixées par proclamation.

Entrée en  
vigueur

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OTTAWA, 1987

## APPENDIX "C"





# Acts of the Parliament of Canada

Passed in the year  
1991

During the thirty-ninth  
and fortieth years  
of the Reign of Her Majesty  
QUEEN ELIZABETH II

These Acts were passed during  
that portion of the Second  
Session and of the Third Session  
of the Thirty-fourth  
Parliament that included  
the 1991 calendar year

His Excellency the Right Honourable  
RAMON HNATYSHYN  
Governor General

# Lois du Parlement du Canada

adoptées en  
1991

pendant les trente-neuvième  
et quarantième années  
du règne de Sa Majesté  
LA REINE ELIZABETH II

au cours de la période 1991 de la  
deuxième session et de  
la troisième session de la  
trente-quatrième législature

Son Excellence le très honorable  
RAMON HNATYSHYN  
Gouverneur général

## 40 ELIZABETH II

### CHAPTER 47

An Act respecting insurance companies and fraternal benefit societies

[Assented to 13th December, 1991]

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

#### SHORT TITLE

Short title

1. This Act may be cited as the *Insurance Companies Act*.

#### PART I

#### INTERPRETATION AND APPLICATION

##### Definitions

Definitions

“actuary”  
“actuaire”

2. (1) In this Act,  
“actuary” means

(a) in respect of a company, the actuary of the company appointed under subsection 49(1), paragraph 165(2)(i) or section 362,

(b) in respect of a society, the actuary of the society appointed under subsection 49(1), section 362, as applied by subsection 547(1), or subsection 547(2),

(c) in respect of a foreign company, the actuary of the foreign company for its insurance business in Canada appointed under section 623, and

(d) in respect of a provincial company, the actuary of the provincial company appointed in respect of its insurance

## 40 ELIZABETH II

### CHAPITRE 47

Loi concernant les sociétés d'assurances et les sociétés de secours mutuels

[Sanctionnée le 13 décembre 1991]

Sa Majesté, sur l'avis et avec le consentement du Sénat et de la Chambre des communes du Canada, édicte :

#### TITRE ABRÉGÉ

Titre abrégé

1. *Loi sur les sociétés d'assurances.*

#### PARTIE I

#### DÉFINITIONS ET APPLICATION

##### Définitions

Définitions

2. (1) Les définitions qui suivent s'appliquent à la présente loi.

« acte constitutif » Loi spéciale, lettres patentes, acte de prorogation ou tout autre acte — avec ses modifications ou mises à jour éventuelles — constituant ou prorogeant une personne morale.

« actif au Canada » Les éléments d'actif placés en fiducie pour une société étrangère sous le régime de la partie XIII.

« actif total » S'entend au sens des règlements, en ce qui touche la société, la société de secours ou la société provinciale.

« action avec droit de vote » Action d'une personne morale comportant — quelle qu'en soit la catégorie — un droit de vote en tout état de cause ou en raison soit de la

« acte constitutif »  
“incorporating instrument”

« actif au Canada »  
“assets in Canada”

« actif total »  
“total assets”

« action avec droit de vote »  
“voting share”

748. Paragraphs 160(1)(b) and (c) of the said Act are repealed and the following substituted therefor:

- (b) being a company, society or provincial company the commencement and carrying on of business by which has been approved by order of the Superintendent under the *Insurance Companies Act*, or a foreign company the insurance of risks in Canada by which has been approved by order of the Superintendent under Part XIII of that Act, the Superintendent has made a report to the Minister that the Superintendent is of the opinion that the circumstances described in any of subparagraphs 680(1)(b)(iii) to (ix) of that Act exist; or
- (c) being a foreign company the insurance of risks in Canada by which has been approved by order of the Superintendent under Part XIII of the *Insurance Companies Act*, the order has been rescinded under section 655 of that Act and has not been remade within thirty days thereafter.

749. (1) Paragraph 161(1)(a) of the said Act is repealed and the following substituted therefor:

- (a) costs of liquidation and the mortgage insurance and special insurance portions of the expenses described in paragraph 686(1)(a) of the *Insurance Companies Act* that were incurred by the Superintendent in respect of the company after March 31, 1986;

(2) Subsection 161(1) of the said Act is further amended by striking out the word "and" at the end of paragraph (b) thereof, by adding the word "and" at the end of paragraph (c) thereof and by adding thereto the following paragraph:

- (d) expenses described in paragraph 686(1)(a) of the *Insurance Companies Act* that were incurred by the Superintendent in respect of the company after March 31, 1986 and assessed against and paid by other companies pursuant to that Act, the *Canadian and British Insurance Companies Act* or the *Foreign Insurance Companies Act*, and interest in respect thereof at

748. Les alinéas 160(1)b) et c) de la même loi sont abrogés et remplacés par ce qui suit :

- b) étant une compagnie, une société de secours ou une société provinciale à qui le surintendant a délivré un agrément de fonctionnement sous le régime de la *Loi sur les sociétés d'assurances*, ou une société étrangère à qui le surintendant a délivré une ordonnance aux termes de la partie XIII de cette loi, et le surintendant, dans un rapport au ministre, l'informe qu'à son avis, la situation visée à l'un ou l'autre des sous-alinéas 680(1)b)(iii) à (ix) de cette loi existe;
- c) étant une société étrangère que le surintendant a autorisée, par ordonnance, à garantir des risques aux termes de la partie XIII de la *Loi sur les sociétés d'assurances*, l'ordonnance a été révoquée aux termes de l'article 655 de cette loi et n'a pas été reprise dans les trente jours qui suivent.

749. (1) L'alinéa 161(1)a) de la même loi est abrogé et remplacé par ce qui suit :

- a) les frais de liquidation et la part des dépenses liées à l'assurance hypothécaire et à l'assurance spéciale visées à l'alinéa 686(1)a) de la *Loi sur les sociétés d'assurances* payés par le surintendant à l'égard de la compagnie après le 31 mars 1986;

(2) Le paragraphe 161(1) de la même loi est modifié par adjonction de ce qui suit :

- d) les dépenses visées à l'alinéa 686(1)a) de la *Loi sur les sociétés d'assurances* payées par le surintendant à l'égard de la compagnie après le 31 mars 1986 et qui font l'objet d'une cotisation et que d'autres compagnies ont payées aux termes de cette loi, de la *Loi sur les compagnies d'assurance canadiennes et britanniques* ou de la *Loi sur les compagnies d'assurance étran-*

such rate as is specified by the Superintendent.

(3) Subsections 161(2) and (3) of the said Act are repealed and the following substituted therefor:

Other creditors

(2) Other creditors and policyholders of the company, including policyholders claiming any minimum amount that a life company has agreed to pay under a policy or in respect of an amount in respect of which a segregated fund is maintained pursuant to section 451, 542 or 593 of the *Insurance Companies Act* for a deficiency if the assets of the fund are insufficient to satisfy such a claim, are entitled to receive a dividend on their claims only if the assets are more than sufficient to pay the claims specified in subsection (1).

Claim of Superintendent

(2.1) Expenses described in paragraph 686(1)(a) of the *Insurance Companies Act* that were incurred by the Superintendent in respect of the company before April 1, 1986 and assessed against and paid by other companies pursuant to that Act, the *Canadian and British Insurance Companies Act* or the *Foreign Insurance Companies Act*, and interest in respect thereof at such rate as is specified by the Superintendent constitute a claim of Her Majesty against the assets of the company prior to any claim in respect of the shares, if any, of the company or any similar claim against those assets.

Priority of claims of policyholders in foreign companies

(3) Notwithstanding anything in this Part, if a company is a foreign company the insurance of risks in Canada by which has been approved by order of the Superintendent under Part XIII of the *Insurance Companies Act*, no claim, after the payment of costs of liquidation and the mortgage insurance and special insurance portions of the expenses described in paragraph 686(1)(a) of the *Insurance Companies Act* that were incurred by the Superintendent in respect of the foreign company after March 31, 1986, other than claims of

(a) the preferred creditors referred to in paragraph (1)(b),

(b) holders of policies of a class of insurance specified in the order, and

gères, ainsi que les intérêts afférents qu'il fixe.

(3) Les paragraphes 161(2) et (3) de la même loi sont abrogés et remplacés par ce qui suit :

Autres créanciers

(2) N'ont le droit de toucher un dividende sur leurs réclamations que si l'actif est plus que suffisant pour couvrir les réclamations spécifiées au paragraphe (1) les autres créanciers de la compagnie, y compris les porteurs de police dont la réclamation représente le montant minimal qu'une compagnie d'assurance-vie a consenti à payer aux termes d'une police et ceux ayant une réclamation à l'égard d'une caisse séparée maintenue aux termes des articles 451, 542 ou 593 de la *Loi sur les sociétés d'assurances* en cas d'insuffisance, si l'actif de la caisse est insuffisant.

Réclamation du surintendant

(2.1) Les dépenses visées à l'alinéa 686(1)a) de la *Loi sur les sociétés d'assurances* payées par le surintendant à l'égard de la compagnie avant le 1<sup>er</sup> avril 1986 et qui font l'objet d'une cotisation et que d'autres compagnies ont payées aux termes de cette loi, de la *Loi sur les compagnies d'assurance canadiennes et britanniques* ou de la *Loi sur les compagnies d'assurance étrangères*, ainsi que les intérêts afférents qu'il fixe, constituent, sur l'actif de la compagnie, une réclamation de Sa Majesté ayant priorité sur toute réclamation portant sur les actions de la compagnie ou sur toute autre réclamation semblable sur l'actif.

Priorité des réclamations des assurés dans les sociétés étrangères

(3) Par dérogation aux autres dispositions de la présente partie, si la compagnie est une société étrangère à qui le surintendant a délivré aux termes de la partie XIII de la *Loi sur les sociétés d'assurances* un agrément de fonctionnement autorisant la garantie de risques au Canada, aucune réclamation, après le paiement des frais de liquidation et de la part des dépenses liées à l'assurance hypothécaire et à l'assurance spéciale visées à l'alinéa 686(1)a) de cette loi payée par le surintendant à l'égard de la société étrangère après le 31 mars 1986, autre que les réclamations des créanciers privilégiés visés à l'alinéa (1)b), des porteurs de police d'une classe d'assurance précisée dans l'ordonnance et des réassureurs de ces polices, le cas échéant, ne

## **APPENDIX “D”**



CANADA

CONSOLIDATION

CODIFICATION

## Winding-up and Restructuring Act

## Loi sur les liquidations et les restructurations

R.S.C., 1985, c. W-11

L.R.C., 1985, ch. W-11

Current to May 17, 2011

À jour au 17 mai 2011

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OFFICIAL STATUS  
OF CONSOLIDATIONS

CARACTÈRE OFFICIEL  
DES CODIFICATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1<sup>er</sup> juin 2009, prévoient ce qui suit:

Published  
consolidation is  
evidence

31. (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies  
in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails, to the extent of the inconsistency.

31. (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

Codifications  
comme élément  
de preuve

Incompatibilité  
— lois

tion or stay proceedings thereon on such terms as the court thinks just.

R.S., c. W-10, s. 92.

la contestation, soit surseoir aux procédures, à telles conditions qu'il estime justes.

S.R., ch. W-10, art. 92.

#### DISTRIBUTION OF ASSETS

Distribution of property

93. The property of the company shall be applied in satisfaction of its debts and liabilities, and the charges, costs and expenses incurred in winding-up its affairs.

R.S., c. W-10, s. 93.

Winding-up expenses

94. All costs, charges and expenses properly incurred in the winding-up of a company, including the remuneration of the liquidator, are payable out of the assets of the company, in priority to all other claims.

R.S., c. W-10, s. 94.

Distribution of surplus

95. (1) The court shall distribute among the persons entitled thereto any surplus that remains after the satisfaction of the debts and liabilities of the company and the winding-up charges, costs and expenses, and unless otherwise provided by law or by the Act, charter or instrument of incorporation of the company, any property or assets remaining after the satisfaction shall be distributed among the members or shareholders according to their rights and interests in the company.

Interest from commencement of winding-up

(2) Any surplus referred to in subsection (1) shall first be applied 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.

R.S., 1985, c. W-11, s. 95; 1996, c. 6, s. 155.

#### FRAUDULENT PREFERENCES

Gratuitous contracts

96. All gratuitous contracts, or conveyances or contracts without consideration or with a merely nominal consideration, respecting either real or personal property, made by a company in respect of which a winding-up order under this Act is afterwards made, with or to any person whatever, whether a creditor of the company or not, within three months immediately preceding the commencement of the winding-up, or at any time afterwards, shall be presumed to have been made with intent to defraud the creditors of the company.

R.S., c. W-10, s. 96.

#### DISTRIBUTION DE L'ACTIF

Distribution des biens

93. Les biens de la compagnie sont employés à l'acquittement de ses dettes et engagements, et des frais, charges et dépenses occasionnés par la liquidation de ses affaires.

S.R., ch. W-10, art. 93.

Frais de liquidation

94. Les dépenses, charges et frais légitimes de la liquidation d'une compagnie, y compris la rémunération du liquidateur, sont payables sur l'actif de la compagnie par droit de priorité sur toutes autres réclamations.

S.R., ch. W-10, art. 94.

Distribution du surplus

95. (1) Le tribunal distribue entre les personnes qui y ont droit tout surplus qui reste après l'acquittement des dettes et engagements de la compagnie et des frais de la liquidation, et, à moins qu'une règle de droit ou la loi de constitution, la charte ou le titre constitutif de la compagnie n'en dispose autrement, tout bien ou actif qui reste après cet acquittement est distribué entre les membres ou les actionnaires suivant les droits et les intérêts qu'ils ont dans la compagnie.

Intérêts

(2) L'excédent sert d'abord à payer les intérêts qui courent depuis le commencement de la liquidation au taux de cinq pour cent par année sur toutes les réclamations prouvées en fonction de leur rang.

L.R. (1985), ch. W-11, art. 95; 1996, ch. 6, art. 155.

#### PRÉFÉRENCES FRAUDULEUSES

Contrats à titre gratuit

96. Sont présumés faits avec l'intention de frauder les créanciers, tous les contrats ou transports relatifs à des biens meubles ou immeubles, à titre gratuit, ou sans considération, ou pour une considération purement nominale, qui ont été faits par une compagnie à l'égard de laquelle une ordonnance de mise en liquidation sous le régime de la présente loi a été ultérieurement rendue, avec toute personne, ou en sa faveur, qu'elle soit ou non créancière de la compagnie, dans les trois mois qui précèdent immédiatement l'ouverture de la liquidation ou à toute date postérieure.

S.R., ch. W-10, art. 96.



bank any assets remaining after payment of the interest.

1999, c. 28, s. 92.

Transfer to  
foreign  
liquidator

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

1999, c. 28, s. 92.

Right of action  
not debarred

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

1999, c. 28, s. 92.

### PART III

#### RESTRUCTURING OF INSURANCE COMPANIES

Definitions

“company”  
« société »

“foreign  
company”  
Version anglaise  
seulement

“policy”  
« police »

**159.** In this Part,

“company” means an insurance company;

“foreign company” means a foreign insurance company;

“policy” includes, without limiting the generality of its meaning, “policy” as defined in subsection 2(1) of the *Insurance Companies Act*.

R.S., 1985, c. W-11, s. 159; R.S., 1985, c. 18 (3rd Supp.), s. 43; 1991, c. 47, s. 747; 1996, c. 6, s. 161.

Application of  
Part

**159.1 (1)** This Part applies only to insurance companies.

Transitional

(2) This Part applies only in respect of applications for winding-up orders that are made after the date of coming into force of this subsection, and applications for winding-up orders that were made on or before that date shall be dealt with in accordance with the provisions of this Part as they read immediately before that date.

1991, c. 47, s. 747; 1996, c. 6, s. 161.

tout reliquat de l’actif subsistant après le paiement des intérêts.

1999, ch. 28, art. 92.

**158.2** En cas de liquidation d’une banque étrangère autorisée dans le pays où est situé son siège social ou dans celui où elle exerce principalement son activité, le surintendant peut, s’il le juge opportun et dans l’intérêt des créanciers de la banque étrangère autorisée, autoriser le liquidateur, sous réserve de l’approbation du tribunal, à transférer l’actif de celle-ci au liquidateur en tel pays.

1999, ch. 28, art. 92.

Transfert à un  
liquidateur  
étranger

**158.3** Si l’actif ne suffit pas à couvrir intégralement toutes les réclamations visées au paragraphe 158.1(1), les créanciers conservent tout recours qu’ils peuvent posséder, en droit ou en equity, sauf en ce qui concerne la part, le cas échéant, reçue dans la distribution de l’actif.

1999, ch. 28, art. 92.

Non-privation  
du droit d’action

### PARTIE III

#### RESTRUCTURATION DES SOCIÉTÉS D’ASSURANCES

Définitions

« police »  
“policy”

« société »  
“company”

**159.** Les définitions qui suivent s’appliquent à la présente partie.

« police » S’entend notamment au sens du paragraphe 2(1) de la *Loi sur les sociétés d’assurances*.

« société » S’entend d’une société d’assurances. L.R. (1985), ch. W-11, art. 159; L.R. (1985), ch. 18 (3<sup>e</sup> suppl.), art. 43; 1991, ch. 47, art. 747; 1996, ch. 6, art. 161.

**159.1 (1)** La présente partie s’applique uniquement aux sociétés.

(2) La présente partie ne vise que les demandes d’ordonnance de mise en liquidation présentées après la date d’entrée en vigueur du présent paragraphe. Les autres demandes sont assujetties au régime de la présente partie en son état avant cette date.

1991, ch. 47, art. 747; 1996, ch. 6, art. 161.

Application de  
la partie

Disposition  
transitoire

Protection of  
asset orders

**160.** The court may, at any time after an application for a winding-up order is made, on the application of the applicant for the winding-up order or of the liquidator, make such order as the court considers appropriate for the protection of the assets of the estate of the company.

R.S., 1985, c. W-11, s. 160; 1991, c. 47, s. 748; 1996, c. 6, s. 161.

Order of priority  
for payment of  
claims

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

(a) costs of liquidation and the mortgage insurance and special insurance portions of the expenses described in paragraph 686(1)(a) of the *Insurance Companies Act*;

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

(c) claims of policyholders of the company ranking as follows:

(i) in the case of policies of life insurance and policies of accident and sickness insurance,

(A) if transfer or reinsurance is not effected as provided in section 162, claims that have arisen under those policies of the company, in accordance with the terms thereof, prior to the date of the filing of the statement of the liquidator in the Office of the Superintendent as provided in subsection 168(1), less any amount previously advanced by the company on the security of those policies, and claims to the value of those policies computed as provided in section 163, or

(B) if transfer or reinsurance is effected as provided in section 162, of all or any of the policies of the company,

(I) in respect of those policies of the company for which transfer or reinsurance is effected, the consideration payable for the transfer or reinsurance of the policies of the company, and

(II) in respect of those policies of the company for which transfer or reinsurance is not effected, claims that have arisen under those policies, in accordance with the terms thereof, prior to the date of the filing of the

Ordonnance  
conservatoire

**160.** Le tribunal peut, après la présentation de la demande d'ordonnance de mise en liquidation, si son auteur ou le liquidateur le demande, rendre l'ordonnance qu'il juge indiquée pour la protection de l'actif de la société.

L.R. (1985), ch. W-11, art. 160; 1991, ch. 47, art. 748; 1996, ch. 6, art. 161.

**161.** (1) Sous réserve des autres dispositions de la présente loi, les réclamations sont acquittées dans l'ordre de priorité suivant:

a) les frais de liquidation et la part des dépenses liées à l'assurance hypothécaire et à l'assurance spéciale visées à l'alinéa 686(1)a de la *Loi sur les sociétés d'assurances*;

b) les réclamations des créanciers privilégiés spécifiés à l'article 72;

c) les réclamations des porteurs de police de la société prenant rang comme il suit:

(i) dans le cas des polices d'assurance-vie et des polices d'assurance contre les accidents et la maladie:

(A) si le transfert ou la réassurance n'est pas effectué selon l'article 162, les réclamations qui ont découlé de ces polices de la société, suivant les termes des polices, antérieurement à la date du dépôt de l'état du liquidateur auprès du Bureau, de la manière prévue au paragraphe 168(1), moins tout montant antérieurement avancé par la société sur la garantie de ces polices et les réclamations des porteurs de police d'assurance-vie et d'assurance contre les accidents et la maladie jusqu'à concurrence de la valeur de leurs polices calculée de la manière prévue à l'article 163,

(B) si le transfert ou la réassurance est effectué selon l'article 162, le prix à payer pour le transfert ou la réassurance de ces polices; pour les polices qui ne sont pas visées par ce transfert ou cette réassurance, les réclamations qui ont découlé de ces polices de la société, suivant les termes des polices, antérieurement à la date du dépôt de l'état du liquidateur auprès du Bureau, de la manière prévue au paragraphe 168(1), moins tout montant antérieurement

Ordre de priorité  
pour le paiement  
des réclamations

statement of the liquidator in the Office of the Superintendent as provided in subsection 168(1), less any amount previously advanced by the company on the security of those policies and claims to the value of those policies computed as provided in section 163, and

(ii) in the case of policies of insurance other than policies of life insurance and policies of accident and sickness insurance,

(A) firstly, claims that have arisen under those policies of the company by reason of the occurrence of the event insured against, in accordance with the terms thereof, prior to the date of the filing of the statement of the liquidator in the Office of the Superintendent as provided in subsection 168(1), less any amount previously advanced by the company on the security of those policies, and

(B) secondly, the claims of such policyholders to the value of those policies computed as provided in section 163 or, where transfer or reinsurance is effected as provided in section 162 of all or any of the policies of the company, the consideration payable for the transfer or reinsurance of the policies of the company or, as the case may be, claims that have arisen under those policies of the company by reason of the cancellation of such policies, in accordance with the terms thereof, prior to the date of the filing of the statement of the liquidator in the Office of the Superintendent as provided in subsection 168(1), less any amount previously advanced by the company on the security of the policies so cancelled; and

(d) expenses described in paragraph 686(1)(a) of the *Insurance Companies Act* that were incurred by the Superintendent in respect of the company and assessed against and paid by other companies pursuant to that Act, and interest in respect thereof at such rate as is specified by the Superintendent.

avancé par la société sur la garantie de ces polices et les réclamations des porteurs de ces polices jusqu'à concurrence de la valeur de leurs polices calculée de la manière prévue à l'article 163,

(ii) dans le cas des polices d'assurance autres que les polices d'assurance-vie et les polices d'assurance contre les accidents et la maladie:

(A) en premier lieu, les réclamations qui ont découlé de ces polices de la société en raison de la survenance d'un sinistre faisant l'objet du contrat d'assurance, suivant les termes des polices, antérieurement à la date du dépôt de l'état du liquidateur auprès du Bureau, de la manière prévue au paragraphe 168(1), moins tout montant antérieurement avancé par la société sur la garantie de ces polices,

(B) en deuxième lieu, les réclamations des assurés jusqu'à concurrence de la valeur de leurs polices calculée de la manière prévue à l'article 163 ou, si le transfert ou la réassurance de toutes les polices, ou partie d'entre elles, est effectué selon l'article 162, le prix à payer pour le transfert ou la réassurance de ces polices ou, le cas échéant, les réclamations qui ont découlé de ces polices de la société en raison de l'annulation de pareilles polices, suivant les termes des polices, antérieurement à la date du dépôt de l'état du liquidateur auprès du Bureau, de la manière prévue au paragraphe 168(1), moins tout montant antérieurement avancé par la société sur la garantie de ces polices;

d) les dépenses visées à l'alinéa 686(1)a) de la *Loi sur les sociétés d'assurances* payées par le surintendant à l'égard de la société qui font l'objet d'une cotisation et que d'autres sociétés ont payées aux termes de cette loi, ainsi que les intérêts afférents qu'il fixe.

Claims re life companies

(2) No payment on a claim by

(a) a creditor of a company insuring risks under policies referred to in subparagraph 161(1)(c)(i), or

(b) a policyholder of the company claiming a minimum amount that the company has agreed to pay under a policy or in respect of an amount for which a segregated fund is maintained under section 451, subsection 542.03(2) or section 593 of the *Insurance Companies Act* for a deficiency if the assets of the fund are insufficient to satisfy such a claim

shall be made unless the assets of the company are sufficient to pay the claims referred to in subsection (1) and all of the terms of the policies of policyholders referred to in that subsection have been satisfied in full including any interest component of those policies accruing to the date of payment of the claim.

Interest component

(3) For the purposes of subsection (2), the interest component of the claims of policyholders referred to in subparagraph 161(1)(c)(i) shall be treated as part of the claim that has arisen under the policy in accordance with the terms thereof.

Claims re other companies

(4) No payment on a claim by a creditor of a company insuring risks under policies referred to in subparagraph 161(1)(c)(ii) shall be made unless the assets of the company are sufficient to pay the claims referred to in subsection (1).

Subordinated debt holders

(5) Holders of subordinated indebtedness, within the meaning of subsection 2(1) of the *Insurance Companies Act*, of a company and other indebtedness that by their terms rank equally or are subordinate to such indebtedness are entitled to receive payment on their claims only if the assets of the company are sufficient to pay the claims referred to in subsections (2) and (4).

Priority of claims of policyholders in foreign companies

(6) Notwithstanding anything in this Part, but subject to subsection (8), if a company is a foreign company, no claim, after the payment of costs of liquidation and the mortgage insurance and special insurance portions of the expenses described in paragraph 686(1)(a) of the *Insurance Companies Act*, other than claims of

(a) the preferred creditors referred to in paragraph (1)(b),

(2) Il ne peut être satisfait à la réclamation d'un créancier d'une société qui assure des risques en vertu des polices visées au sous-alinéa 161(1)c)(i) ou du porteur de police dont la réclamation représente le montant minimal qu'une société d'assurance-vie a consenti à payer aux termes d'une police et par celui ayant une réclamation à l'égard d'une caisse séparée maintenue aux termes de l'article 451, du paragraphe 542.03(2) ou de l'article 593 de la *Loi sur les sociétés d'assurances* en cas d'insuffisance, si l'actif de la caisse est insuffisant, à moins que l'actif de la société soit plus que suffisant pour couvrir les réclamations spécifiées au paragraphe (1) et pour respecter les termes des polices visées à ce paragraphe, y compris l'intérêt afférent à la date du paiement de la réclamation.

Autres créanciers

(3) Pour l'application du paragraphe (2), l'intérêt afférent fait partie de la réclamation qui découle de la police selon les termes de celle-ci.

Intérêt

(4) Il ne peut être satisfait à la réclamation d'un créancier d'une société qui assure des risques en vertu des polices visées au sous-alinéa 161(1)c)(ii) à moins que l'actif de la société soit plus que suffisant pour couvrir les réclamations spécifiées au paragraphe (1).

Autres réclamations

(5) Il est satisfait aux réclamations des détenteurs de titres secondaires d'une société — au sens du paragraphe 2(1) de la *Loi sur les sociétés d'assurances* — et d'autres titres de créance dont le paiement, selon leurs propres termes, est de rang égal ou inférieur si l'actif de la société est plus que suffisant pour couvrir les réclamations visées aux paragraphes (2) et (4).

Dettes subordonnées

(6) Par dérogation aux autres dispositions de la présente partie et sous réserve du paragraphe (8), si la société est une société étrangère, aucune réclamation, après le paiement des frais de liquidation et de la part des dépenses liées à l'assurance hypothécaire et à l'assurance spéciale visées à l'alinéa 686(1)a) de la *Loi sur les sociétés d'assurances*, autre que les réclamations des créanciers privilégiés visés à l'alinéa (1)b), des porteurs de police d'une classe d'as-

Priorité des réclamations des assurés dans les sociétés étrangères

(b) holders of policies of a class of insurance specified in the order of the Superintendent under Part XIII of the *Insurance Companies Act*, other than holders of a policy exempt from Part XIII by virtue of section 572.1 of that Act, and

(c) expenses described in paragraph 686(1)(a) of the *Insurance Companies Act*, that were incurred by the Superintendent in respect of the company and assessed against and paid by other companies pursuant to that Act, and interest in respect thereof at such rate as is specified by the Superintendent,

ranks against the assets, and the balance, if any, of the assets remaining after the claims are paid shall be applied by the liquidator in satisfaction of the claims of any other creditors of the insurance business in Canada of the foreign company in accordance with subsections (2) and (4), but not including policyholders and creditors of the foreign company in respect of a class of insurance not specified in that order.

Definitions

"assets in Canada"  
« actif au Canada »

"assets under the control of the chief agent"  
« actifs sous le contrôle de l'agent principal »

Other foreign company priority provisions

(7) In subsection (8),

"assets in Canada" means assets in Canada, within the meaning of subsection 2(1) of the *Insurance Companies Act*, of a foreign company;

"assets under the control of the chief agent" means the other assets of the foreign company that are held in Canada under the control of its chief agent, within the meaning of section 571 of the *Insurance Companies Act*, including all amounts received or receivable in respect of its insurance business in Canada.

(8) Where a foreign company is authorized to insure in Canada

(a) risks falling within the class of life insurance; and

(b) risks falling within some other class of insurance, other than accident and sickness insurance, accident insurance, personal accident insurance and sickness insurance,

(i) in the case of

(A) the costs of liquidation, the mortgage insurance and special insurance portions of the expenses described in paragraph 686(1)(a) of the *Insurance Companies Act*, and

surance précisée dans l'ordonnance du surintendant prise en vertu de la partie XIII de cette loi, autres que les porteurs d'une police soustraite à l'application de la partie XIII par application de l'article 572.1 de cette loi, et des dépenses visées à l'alinéa 686(1)a) de la même loi faites par le surintendant à l'égard de la société et cotisées auprès des autres sociétés en vertu de cette loi avec l'intérêt au taux spécifié par le surintendant, le cas échéant, ne prend rang à l'égard de l'actif. Le reliquat de cet actif subsistant après le paiement de ces réclamations est affecté par le liquidateur au désintéressement de tous autres créanciers des activités d'assurances de la société étrangère au Canada conformément aux paragraphes (2) et (4), sans toutefois inclure les porteurs de police et les créanciers de telle société à l'égard d'une classe d'assurance non précisée dans l'ordonnance.

(7) Les définitions qui suivent s'appliquent au paragraphe (8).

« actif au Canada » L'actif au Canada d'une société étrangère au sens du paragraphe 2(1) de la *Loi sur les sociétés d'assurances*.

« actif sous le contrôle de l'agent principal » L'actif au Canada d'une société étrangère sous le contrôle de son agent principal, au sens de l'article 571 de la *Loi sur les sociétés d'assurances*, y compris les sommes reçues ou à recevoir relativement à ses activités d'assurances au Canada.

(8) Les réclamations à l'encontre d'une société étrangère autorisée à garantir des risques au Canada dans la branche d'assurance-vie et dans les branches d'assurance autres que l'assurance accidents et maladie, l'assurance-accidents, l'assurance accidents corporels et l'assurance-maladie sont acquittées dans l'ordre de priorité suivant:

a) les frais de liquidation, la part des dépenses liées à l'assurance hypothécaire et à l'assurance spéciale visées à l'alinéa 686(1)a) de la *Loi sur les sociétés d'assurances* et les réclamations des créanciers privilégiés sont payés sur l'actif au Canada gardé à l'égard des polices visées aux alinéas b) et c) ainsi que sur l'actif sous le contrôle de

Définitions

« actif au Canada »  
"assets in Canada"

« actif sous le contrôle de l'agent principal »  
"assets under the control of the chief agent"

Priorité de la société étrangère

(B) the claims of preferred creditors, the costs, portions of expenses and claims shall be paid from the assets in Canada, maintained for the policies referred to in subparagraphs (ii) and (iii), together with the assets under the control of the chief agent, in such proportion as the court considers fair and equitable,

(ii) in the case of policies falling within the classes of life insurance, accident and sickness insurance, accident insurance, personal accident insurance and sickness insurance, claims shall be paid

(A) firstly, from the assets in Canada maintained for those policies,

(B) secondly, from the assets under the control of the chief agent in such proportion as the court considers fair and equitable, and

(C) thirdly, from the balance, if any, of any assets referred to in clauses (iii)(A) and (B) remaining after the claims under subparagraphs (i) and (iii) are paid,

(iii) in the case of policies falling within some other class of insurance, claims shall be paid

(A) firstly, from the assets in Canada maintained for those policies,

(B) secondly, from the assets under the control of the chief agent in such proportion as the court considers fair and equitable, and

(C) thirdly, from the balance, if any, of any assets referred to in clauses (ii)(A) and (B) remaining after the claims under subparagraphs (i) and (ii) are paid, and

(iv) in the case of expenses described in paragraph 686(1)(a) of the *Insurance Companies Act* that were incurred by the Superintendent in respect of the foreign company and assessed against and paid by other companies pursuant to that Act, the expenses shall be paid from the balance, if any, of the assets referred to in clauses (ii)(A) and (B) and (iii)(A) and (B) remaining after the claims under subparagraphs (i), (ii) and (iii) are paid.

l'agent principal dans la proportion que le tribunal estime équitable;

b) les réclamations découlant de polices d'assurance-vie et de polices d'assurance accidents et maladie, d'assurance-accidents, d'assurance accidents corporels et d'assurance-maladie sont acquittées en premier lieu sur l'actif au Canada gardé à l'égard de ces polices; en deuxième lieu, sur l'actif sous le contrôle de l'agent principal dans la proportion que le tribunal estime équitable et, en troisième lieu, sur le reliquat de l'actif au Canada gardé à l'égard des polices visées à l'alinéa c) et de l'actif sous le contrôle de l'agent principal qui subsiste après avoir désintéressé les créanciers des alinéas a) et c);

c) les réclamations découlant des polices d'une autre branche sont acquittées en premier lieu sur l'actif au Canada gardé à l'égard de ces polices; en deuxième lieu, sur l'actif sous le contrôle de l'agent principal dans la proportion que le tribunal estime équitable et, en troisième lieu, sur le reliquat de l'actif au Canada gardé à l'égard des polices visées à l'alinéa b) et de l'actif sous le contrôle de l'agent principal qui subsiste après avoir désintéressé les créanciers des alinéas a) et b);

d) les dépenses visées à l'alinéa 686(1)a) de la *Loi sur les sociétés d'assurances* payées par le surintendant à l'égard de la société étrangère qui font l'objet d'une cotisation et que d'autres sociétés ont payées aux termes de cette loi sont payées sur le reliquat de l'actif au Canada visé aux alinéas b) et c) et de l'actif sous le contrôle de l'agent principal qui subsiste après avoir désintéressé les créanciers des alinéas a), b) et c).

Priority of costs, etc.	(9) For greater certainty, the costs, claims and expenses referred to in subsections (6) and (8) shall be paid in accordance with the priorities set out in subsection 161(1).	(9) Il est entendu que les frais, les réclamations et les dépenses visés aux paragraphes (6) et (8) sont payés dans l'ordre de priorité prescrit au paragraphe 161(1).	Priorité quant aux dépenses
Release of balance of assets to company	(10) The liquidator may, with the approval of the court, release to the foreign company any balance of the assets remaining after payment of claims in the order of priority prescribed by subsection (9).	(10) Le liquidateur peut, avec l'approbation du tribunal, remettre à la société étrangère tout reliquat de l'actif subsistant après le paiement des réclamations, dans l'ordre de priorité prescrit au paragraphe (9).	Remise du reliquat d'actif à la société
Payment of liabilities	(11) Notwithstanding anything in this section, the liquidator may, in carrying on the business of the company pursuant to paragraph 35(1)(b), with the approval of the court, pay liabilities relating to the portion of the business being carried on, where the payment is considered desirable for the retention of goodwill and enhancement of value to the estate of the company.  R.S., 1985, c. W-11, s. 161; R.S., 1985, c. 18 (3rd Supp.), s. 44, c. 21 (3rd Supp.), s. 55; 1991, c. 47, s. 749; 1996, c. 6, s. 161; 1997, c. 15, s. 411; 2007, c. 6, s. 445.	(11) Malgré les autres dispositions du présent article, le liquidateur peut, en poursuivant, avec l'approbation du tribunal, les activités d'une société aux termes de l'alinéa 35(1)b), payer les obligations afférentes à cette exploitation lorsqu'il l'estime souhaitable pour garder l'achalandage et pour augmenter la valeur de l'actif.  L.R. (1985), ch. W-11, art. 161; L.R. (1985), ch. 18 (3 <sup>e</sup> suppl.), art. 44, ch. 21 (3 <sup>e</sup> suppl.), art. 55; 1991, ch. 47, art. 749; 1996, ch. 6, art. 161; 1997, ch. 15, art. 411; 2007, ch. 6, art. 445.	Paiement des obligations
Transfer and reinsurance of policies by liquidator	162. (1) The liquidator may, with the approval of the court and without the consent of the policyholders, arrange for the transfer or reinsurance of  (a) all or a portion of the policies of the company, in the case of a company other than a foreign company, or  (b) all or a portion of the policies in respect of a foreign company's insurance business in Canada  in a company, society, foreign company or provincial company within the meaning of subsection 2(1) of the <i>Insurance Companies Act</i> or an insurance company incorporated by or under an Act of a legislature of a province and authorized under the laws of the province to issue policies of the class being transferred or reinsured, if the terms of the transfer or reinsurance are, in the opinion of the court having regard to the priorities set out in this Part, fair and equitable to  (c) the policyholders whose policies are being transferred or reinsured,  (d) the estate of the company as a whole, and  (e) the remaining policyholders of the company.	162. (1) Le liquidateur peut, avec l'approbation du tribunal mais sans l'assentiment des porteurs de police, faire un arrangement visant le transfert ou la réassurance de toutes les polices de la société ou certaines d'entre elles, s'il s'agit d'une société autre qu'une société étrangère, ou de toutes les polices d'une société étrangère liées à ses opérations d'assurance au Canada, ou certaines d'entre elles, dans une société, une société de secours, une société étrangère ou une société provinciale au sens du paragraphe 2(1) de la <i>Loi sur les sociétés d'assurances</i> ou dans une société d'assurances constituée aux termes d'une loi provinciale et autorisée par celle-ci à émettre des polices dans la branche de celles qui font l'objet du transfert ou de la réassurance si les termes du transfert ou de la réassurance sont, de l'avis du tribunal, compte tenu de l'ordre de priorité prévu par la présente partie, équitables pour les porteurs de police visés par le transfert ou la réassurance, l'actif de la société pris comme un tout et, enfin, les autres porteurs de police de la société.	Réassurance des contrats par le liquidateur

## **APPENDIX "E"**



consider possible prejudice to Montreal Trust flowing from the injunction, in the event Montreal Trust is ultimately found to have been entitled to change the mortgage documentation to eliminate liability on the covenants. In my opinion, such prejudice would be confined to the consequences to Montreal Trust of delay in arranging its affairs to its satisfaction, and would be fully compensable in damages. Montreal Trust, in an application for damages on the injunction, would be free to assert that it would have changed its documentation but for the injunction and that, had it done so, it would have had a defence to B.N.P.'s applications. While this contention is to some degree hypothetical, that is inherent in any claim for damages flowing from an injunction which must necessarily be based on what would have happened had the injunction not been granted. The question being mainly one of law, I cannot see how Montreal Trust would be adversely affected in the presentation of its claim for damages arising from the injunction. It is not suggested that B.N.P. would not be in a position to pay any damages awarded. In these circumstances, I can see no prejudice to Montreal Trust flowing from the injunction which could not be remedied in damage.

#### CONCLUSION

In my opinion, the chambers judge did not err in granting the injunctions. I would dismiss the appeal.

*Appeal dismissed.*

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#### Re Attorney-General of Canada and Northumberland General Insurance Co.

[Indexed as: Canada (Attorney-General) v. Northumberland General Insurance Co.]

*Ontario High Court of Justice, Saunders J.*

*February 11, 1988.*

**Corporations — Winding up — Insurance companies — Assets insufficient to pay all loss claims and unearned premium claims — Policyholders entitled to priority for one claim only — Have priority for loss claim, only if making both claims — Entitled to assert other claim against estate without priority — Winding-up Act, R.S.C. 1970, c. W-10, ss. 71, 162, 164.**

The respondent insurance company was ordered wound up by court order and its policies cancelled. Various policyholders made one or both of the following claims under their former policies: loss claims for actual or contingent losses and unearned premium claims. There were insufficient funds to pay all of the claims. The liquidator brought a motion to determine whether policyholders who made both claims had priority for both or only for one.

Held, a policyholder who made both claims had priority only for the loss claim, but could make an unearned premium claim against the estate without priority.

Under s. 71 of the *Winding-Up Act*, R.S.C. 1970, c. W-10, both types of claim could be made. However, that section is subject, *inter alia*, to s. 162, which provides that, after the costs of liquidation and claims of preferred creditors, the claims of policyholders ranking; (a) as to loss claims, and (b) as to unearned premium claims to the value of the policies "as hereinafter provided", have priority over general creditors. Further, s. 164 provides for the computation of the unearned premium values on policies under which no claims have arisen. Having regard to the history of the legislation and to the wording of the relevant sections, dual claim policyholders only had priority for their loss claims. However, they could make an unearned premium claim against the estate, but would rank with the general creditors for that claim. If, however, a policyholder made an unearned premium claim under s. 164, he would have relinquished any loss claim that arose after the winding up order.

#### Cases referred to

*Tyrie v. Fletcher* (1777), 98 E.R. 1297, 2 Cowp. 666; *Re A.-G. Can. and Northumberland General Ins. Co.* (1986), 56 O.R. (2d) 609, 31 D.L.R. (4th) 658, 22 C.C.L.I. 36

#### Statutes referred to

"Act respecting Insolvent Banks, Insurance Companies, Loan Companies, Building Societies, and Trading Corporations", S.C. 1882, c. 23

"Act to amend and consolidate the several Acts respecting Insurance, in so far as regards Fire and Inland Marine business", S.C. 1875, c. 20, s. 17

*Bankruptcy Act*, R.S.C. 1970, c. B-3

*Winding Up Act*, R.S.C. 1886, c. 129, s. 118

*Winding-Up Act*, R.S.C. 1906, c. 144, ss. 162 to 166 (rep. & sub. 1927, c. 75, s. 2), 176, 177, 179, 180, 181, 184, 185, 186

*Winding-Up Act*, R.S.C. 1927, c. 213, ss. 124, 162 to 166 (rep. & sub. 1932, c. 56, s. 2)

*Winding-Up Act*, R.S.C. 1970, c. W-10, ss. 9, 71(1), 162 (am. 1987, c. 26, s. 52), 163, 164 (am. 1987, c. 23, s. 53), 167, 169 (am. *idem.*, s. 54)

MOTION for an order resolving an issue that arose in the winding-up of an insurance company.

*Gale Rubenstein and Cary H. Kochberg*, for liquidator.

*Leslie A. Wittlin*, representing policyholders having both a claim for loss and a claim for unearned premium.

*Ronald N. Robertson*, Q.C., and *Deborah S. Grieve*, representing policyholders having only a claim for loss or a claim for unearned premium but not both.

*Richard A. Conway*, for MacMillan Bloedel Ltd.

*Gerald A. Levitan*, for the Minister of Supply and Services (Canada).

SAUNDERS J.:—This is a motion by the liquidator of Northumberland General Insurance Company ("Northumberland") for

the resolution of an issue that has arisen in the course of the administration of the winding-up. The issue involves the extent to which policyholders may claim against the estate. In order to determine it, an interpretation of several sections of the *Winding-Up Act*, R.S.C. 1970, c. W-10, as amended is required.

### *The background*

1. On July 24, 1985, Northumberland was wound up pursuant to the *Winding-Up Act*, by order of this court. The Superintendent of Insurance subsequently appointed Coopers & Lybrand Limited as his agent to assist him in fulfilling his duties and in carrying out the winding up. The Superintendent of Insurance and Coopers and Lybrand Limited will be referred to collectively in these reasons as the "Liquidator".

2. On September 30, 1985, by a further order of this court, all outstanding policies of insurance of Northumberland were cancelled as of September 17, 1985.

3. There are two broad classes of claims by policyholders or former policyholders:

- (a) claims, either actual or contingent, under the terms of a policy ("loss claims"); and
- (b) claims for unearned premiums for policies still in effect at the time of the winding-up order or for policies previously cancelled in respect of which the unearned premium has not been paid ("unearned premium claims").

4. The issue on this motion is the extent to which policyholders may assert their respective loss claims and unearned premium claims. An understanding of the issue requires detailed consideration of the *Winding-Up Act*. By way of introduction, the issue is whether a policyholder may claim priority under the *Winding-Up Act* for both a loss claim and an unearned premium claim or whether such a policyholder is restricted to claiming either one or the other but not both.

### *The Winding-Up Act*

The sections of the *Winding-Up Act* referred to in these reasons are set out in Schedule "A" [see p. 406, *post*]. The following general comments may be made.

1. At one time, it was an insurance rule that once the risk of the contract of indemnity had been commenced, there could be no apportionment or return of premium: see *Tyrie v. Fletcher* (1777), 98 E.R. 1297, 2 Cowp. 666. Later, that rule was often modified by contract, and in some cases by statute, to provide for the return of unearned premium if the policy had been prematurely cancelled or terminated. Northumberland was a general insurance company

and wrote a broad range of commercial and personal insurance policies. Generally, the policies contained provisions or were subject to statutory conditions under which, in the event of premature cancellation, the insured would be entitled to a return of a portion of the premium paid for the insurance, the amount of which depended on whether cancellation was by the insurer or the insured. In addition, premiums might be subject to retroactive adjustment based upon various factors. Many commercial policies contained reinstatement of loss provisions of various kinds. On the other hand, many personal policies did not contain reinstatement of loss provisions, although some were worded to the effect that a loss did not reduce coverage.

There was no standard wording in the policies. It was generally conceded for the purpose of this motion that immediately prior to the winding-up order, every policyholder of Northumberland was entitled to an unearned premium claim upon the cancellation or termination of his policy whether or not a loss claim had arisen.

2. Under s. 71(1) of the *Winding-Up Act*, when the business of a company is being wound up, all debts payable on a contingency and all claims against the company, present or future, certain or contingent, and for liquidated or unliquidated damages, are admissible to proof against the company. This section would embrace both loss claims and unearned premium claims.

3. As s. 71 is in Part I of the *Winding-Up Act*, its provisions are subject to ss. 162, 163, 164, 167 and 169 which are in Part III of the statute (s. 9).

4. Section 167 of the *Winding-Up Act* imposes a duty on the Liquidator to prepare and file a statement of claimants and creditors (the "Statement") with the Department of Insurance.

The Liquidator is required to prepare the Statement without the filing of any claim, notice or evidence, or the taking of any action by any person. The Statement is to contain a list of all the persons appearing by the books and records of the company to be creditors of the company or to be claimants under any policy, including any matured, valued or cancelled policy, taking cognizance in this connection of all claims that have arisen in accordance with the terms of the policies of which he has notice. The Statement must show the amount, determined as provided in the statute, for which each such person is to rank as a claimant or a creditor and every such person shall be collocated and ranked as, and is entitled to the right of, a claimant or a creditor for the amount so ascertained by the Liquidator, without filing any claim, notice or evidence or taking any action (s. 167(1)).

The collocation may be contested by any interested person and any person who is not collocated, or who is dissatisfied with the amount for which he is collocated, may file his own claim (s. 167(1)).

There is no time set out for the initiation of a contestation or for the filing of a claim. The Liquidator or the court may rectify the Statement on account of omissions or errors therein, notified to the Liquidator or discovered by him at any time before the completion of the liquidation and only the claims appearing in the Statement or amended Statement shall be regarded in the distribution of the assets (s. 167(2)).

Any claim that has arisen under the terms of a policy of which notice is received by the Liquidator after the filing of the Statement, shall rank upon the assets of the company only for the value entered in the Statement, unless the assets are sufficient to pay all claimants in full, and in such case, the policyholder shall rank as a creditor for the balance of his claim (s. 169(2)).

5. Section 163 authorizes a liquidator, without the consent of the policyholders, to arrange for the reinsurance of the policies of the company. No such reinsurance was arranged by the Liquidator.

6. Section 162 provides, subject to the *Winding-Up Act*, for an order of priority for the payment of claims. As no reinsurance was arranged, the claims against Northumberland are to be paid out in the following order of priority:

- (a) first, costs of liquidation;
- (b) secondly, claims of preferred creditors;
- (c) thirdly, claims of policyholders ranking as follows: claims that have arisen under the policies of Northumberland, in accordance with the terms thereof, prior to the date of the filing of the Statement, and claims of policyholders to the value of their policies computed as provided in the *Winding-Up Act*, and
- (d) creditors, other than policyholders, reinsurers and preferred creditors, are entitled to receive a dividend on their claims only if the assets are more than sufficient to pay the claims specified in paras. (a), (b), and (c) above.

7. Section 164 provides for the computation of certain claims. In s-s. (1), policyholders on which no claims have arisen in accordance with the terms of the policies prior to the date of the winding-up order are entitled to claim against the assets of Northumberland for the value of their respective policies computed as of

the date of the winding-up order in accordance with such bases, methods and rules of computation as the Treasury Board may deem just and equitable.

Subsection (2) requires the Treasury Board to take into account certain matters in prescribing the bases, methods and rules of computation. In no case shall the value for which a policyholder may claim be less than the value for which he might have claimed under the terms of his policy on cancellation thereof as of the date of the winding-up order.

On September 12, 1985, the Treasury Board prescribed the value of a Northumberland insurance policy, in respect of which no claim had arisen in accordance with the terms of the policy, to be an amount equal to the unearned premium. A Treasury Board prescription is binding on all concerned subject only to revocation or amendment by the board (s. 164(3)).

The Liquidator may require the superintendent to compute the value of policies in respect of which claims are made (s. 164(4)).

#### *The issue*

As has been noted, the issue is whether or not a policyholder may claim priority for both a loss claim and an unearned premium claim. The assets of Northumberland are insufficient to pay all claims of all creditors. They are not even sufficient to pay all s. 162(1) priority claimants in full. Accordingly, a policyholder with both classes of claim (a "dual claim") will be clearly prejudiced if only one of his claims is entitled to priority. On the other hand, policyholders with a single claim stand to lose on a distribution if both claims may be made.

Submissions were made by representative counsel for the single claim policyholders and for the dual claim policyholders. Submissions in support of the dual claim policyholders were also made on behalf of MacMillan Bloedel Limited. The Liquidator made submissions but took no position.

At first blush, one would think that both loss claims and unearned premium claims should be entitled to the same treatment as they are each proper claims that could be made under s. 71. Furthermore, s. 162 would appear to confer priority on both classes of claims. The problem is one of interpretation. Section 164(1) is, by its terms, confined to policies on which no claims have arisen. It is the submission on behalf of the single claim policyholders that this limitation precludes priority for an unearned premium claim where there has been a loss claim. The dual claim policyholders submit that such an interpretation

derogates from the rights of policyholders and that the statute can and should be interpreted to confer priority on dual claims.

*History of the legislation*

1. Both representative counsel made extensive submissions on the history of the statutes that led up to the *Winding-Up Act*. It is proper and possibly helpful to look at legislative history as an aid to statutory interpretation. The provisions referred to are set out in Schedule "B" to these reasons. Subject to specific statutory provisions, policyholders would be entitled to make their claims and to share *pro rata* with other creditors. In most cases, the loss claims are relatively easy to value. In the case of policies in force at the time of a winding-up, there is a valuation problem.

2. In 1875, a rule was enacted that policyholders would be entitled to claim for a proportionate part of the premiums paid and that such a claim "shall rank with judgments obtained and the claims accrued, in the distribution of assets": "Act to amend and consolidate the several Acts respecting Insurance, in so far as regards Fire and Inland marine business", S.C. 1875, c. 20, s. 17.

3. In 1882, additional provisions relating to claims of policyholders on a winding-up were enacted in a statute respecting certain insolvent corporations including insurance companies ["Act respecting Insolvent Banks, Insurance Companies, Loan Companies, Building Societies and Trading Corporations", S.C. 1882, c. 23]. These provisions were carried forward without significant alteration into the *Winding Up Act*, R.S.C. 1886, c. 129, and then into the *Winding-Up Act*, R.S.C. 1906, c. 144. The 1906 Act provided that:

- (a) the provision of the 1875 Act was continued except that the claims were confined to those policies on which no claim had accrued (s. 177).
- (b) former holders of cancelled policies were entitled to claim for the amount due on cancellation (s. 179);
- (c) a statement of claimants was to be prepared by the liquidator similar to the Statement in the current legislation (ss. 180, 181);
- (d) loss claims accruing up to 30 days after the filing of the statement were to be included in the statement. Loss claims accruing after that date were not to rank unless all creditors could be paid in full (s. 184), and
- (e) a liquidator was entitled with the sanction of the court to arrange for reinsurance. Any such arrangement was to be in lieu of the claim for unearned premium (ss. 185, 186).

4. In 1927, the *Winding-Up Act* was significantly amended [1927, c. 75, s. 2]. The provisions relating to life insurance companies and other insurance companies were merged into one part. More importantly, priorities were created amongst claimants (s. 162). There was also a provision that reinsurance could be arranged without the consent of policyholders. If the assets were not sufficient to provide for the claims of which notice had been received and for full reinsurance, then the reinsurance could be effected for as much as the assets available would provide. As before, the reinsurance was to be in lieu of claims for unearned premiums (s. 163).

The provision permitting unearned premium claims remained as before (s. 164). The provision permitting claims to be made under contractual provisions upon actual cancellation and permitting claims which accrued during the limited period after the making of the winding-up order were continued (ss. 165, 166).

5. In 1932, there was a further amendment to the *Winding-Up Act* [1932, c. 56, s. 2]. Part III entitled "Insurance Companies" was substantially the same as the Part III in force at the time of the winding-up order of Northumberland. There is no need to refer to the 1932 provisions. Instead, it is appropriate to note the relevant changes in the present Act from those contained in the 1927 Act. Section references are to the present statute. They would appear to be as follows:

- (a) the order of priorities has been changed (s. 162); the 1927 Act referred to "claims accrued" while the present statute refers to "claims that have arisen";
- (b) the section providing for the computation of the value of unmaturing policies (s. 164) is now confined to policies "on which no claims have arisen" rather than to policies "on which no claim has accrued". In the 1927 Act, such policies were separated from life insurance claims and their holders were entitled to claim "in respect of unearned premiums". In the present statute all policies including life insurance policies are lumped together and holders of policies on which no claims have arisen are entitled to claim "for the value of their respective policies". In the present s. 164(2), there is a provision that in no case shall the value for which a policyholder may claim be less than the value for which he might have claimed under the terms of his policy on cancellation as of the date of the winding-up order. There are other wording changes in s. 164 which will be discussed later, and



- (c) section 165 of the 1927 Act provided the former holder of a cancelled policy could claim for the amount due upon cancellation. There is no equivalent section in the current statute.

*Determination of the issue*

It is now possible to more precisely assess the issue. It requires an interpretation of parts of the *Winding-Up Act*. Policyholders have claims against Northumberland (s. 71). Section 71 is subject to Part III which includes s. 162 and s. 164. Section 162 provides that certain claims will be paid in priority to others. As no reinsurance was effected, the third rank of priority includes:

- (a) loss claims that have arisen prior to the date of the filing of the Statement, and
- (b) unearned premium claims of policyholders to the value of their policies computed "as hereinafter provided".

Stopping there, it is noted that loss claims have priority whether or not the policy has expired or has been cancelled as long as they have arisen under the policy and in accordance with the terms thereof. The extent to which loss claims may be asserted has already been dealt with in an earlier motion: see *Re A.-G. Can. and Northumberland General Ins. Co.* (1986), 56 O.R. (2d) 609, 31 D.L.R. (4th) 658, 22 C.C.L.I. 36.

Policyholders with unearned premium claims have priority under s. 162 to the value of their policies computed "as hereinafter provided". Section 164 is the only section which provides for the computation of the value of policies. Under s. 164(1), policyholders are entitled to claim for the value of their policies. That entitlement, however, is confined to policies "on which no claims have arisen". The section covers all classes of insurance including life insurance. Section 164(4) permits a liquidator to require the superintendent to compute the value of policies in respect of which claims are made.

It is the position of the single claim policyholders that reading ss. 162 and 164 in the context of the legislation and bearing in mind the legislative history, it is clear that Parliament intended that policyholders could claim priority for either loss or for unearned premiums but not for both. The dual claim policyholders contend that such an interpretation results in an unreasonable derogation of the rights of certain policyholders. It is submitted that such policyholders may have separate and valid claims and that they ought not to be deprived of one of them unless there is a clear provision in the statute effecting such a deprivation. It is

further submitted that s. 164 can be interpreted so as to confer s. 162 priority on unearned premium claims even if a claim has arisen under a policy.

With respect, I am of the opinion that the statute ought to be interpreted in the manner suggested by counsel for the single claim policyholders. Section 162 provides for the priority of certain claims. There is no issue that claims that have arisen under policies have priority. Claims of policyholders to the value of their policies computed "as hereinafter provided" must in my opinion refer only to claims valued pursuant to s. 164. There is no other provision subsequent to s. 162(1)(c)(i) for the computation of the value of policies. Section 164, in my opinion, is confined to policies on which no claims have arisen prior to the winding-up order.

Counsel for the dual claim policyholders argued that unearned premium claims where no claim had arisen could be valued under s. 164(4). The language of that subsection does not specifically refer to claims under s. 164(1). The predecessor provisions of the 1927 Act referred to "net value of the policies under which the *said* claims are made". It was argued that the deletion of the word "said" in the current legislation was deliberate and that it had the effect of broadening the application of s. 164(4). It is to be borne in mind that s. 124 in the 1927 Act dealt separately with life policies. Holders of non-life policies were entitled to claim in respect of *unearned premiums* proportionate to the unexpired period of the policies. On the other hand, holders of life policies were entitled to claim for the *net value* of those policies. Subsection (2) and (3) of s. 164 of the 1927 Act provided for the computation of net values. In my opinion, those two subsections referred only to net values of life policies and not to non-life policies. Accordingly, the "said claim" did not include unearned premium claims. The current s. 164 does not distinguish between life policies and non-life policies. Policyholders are entitled to claim for the value of their policies computed in accordance with such bases, methods and rules of computation as the Treasury Board may deem just and equitable. The value may not be less than the value for which the policyholder might have claimed upon cancellation as of the date of the winding-up order which is another way of describing the unearned premium claim in s. 164(1) of the 1927 Act. Section 164(4) of the current Act permits a liquidator to enlist the assistance of the superintendent in the valuation of policies. In my opinion, the absence of the word "said" from that subsection is of no significance other than, perhaps, as a drafting improvement. The computations provided for in the subsection, in my opinion, are

confined to claims in s. 164. To hold otherwise would make meaningless the words "on which no claims have arisen" in s. 164(1).

It was submitted that interpreting the statute as granting priority for only a single claim was unreasonable and derogated from the contractual, and in some cases the statutory rights of policyholders. While some policyholders will not obtain priority for their unearned premium claim under s. 162 they would, in my opinion, still be entitled to make such a claim in the estate. Section 164 entitles policyholders on which no claim has arisen to claim for the value of their policies computed in the manner prescribed by the section and priority is conferred on those claims by s. 162(1). Section 164(1), however, does not disentitle a policyholder with loss claims from claiming for unearned premiums in the estate under s. 71. Furthermore, in my opinion, such policyholders would not be precluded from claiming because of the provisions of s. 162(2). That subsection provides that creditors, other than policyholders and certain other creditors, are entitled to dividends only if assets are sufficient to pay the prior claims in s. 162(1). Section 162(2), in my opinion, goes no farther than to limit the entitlement of certain creditors. It does not say that policyholders have no claim. The drafting could have been improved. Nevertheless, it would, in my opinion, be going too far to say that a policyholder has no claim unless he can bring such a claim within the priority provision of s. 162(1).

In the result, a policyholder has priority under s. 162 for a loss claim. He may also have priority under that section for an unearned premium claim but only if he does not have a loss claim. If he does have a loss claim, his unearned premium claim is postponed but not eliminated and he may still assert it in the estate. He loses only his priority. In the case of the estate of Northumberland, it is a significant loss as there will be insufficient assets to pay in full all the priority claims under s. 162(1). The insufficiency of the assets, however, is not a matter that should be taken into account in determining the meaning of the statute.

In general, all creditors on a winding-up should rank *pari passu*. Legislatures may wish to qualify that principle by statute. This has been done by Parliament in the *Bankruptcy Act*, R.S.C. 1970, c. B-3, where the distribution of the proceeds realized from the property of a bankrupt is subject to certain priorities. In 1906, Parliament introduced a scheme of priority into the *Winding-Up Act* with respect to insurance companies. Loss claims were given a priority even if they arose after the date of the winding-up order.

Complementary to that provision, unearned premium claims could only have priority if there were no loss claims. The language is far from perfect but, in my opinion, the intention is clear from the language of the statute.

There are three other situations that require comment. Section 162(1) confers priority on a loss claim that arises after the winding-up order but before the filing of the Statement. If there were no other loss claims, s. 164(1) might also be applicable as no claim would have arisen prior to the date of the winding-up order. In my opinion, the scheme of the statute and the language of s. 162 and s. 164 have the result that if a policyholder makes a claim under s. 164(1), he thereby relinquishes any loss claim arising after the date of the winding-up order. In other words, the policyholder has a choice. He can make one claim but not both. He may, if he wishes, allow the policy to continue until the filing of the Statement and make a loss claim. Alternatively, he may make, in effect, an unearned premium claim under s. 164(1) as of the date of the winding-up order.

The submissions on behalf of MacMillan Bloedel and by other counsel raise the question of claims under policies that were cancelled prior to the date of the winding-up order. Such claims are not within the directed issue and I express no opinion on them at this time.

Finally, there may be policies where the unearned premium claim is greater than the loss claim. This situation may not have been envisaged by the drafters of the legislation. Under the statute, only the loss claim would be entitled to priority. The Liquidator has sought to resolve the problem by allowing the policyholders to withdraw loss claims, if so advised.

MacMillan Bloedel Limited, the holder of three policies, asks that it be entitled to assert separate claims in the winding-up in respect of each policy. The Liquidator does not object to this request and it will be so ordered. It seems to be consistent with the scheme of the statute.

### *Conclusion*

The answer to the question posed in the notice of motion is negative. The Liquidator and the representation counsel are entitled to costs out of the estate on a solicitor-and-client basis.

MacMillan Bloedel Limited may also have its costs out of the estate on a party-and-party basis.

*Judgment accordingly.*

#### SCHEDULE "A"

*Extracts from the Winding-Up Act, R.S.C. 1970, c. W-10*

#### PART I

#### GENERAL

#### Limitation of Part

. . . . .

9. In the case of insurance companies the provisions of this Part are subject to the provisions of Part III.

. . . . .

#### Creditors' Claims

71(1) When the business of a company is being wound up under this Act, all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, and for liquidated or unliquidated damages, are admissible to proof against the company.

. . . . .

#### PART III

#### INSURANCE COMPANIES

. . . . .

162(1) Subject to this Act, claims shall be paid in the following order of priority:

- (a) firstly, costs of liquidation;
- (b) secondly, claims of preferred creditors, specified in section 72;
- (c) thirdly, claims of policyholders of the company ranking as follows:
  - (i) if reinsurance is not effected as hereinafter provided, claims that have arisen under the policies of the company, in accordance with the terms thereof, prior to the date of the filing of the statement of the liquidator in the Department of Insurance as hereinafter provided, less any amount previously advanced by the company on the security of the policies, and the claims of policyholders to the value of their policies computed as hereinafter provided; or
  - (ii) if reinsurance is effected, firstly, claims that have arisen under the policies of the company, in accordance with the terms thereof, of which notice is received by the company prior to the date the reinsurance is effected, less any amount previously advanced by the company on the security of the policies; secondly, the consideration payable for the reinsurance of policies under which no claims have arisen.

(2) Creditors of the company, other than policyholders, reinsurers if any, and the aforementioned preferred creditors, are entitled to receive a dividend on their claims only if the assets are more than sufficient to pay the claims specified in subsection (1).

(3) Notwithstanding anything in this Part, if the company is a British company registered under the *Canadian and British Insurance Companies Act*, or a foreign company registered under the *Foreign Insurance Companies Act*, no claim, after the payment of costs of liquidation, other than claims of the preferred creditors hereinbefore specified, holders of policies of a class of insurance for which the company was so registered, and reinsurers of such policies, if any, shall rank against the assets in Canada maintained by the company under and for the purposes of those Acts, if such assets are maintained solely for the protection of policyholders in Canada; and the balance, if any, of the said assets, remaining after the said claims are paid, shall be applied by the liquidator in satisfaction of the claims of any other creditors of the company in Canada, but not including policyholders of any such company in respect of a class of insurance for which the company was not registered under either of the Acts aforesaid.

(4) The liquidator may, with the approval of the court and the Treasury Board, release to the company any balance of the assets in Canada remaining after payment of claims in the order of priority prescribed by subsection (3).

163(1) The liquidator may, without the consent of the policyholders, arrange for the reinsurance of the policies of the company, in the case of a company other than a British or foreign company, and of its policies in Canada in the case of a British or foreign company, in some company or companies registered under the *Canadian and British Insurance Companies Act* or the *Foreign Insurance Companies Act*, and in such case the reinsurance shall be in lieu of the claim for the value of their policies computed as hereinafter provided.

(2) Where the assets of the company are insufficient to provide for the preferred claims specified in section 72 and for claims under the policies of the company of which notice has been received by the company prior to the date of reinsurance, and for the reinsurance in full of the policies of the company, the reinsurance may be effected for such a percentage of the full amount of the policies as the said assets will secure.

(3) No contract of reinsurance made in pursuance of this section becomes effective until approved by the court and by the Treasury Board.

164(1) Where the reinsurance is not effected, holders of policies of all classes of insurance on which no claims have arisen in accordance with the terms of the policies prior to the date of the winding-up order are entitled to claim against the assets of the company for the value of their respective policies computed as of the date of the winding-up order in accordance with such bases, methods and rules of computation as the Treasury Board may deem just and equitable, less any amount previously advanced by the company on the security of the policies.

(2) In prescribing bases, methods and rules of computation, the Treasury Board shall take into consideration the prospective indemnities, benefits and equities guaranteed under the terms of the policies of the several classes thereof (including any bonus or other additional indemnity or benefit granted after the date of issue of the policy and subsisting at the date of the winding-up order and profits apportioned to policies but not distributed), the prospective premium payments, if any, the contingencies on which the payment of indemnities, benefits and premiums may depend, and such rate or rates of interest may be deemed appropriate, but in no case shall the value for which a policyholder may claim be less than the value for which he might have claimed under the terms of his policy on cancellation thereof as of the date of the winding-up order.

(3) The bases, methods and rules of computation so prescribed by the Treasury Board are binding on all concerned, subject only to revocation or amendment by the Treasury Board.

(4) The liquidator may require the Superintendent to compute the values of policies in respect of which claims are made and the expense of such valuation at the rate of three cents for each policy valued shall be paid by the liquidator to the Minister and applied toward payment of the expenses of the Department of Insurance.

. . . . .

167(1) The liquidator shall, without the filing of any claim, notice or evidence, or the taking of any action by any person, prepare a statement of all the persons appearing by the books and records of the company to be creditors of the company or to be claimants under any policy including any matured, valued or cancelled policy, taking cognizance in this connection of all claims that have arisen in accordance with the terms of the policies of which he has notice, and such statement shall show the amount, determined as hereinbefore provided in respect of policyholders, for which each such person is to rank as a claimant or creditor and every such person shall be collocated and ranked as, and is entitled to the right of, a claimant or a creditor for the amount so ascertained by the liquidator, without filing any claim, notice or evidence, or taking any action; but any such collocation may be contested by any person interested, and any person who is not collocated, or who is dissatisfied with the amount for which he is collocated, may file his own claim.

(2) The liquidator or the court may rectify any such statement on account of omissions or errors therein notified to the liquidator or discovered by him at any time before the completion of the liquidation, and only the claims appearing in such statement or amended statement shall be regarded in the distribution of the assets.

. . . . .

169(1) A copy of the statement mentioned in section 168, certified by the liquidator, shall be filed in the Department of Insurance, after not less than thirty days notice of his intention to do so has been given by the liquidator by notice in the *Canada Gazette* and in the official gazette of each province, and in two newspapers issued at or nearest the place where the head office of the company or the chief agency of the company in Canada, as the case may be, is situated.

(2) Any claim that has arisen under the terms of a policy of which notice is received by the liquidator after the date of the filing of the said statement, shall rank upon the assets only for the value entered in the said statement, unless the assets are sufficient to pay all claimants in full, and in such case, the policyholder shall rank as a creditor for the balance of his claim.

#### SCHEDULE "B"

*An Act to amend and consolidate the several Acts respecting Insurance, in so far as regards Fire and Inland Marine business, S.C. 1875, c. 20*

17. Upon the insolvency of any company, such court as aforesaid having jurisdiction in the Province (or sitting in the district, if such Province be the Province of Quebec), where the chief agency in Canada of such company is situated, shall appoint an assignee or assignees, who may be an officer or officers of such court, who shall forthwith call upon the company to furnish a statement of all its outstanding policies in Canada, and upon all such policy holders to file their claims;

and upon the filing of the claims before the assignees, the parties interested shall have the right of contestation thereof, and the right of appeal from their decision to such court as aforesaid, according to the practice of such court; and in case of any insurance company becoming insolvent, the parties insured in Canada shall be entitled to claim for a part of the premium paid, proportionate to the unexpired period of their policies respectively, and such return premium shall rank with judgments obtained and claims accrued, in the distribution of the assets; and upon the completion of the schedule to be prepared by the Assignees, of all judgments against the company upon such policies held in Canada, and of all claims for re-insurance or for surrender of a policy as aforesaid, the court having jurisdiction, as above provided, shall cause the securities held by the Receiver-General for such company, or any part of them, to be sold in such manner and after such notice and formalities as the court may appoint; and the process thereof, after paying expenses incurred, shall be distributed *pro rata* amongst the claimants according to such schedule, and the balance, if any, shall be surrendered to the company. But if any loss is sustained or any claim arises after the statement of such outstanding policies has been obtained from the company, as hereinbefore provided, and before the final order of the court for the distribution of the proceeds of the securities, or if the proceeds of the securities are not sufficient to cover in full all claims recorded in the schedule, such policy holders shall not be barred from any recourse they may have either in law or equity against the company issuing the policy, other than that for a share in the distribution of the proceeds of the securities held for such company by the Receiver-General.

*The Winding-Up Act, R.S.C. 1906, c. 144*

176. Any deposit held by the Minister for policy-holders, shall be applied *pro rata* towards the payment of all claims duly authenticated against such company, upon or in respect of policies issued to policy-holders in Canada.

177. Holders of policies or contracts of insurance on which no claim has accrued at the time the winding-up order is made, shall be entitled to claim as creditors, for such part of the premium paid, as is proportionate to the period of their policies or contracts respectively unexpired at the date of the winding-up order.

2. Such return or unearned premium shall rank with judgments obtained and claims accrued in the distribution of the assets.

. . . . .

179. Whenever the company or the liquidator, or the holder of the policy or contract of insurance, exercises any right which it or he has to cancel the policy or contract, the holder shall be entitled to claim as a creditor for the sum which, under the terms of the policy or contract, is due to him upon such cancellation.

180. The liquidator shall, without the filing of any claim, notice or evidence, or the taking of any action by the person, make a statement of all the persons appearing, by the books and records of the officers of the company, to be creditors or claimants under the three last preceding sections, and of the amounts due to each such person thereunder.

181. Every such person shall be collocated and ranked as, and shall be entitled to the rights of, a creditor or claimant for such amount, without filing any claim, notice or evidence, or taking any action: Provided that any such collocation may be contested by any person interested, and any person not collocated, or dissatisfied with the amount for which he is collocated, may file his own claim.



. . . . .

184. The holder of a policy or contract of insurance upon which a claim accrues, after the date of the winding-up order, and before the expiration of thirty days after the filing, in the office of the Superintendent of Insurance, of the statement aforesaid, shall be entitled to claim, as a creditor, for the full net amount of such claim; and the said statement and the dividend sheet shall, if necessary, be amended accordingly: Provided that no claim which accrues after the expiration of the thirty days hereinbefore mentioned, shall rank upon the estate, unless nor until there is sufficient to pay all creditors in full.

185. Before the expiration of the thirty days aforesaid, the liquidator may, with the sanction of the court, arrange with any incorporated insurance company, approved of for such purpose by the Superintendent of Insurance, for the re-insurance by such company of the outstanding risks of the insolvent company, and for the assumption by such company of the whole or any part of the other liabilities of the insolvent company.

186. In case of such arrangement the liquidator may pay or transfer to such company, such of the assets of the insolvent company as may be agreed on as the consideration for such re-insurance or assumption, and in such case the arrangement for re-insurance shall be in lieu of the claim for unearned premium.

2. Any remaining assets of the insolvent company shall be returned by the liquidator as a security to the creditors for the payment of their claims, and shall, if necessary, be so applied, and shall not be returned to the company, except on the order of the court after the satisfaction of such claims.

*An Act to amend the Winding-Up Act, S.C. 1927, c. 75*

2. . . .

. . . . .

"162(1) Subject to the provisions of this Act claims shall be paid in the following order of priority:

"First. — Costs of liquidation

"Secondly. — Claims of preferred creditors, specified in section seventy of this Act.

"Thirdly. — If reinsurance is effected as hereinafter provided, claims accrued under the company's policies of which notice has been received by the company prior to the date of reinsurance.

"Fourthly. — If reinsurance is not effected, claims by policyholders, as hereinafter provided, to unearned premiums or to the net value of their policies, and claims accrued under the company's policies; or if reinsurance is effected, the consideration payable for the reinsurance.

"(2) Creditors of the company other than policyholders, reinsurers if any, and the aforementioned preferred creditors shall be entitled to receive a dividend on their claims only if the assets are more than sufficient to provide for the claims mentioned in the preceeding subsection.

"(3) Notwithstanding anything contained in this Part, if the company is a British or foreign company, no claim other than those of the preferred creditors hereinbefore specified, holders of policies of a class for which the company was licensed under the Insurance Act, and reinsurers of such policies if any, shall rank against

the deposit made by the company with the Minister under the said Act, and the balance of the said deposit remaining after the claims herein specified are paid, may, with the approval of the Court and of the Treasury Board, be released by the liquidator to the company.

"163(1) The liquidator may, without the consent of the policyholders, arrange for the reinsurance of the contracts of its policyholders in the case of a Canadian company, and of its policyholders in Canada in the case of a company other than a Canadian company, in some company or companies licensed under this Act to transact insurance in Canada, and in such case the reinsurance shall be in lieu of the claim for unearned premiums or net values.

"(2) If the assets of the company are insufficient to provide for the preferred claims specified in section seventy of this Act and for claims under the company's policies of which notice has been received by the company prior to the date of reinsurance, and for the reinsurance in full of the company's policies, the reinsurance may be effected for such a percentage of the full amount of the contracts as the said assets will secure.

"(3) No contract of reinsurance made in pursuance of this section shall become effective until approved by the Court and by the Treasury Board.

"164(1) Subject to the provisions of the next two succeeding sections, if reinsurance is not effected, holders of policies other than policies of life insurance, on which no claim has accrued at the time the winding-up order is made, shall be entitled to claim as hereinbefore provided in respect of unearned premiums, which shall be such part of the premiums as is proportionate to the period of the policies respectively unexpired on the date of the winding-up order; and holders of policies of life insurance on which no claim has accrued at the time of the said winding-up order, shall be entitled to claim as hereinbefore provided for the net value, which shall include bonus additions and profits accrued on the policies at the time of the said winding-up order less any amount previously advanced by the company on the security of the policies respectively.

"(2) The said net values shall be computed, as to the death benefit, on the basis prescribed by *The Insurance Act, 1917*, and as to the disability, accident or other benefit, if any, on such basis as may be approved by the Treasury Board.

"(3) The liquidator may require the Superintendent of Insurance to determine the net values of the policies under which the said claims are made, and in such event, the expense of such valuation at a rate of three cents for each policy so valued shall be retained by the Minister from the securities held by him as a deposit under *The Insurance Act, 1917*.

"165. If no reinsurance is effected, whenever the company or the liquidator or the holder of a policy of insurance exercises any right which it or he has to cancel the policy, the holder shall be entitled to claim the sum which under the terms of the policy is due to him upon such cancellation.

"166. If no reinsurance is effected, the holder of a policy upon which a claim accrues, for which claim notice has been received by the liquidator before the date of the filing of the statement hereinafter mentioned, shall be entitled to claim for the full net amount of such claim less any amount previously advanced by the company on the security of the policy, and no claim of which notice is received after the said date shall rank upon the estate unless or until there is sufficient to pay all creditors in full."

## APPENDIX "F"

Court File No: 01-CL-4313

Date: 20090714

ONTARIO  
SUPERIOR COURT OF JUSTICE  
Commercial List

IN THE MATTER OF	)	
RELiance INSURANCE COMPANY	)	<i>Graham D. Smith, Lauren Butti</i> for
	)	KPMG Inc., the Liquidator of Reliance
	)	Canada
AND IN THE MATTER OF THE	)	
INSURANCE COMPANIES ACT, S.C. 1991,	)	<i>Deborah S. Grieve</i> , for the Insurance
C.47, AS AMENDED	)	Commissioner for the Commonwealth
AND IN THE MATTER OF THE	)	of Pennsylvania, Liquidator of Reliance
WINDING-UP AND RESTRUCTURING	)	Insurance Company
ACT, R.S.C. 1985, C.W-11, AS AMENDED	)	
	)	<i>Elizabeth Pillon, Jennifer Cantwell</i> for
BETWEEN	)	the Under-Limit Claimants of Reliance
	)	Canada
THE ATTORNEY GENERAL OF CANADA	)	
Applicant	)	<i>James H. Grout</i> representative counsel
-and-	)	for the Over-limits Claimants
	)	
RELiance INSURANCE COMPANY	)	
Respondent	)	
	)	Heard: April 16 & 17, 2009

2009 CanLII 37915 (ON SC)

C. CAMPBELL J.:

REASONS FOR DECISION

[1] This Application concerns the allocation of surplus arising from the liquidation of the Canadian branch among those who may be entitled in Canada and the creditors of the United States-based foreign-based insurance company to which it is related and which is itself in liquidation.

[2] The liquidator of the Canadian branch of Reliance Insurance Company, KPMG Inc. ("the Canadian Liquidator"), seeks advice and direction with respect to an anticipated surplus of assets over claims of the property and casualty insurance business in Canada. The direction sought concerns the entitlement, if any, of Canadian policyholders to interest on post-liquidation claims under the *Winding-Up and Restructuring Act*, R.S.C. 1985 c. W-11 ("WURA") for claims made during a run-off period.

[3] A Procedural Order dated January 25, 2009 provided for the appointment of representative counsel for the two classes of claimants in the liquidation of Reliance Canada affected by the motion.

[4] Reliance Insurance Company is a property and casualty insurer incorporated in the early 1800's in the Commonwealth of Pennsylvania. In 1918, Reliance Insurance Company established a Canadian branch ("Reliance Canada") in the City of Toronto to carry on specific insurance business in Canada. Reliance Canada carried on business in Canada as a branch of a foreign insurance company under the predecessor legislation to the Part XIII of the *Insurance Companies Act*, S.C. 1991, c. 47 (the "ICA"), and ultimately under the ICA.

[5] The ICA sets out a regime and imposes specific requirements for the carrying on of business of a Canadian branch of a foreign insurance company such as Reliance Canada. Among other matters, a Canadian branch must seek approval to issue policies in Canada, maintain in a trust account in Canada assets of prescribed value and keep appropriate records of its customers and claimants and the nature of its liabilities, including those under policies.

[6] The Reliance branch in Canada is regulated by the Office of the Superintendent of Financial Institutions in Canada, which issues detailed guidelines and requirements under the ICA.

[7] In May 2001, Reliance U.S. was insolvent and its regulator, the Insurance Commission for Pennsylvania, sought and was granted an order on October 3, 2001 appointing the Commissioner liquidator ("U.S. Liquidator") of Reliance U.S.

[8] On October 5, 2001, pursuant to the ICA, the Superintendent took control of the assets in Canada of Reliance Canada and pursuant to the recommendation of the Superintendent, the Attorney General of Canada sought and was granted an Order of Winding-Up pursuant to the WURA dated December 3, 2001 and on the same day, KPMG was appointed liquidator of Reliance Canada.

[9] All policy loss claims that had been settled prior to the commencement of the Winding-Up were paid by Reliance Canada prior to the commencement of the Winding-Up. Reliance Canada's policies were not cancelled with the winding-up, but rather continued to be run-off and settled in the normal course of claims adjudication. From the beginning of the winding-up, this Court permitted payment of various policy loss claims within certain thresholds ("Authorized Policy Payments") as these claims were settled and allowed during the course of the liquidation.

[10] In particular, pursuant to the Appointment Order and subsequent extension Orders of this Court, the Liquidator paid the following policy benefits by way of Authorized Policy Payments: (a) defence costs; (b) valid policy loss claims up to the \$250,000 limit of the voluntary compensation payment of the Property and Casualty Insurance Compensation Corporation ("PACICC"); and (c) valid policy loss claims, not covered by PACICC, up to \$25,000.

[11] Further, as the liquidation progressed, this Court granted Orders approving distributions by various interim dividend payments ("Interim Dividend Payments") on all allowed policy loss claims in the estate of Reliance Canada (to the extent such claims had not already been paid-in-full by way of the Authorized Policy Payments). This Court's Order of April 8, 2008 brought the total authorized level of Interim Dividend Payments to 100% of the principal amount of claims.

[12] Claims other than policy claims have either been paid or provided for by further order.

[13] As a consequence of the two types of payments (the Authorized Policy Payments and the Interim Dividend Payments), many policy loss claims were paid-in-full as they were settled and allowed. That is, the liquidation did not cause any delay in payment-in-full of these claims. (As of December 31, 2007 approximately 18,240 such policy loss claims, with a total value of approximately \$66 million, had been paid-in-full without any delay caused by the liquidation.)

[14] Conversely, several reinsurance claims and 64 policy loss claims (with a combined total value of approximately \$65 million) could *not* be paid-in-full contemporaneously with their being settled and allowed, because they exceeded the Authorized Policy Payments and they were settled prior to the cumulative Interim Dividend Payments level reaching 100%. These policy loss claims were instead paid over time by way of the Court-authorized Interim Dividend Payments, ultimately resulting in a cumulative 100 cents on the dollar distribution on April 8, 2008. (Similarly, the allowed ordinary creditor claim was not paid until the Order of December 17, 2008).

[15] Those policyholders who were paid in full as settled and allowed (as they would have been in contract) are represented in this application as "Under-Limits Claimants." Those claimants not paid in full immediately as their policy loss claims were settled and allowed in the liquidation are referred to as "Over-Limits Claimants." The Canadian Liquidator currently forecasts a surplus in the Canadian estate of approximately \$95.8 million.

#### Four Questions

[16] The four questions posed by this motion for directions are as follows:

*Question 1:* Does subsection 95(2) of the *Winding-up and Restructuring Act*, R.S.C. 1985, c.W-11 ("WURA") apply to the winding-up of Reliance Canada, so that interest on allowed claims in the winding-up of Reliance Canada is payable pursuant to subsection 95(2), in the case where there is a surplus, in priority to any release to Reliance Insurance Company of the balance of any assets that the Court may ultimately approve under subsection 161(10) of the *WURA*?

*Question 2:* If the answer to Question 1 is yes, on what basis is post-liquidation interest to be determined? That is, on which type of claims is it payable, at what rate, is it simple or compounded, from what date(s) does it run, and are interim payments that were made on claims to be first applied toward the interest payable on the claim and then to the principal amount of the

claim or first toward the principal amount of the claim?

*Question 3:* If the answer to Question 1 is no, is interest payable in the winding-up of Reliance Canada on allowed claims on some basis other than subsection 95(2) of the *WURA*, in the case where there is a surplus, in priority to any release to Reliance Insurance Company of the balance of any assets that the Court may approve under subsection 161(10) of the *WURA*?

*Question 4:* If the answer to Question 1 is no, and the answer to Question 3 is yes, on what basis is post-liquidation interest to be determined?

[17] The position of the Canadian Liquidator is that Part I of the *WURA* by s. 9 of the statute applies to all windings-up also applies by s. 95 to codify entitlement to post-liquidation interest payable from a surplus, since Part III of the *WURA*, which applies specifically to Insurance Companies, does not refer to the application of a surplus to post-liquidation interest.

[18] The U.S. Liquidator in its submission raises the issue of the applicability of s. 95 of the *WURA*, given the application of Part III of the statute.

[19] Even assuming that s. 95 of the *WURA* applies and even if some interest is payable, the U.S. Liquidator questions why the Court should exercise discretion to permit certain policyholders (Canadian) to be paid interest with respect to paid claims when other policyholders and other creditors of Reliance U.S. will likely be subject to significant shortfalls of the principal amount of their policy loss claims against Reliance U.S.

[20] The U.S. Liquidator also questions, assuming some interest might be payable, why the rate of interest should exceed the actual interest earned on the assets of the Canadian Branch during the course of the Winding-Up (approximately 3.9% per annum.)

[21] Both the Under- and Over-Limit Claimants support the Canadian Liquidator in the proposition that s. 95 of the *WURA* does apply and that the Canadian policyholders are entitled to receive 5% of their claims from the date of the Canadian liquidation orders (December 3, 2001) to the date of actual payment.

[22] The Over-Limit Claimants assert that in the event the Court applies a later date for the commencement of a rate of interest accruing on the Under- and Over-Limit claims, the Over-Limit Claimants should recover 5% from the date at which those Claimants should have received payment pursuant to the applicable policy terms.

[23] Section 95 of Part I of the *WURA* reads as follows:

95. (1) The court shall distribute among the persons entitled thereto any surplus that remains after the satisfaction of the debts and liabilities of the company and the winding-up charges, costs and expenses, and unless otherwise provided by law or by the Act, charter or instrument of incorporation of the company, any property or assets remaining after the satisfaction shall be distributed among the members or shareholders according to their rights and interests in the company.

- (2) Any surplus referred to in subsection (1) shall first be applied 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.

[24] As noted by counsel for the U.S. Liquidator, the WURA is made up of three parts: Part I - General; and two parts applicable to specific industries, which deal specifically with foreign banks and foreign insurance companies, respectively: Part II - Authorized Foreign Banks, which applies only to the winding-up of the business in Canada of authorized foreign banks and to the liquidation of their assets (s. 150); and Part III - Restructuring of Insurance Companies, which applies only to insurance companies, including foreign insurance companies (s. 159.1).

[25] Each Part contains its own provisions regarding the priorities in the distribution of assets in a winding-up: Part I - ss. 93-95; Part II: ss 158.1-158.2; and Part III - s. 161. The provisions of Part I apply subject to those of Part II and Part III, respectively.

[26] Part II of the WURA, dealing with foreign banks, does contain specific terms that provide for the payment of interest from the commencement of the winding-up at the rate of 5% before payment out of remaining assets.

[27] Similar provisions do not apply in Part III that deal with winding up of Insurance Companies.

[28] Section 161 of the WURA under Part III contains detailed provisions relating to claims in the case of policies of life insurance and policies of accident insurance. Among other things, s. 161(2) does provide for the interest component of claims of policyholders on life insurance policies and the priority ranking of claims of policyholders in foreign companies for life policies.

[29] The problem that has given rise to this motion is that there are no detailed provisions applicable to property and casualty policies in Part III as are applicable to life or disability policies.

[30] It is conceded by all parties that whatever assets the foreign insurer (Reliance Insurance Company) had to maintain in Canada in order to operate here have now come under the jurisdiction of the Canadian winding-up Court. See *Maska U.S. Inc. v. Kansa General International Insurance Company Ltd.*, 1998 CanLII 12824 at 29 (QCCA).

[31] As well there is no issue that the winding-up Court sits to administer the assets which are within its jurisdiction and for that purpose the Court administers only the law of its jurisdiction, both on procedural and substantive matters. When a winding-up order is made for the Canadian business of a foreign company, the provisions of the Canadian statute apply and control the entire situation. The Canadian winding-up is an independent and self-contained proceeding.

#### The Position of the Canadian Liquidator

[32] Prior to the coming into force of ss. 95(2) of the *WURA* on June 28, 1996, the rules about interest in a winding-up were strictly common-law rules. In a winding-up, the well-established "interest stops" rule means that interest on provable claims stops accruing as at the commencement of the winding-up; however, at common-law if there ultimately is a surplus in



the estate, post-liquidation interest is payable where there had been a right to interest on a claim by contract, course of conduct, judgment or statute.

[33] The position of the Canadian Liquidator is that the notion of payment of post-liquidation interest in the event of a surplus, and the applicable interest rate, were codified by the 1996 addition of ss. 95(2), which replaced common law rules that previously applied.

[34] The issue in this case arises from the run-off of claims in the Winding Up of Reliance Canada. Where some claimants have incurred delay in distribution caused by the liquidation and have suffered no prejudice, the Canadian Liquidator submits that ss. 95(2) of the *WURA* clearly applies, and post-liquidation interest is payable on appropriate claims, at the statutory simple rate of 5% *per annum*, before any balance is released to the U.S. Liquidator.

[35] Further, the Canadian Liquidator submits that, properly construed and applied, ss. 95(2) envisages that interest is payable to those having claims where payment-in-full was in fact delayed by virtue of the liquidation process (i.e., in this case, only the Over-Limits Claimants.) Interest is calculated from the date those Over-Limits Claimants would otherwise have been entitled to payment in the ordinary course (i.e., absent a liquidation) to the date of actual payment-in-full to them of principal and interest.

[36] The Canadian Liquidator further submits that any interim distributions (by Authorized Policy Payments or Interim Dividend Payments) that were made to these Over-Limits Claimants should be treated as being allocated first to the post-liquidation interest component, and then to the principal amount, in accordance with this Court's 2003 decision in *Attorney General (Canada) v. Confederation Trust Company*, 2003 Can LII 18103 (ON S.C.)

[37] The submission on behalf of the U.S. Liquidator urges that the Court has discretion to determine issues including interest and if any interest is to be awarded, it should be limited to the actual return on assets. This position would lead to the conclusion that the 1996 Part III amendments to the *WURA* provide a complete code in respect of the Winding Up of Insurance Companies.

[38] One of the few cases on this issue is the decision of Justice Durand of the Quebec Superior Court in *Kansa General International Insurance Company*, 2004 CanLII 21472. While the facts are quite different, I agree with the observation at paragraph 37, which favours coherence between amending parts of legislation such as Parts I and III of the *WURA*. I am not satisfied that there is a contradiction between the provisions of Part III and s. 95 as it applies to Insurance Companies.

[39] The position of the U.S. Liquidator contrasts the treatment of different types of policyholders' claims depending on the policy type; namely Life (including accident and sickness) and Non-Life (which includes property and casualty policies such as those issued by Reliance.)

[40] There is a rationale to the distinction made in s. 161(2) and (3) between Life Policies and others. Interest that is expressly provided for in s. 162(3) refers to interest that is part of the policy, not simply interest that arises on a claim in the liquidation.

[41] I accept the position of the Canadian Liquidator that the winding-up Court sits to administer the assets which are within its jurisdiction and for that purpose the Court administers only the law of its jurisdiction, both on procedural and substantive matters. When a winding-up order is made for the Canadian business of a foreign company, the provisions of the Canadian statute apply and control the entire situation. The Canadian winding-up is an independent and self-contained proceeding. *In Re Suidair International Airways Ltd.*, [1951] 1 Ch. 165, at 173-174].

[42] As noted, prior to the coming into force of ss. 95(2) of the *WURA* on June 28, 1996, the rules about interest in a winding-up were strictly common-law rules. The effect of what is known as the "interest stops" rule meant that interest on provable claims stops accruing as at the commencement of the winding-up. At common-law if there was ultimately a surplus in the estate, post-liquidation interest would be payable where there had been a right to interest on a claim by contract, course of conduct, judgment or statute. See *Attorney General (Canada) v. Confederation Trust Company*, 2003 Can LII 18103 at paras. 21, 24 and 28 (ON S.C.); *Canada (Attorney General) v. Security Home Mortgage*, 2003 ABQB 588, at paras. 86 and 89 (Can LII).

[43] The position of the U.S. Liquidator is that since s. 161(3) only provides for interest in respect of Life Policies, there is no statutory requirement that interest be paid in relation to property and casualty insurance policies prior to the transfer of any surplus. It is submitted that if Parliament had intended to require interest on such claims, an express provision could have been inserted into s. 161 similar to s. 158.1 dealing with claims against foreign banks.

[44] The U.S. Liquidator further submits that s. 95 in Part I does not apply to Reliance, as specific provisions are dealt with in s. 161 and the provisions of Part I by s. 9 are subject to the provisions of Part III.

[45] The U.S. Liquidator urges that when the provisions of s. 161(6) are properly applied, there is no surplus, as claimants of Reliance (those in the U.S. Liquidation) are expected to suffer a significant shortfall in their claims against Reliance. In the result, as counsel submitted there should be no "surplus" in s. 95(1) for which the interest in s. 95(2) would be triggered.

[46] I have concluded that there is a logic that supports the position of the Canadian Liquidator. The analysis commences with what Pepall J. of this Court held in an earlier decision<sup>1</sup> in this liquidation, as follows:

[24] By November 8, 2001, two liquidation estates were created, one in the U.S. and one in Canada. The *WURA* specifically provides for a winding up order in respect of the "insurance business in Canada of the foreign insurance company if the court is of the opinion that for any reason it is just and equitable".[9] There is, therefore, no issue that there was jurisdiction to make the winding up and appointment orders. As noted in *Re Breakwater Co.*,[10] the jurisdiction of the court to wind up a company is not defeated because a winding

<sup>1</sup> *Canada (Attorney General) v. Reliance Insurance Company*, 2007 CanLII 41899 at para. 24 (ONSC)

up order has already been made in the company's foreign country of origin. The court then administers the assets of the company that are within its jurisdiction: *Re: Suidair International Airways Ltd.*[11]

...

[44] The winding-up Court sits to administer the assets which are within its jurisdiction and for that purpose the Court administers only the law of its jurisdiction, both on procedural and substantive matters. When a winding-up order is made for the Canadian business of a foreign company, the provisions of the Canadian statute apply and control the entire situation. The Canadian winding-up is an independent and self-contained proceeding.

[47] Part I and s. 95 do apply to liquidations other than those of insurance companies. Section 161, which applies to insurance situations, in my view does not contain a complete code as urged by the U.S. Liquidator. Section 161 does provide some specific provisions for interest, namely those in which the contract itself (i.e., a Life Policy) provides for interest.

[48] I do not find it inconsistent to conclude that liquidation interest, as opposed to contract interest, would be governed by s. 95(2).

[49] I accept the submission of the Canadian Liquidator as set out in paragraph 54 of counsel's factum:

The application of ss. 95(2) to the situation of a surplus in the liquidation of a branch such as Reliance Canada is entirely harmonious and consistent with the treatment of all other liquidations under the *WURA* or bankruptcies under the *BIA*. Further, far from undermining or contradicting Part III of the *WURA* (which is simply the liquidation sequel of the regulatory regime in the *ICA*), ss. 95(2) it is entirely harmonious with the legislative and regulatory regime for foreign insurers who choose to operate in Canada, such as Reliance Insurance Company. As noted in Part II above, that regime imposes conservative margin (i.e., surplus) requirements on foreign insurers and they must deposit in trust in Canada sufficient assets to create a margin of assets over the value of the Canadian branch liabilities, which margin is currently targeted at 150%. The notion of a surplus for the protection of the claimants of the Canadian branch is 'built-in' from the very point that the foreign insurer chooses to commence business in Canada.

[50] The concept of Canadian claimants looking to Canadian branch assets finds its reciprocity in a decision of the New York Court of Appeals dealing with claims against New York assets by a foreign claimant:

We have pointed out in *Matter of People (Norske Lloyd Insurance Company)* (*supra*) that the Legislature in allowing foreign insurance companies "to do business in this State and country intended to treat the domestic agency largely as a complete and separate organization, to place it on a parity with domestic corporations, to supervise and regulate it as such and to require it by the deposit of prescribed assets to set up within this country a capital corresponding to that of domestic corporations and which should be security for business transacted by it here and not elsewhere". Creditors who have dealt with the insurance company here have more than a preference in the distribution of the proceeds of the assets of the corporation on liquidation, or even than a specific lien upon the assets. They are the only claimants who are entitled to share in that distribution. They are the only persons who on liquidation may be regarded in some sense as the equitable owners of the fund in liquidation. All others must look for satisfaction of their claims to the domiciliary representative of the foreign company and not to the fund here. The doctrine that equality is equity can have no application in the liquidation of assets beyond the groups or classes which may share in the distribution under the State. Here "the statute does not classify in different degrees of preference those who are entitled to its protection. They are all in the same class; claimants are entitled to equal protection of the statute or to none at all."

We cannot escape the conclusion that the Legislature in providing carefully for the deposit here of capital by the foreign company for the security and protection of those who transact business with the company here

intended to provide protection as complete as can be given to them through the liquidation of the assets or capital so deposited for their benefit. Concededly, under the statute the claimants who are entitled to the protection of the statute would receive in this proceeding payment of interest on their claims if the foreign corporation were not insolvent. These claimants may not be deprived of the full benefit of the provisions of the statute requiring deposit of capital here sufficient to protect fully those dealing with the foreign company here, because elsewhere the assets applicable to payment of debts proves insufficient.

*Matter of People (Norske Lloyd Insurance Company)*, 249 N.Y. 139 at 148-150 (N.Y. CA 1928) (footnote references deleted)

(Cited with approval on another point: *Union Indemnity Insurance Company*, 199 A.D.2d 209 at 212 (N.Y. App. Div. 1993)

[51] A purposive approach to interpretation of the statutory provisions by reading the words of the statute as a whole in their ordinary sense within the concept and context of the Act is accepted as a means to find the intention of Parliament. See *Re Metcalfe & Mansfield Alternative Investments II Corp.* 2008 ONCA 587 at 11-12 (CanLII) ("*Re Metcalfe*"), leave to appeal denied 2008 CanLII 46997 (S.C.C.); *Interpretation Act*, R.S.C. 1985, c. I-21

[52] Commercial realities are appropriately applied to the interpretation of provisions of an insolvency statute. See *Re Metcalfe*, *supra* at 11, *Saulnier v. Royal Bank of Canada*, 2008 SCC 58 at para. 42 (CanLII)

[53] The logic that is consistent with the Canadian Liquidator position as well as the statute is as follows:

- (a) Canadian claimants are entitled to be paid from Canadian assets before any payments to a foreign liquidator;
- (b) Payment of any contractual interest on insurance policies is to be paid in accordance with s. 161 of Part III;
- (c) If any other interest is payable in calculating a surplus, it will be dealt with under s. 95, Part I.

[54] The distinction that is applicable to policyholders of Reliance in Canada is that business is being run-off so that policyholder claims arise and are only triggered at some time after the commencement of the winding-up.

[55] Only those policyholders whose claims arise during the run-off the payment of which is delayed by the liquidation would be entitled to interest to run from the time it otherwise would have been paid. This result is consistent with both s. 95(2) and s. 161.

[56] The logical conclusion to this analysis is that only the Over-Limits Claimants would be entitled to interest calculated to the payment in the ordinary course (i.e., absent a liquidation) to the actual payment of principal and interest.

[57] The submissions of the U.S. Liquidator recognize that there may be an equitable jurisdiction under s. 161 that could allow for interest to Over-Limits Claimants limited to time of

actual loss, but that it should be limited to the actual rate of recovery on the surplus assets of 3.990 rather than the 5% provided for in s. 95(2).

[58] If I am correct that s. 95 can be read harmoniously with s. 161 as applied to run-off property and casualty policies, there is no need to speculate or calculate what rate might be.

[59] The Under-Limits Claimants's position does not fit within the logical analysis above. There was no period during which they were delayed in receiving payment in full or, as counsel for the Canadian Liquidator submits, the claim to interest of Under-Limits Claimants runs for zero days.

[60] I conclude that it would lead to an absurd result if one group, the Under-Limits Claimants, received a payment of interest greater than that which would be received by the Over-Limits Claimants. Such a result would be a denial of the interests of fairness, equality and predictability among creditors as between the debtor company and creditors.

[61] The approach to interest above is consistent with that applied by Blair J. (as he then was) of this Court in *Canada (Attorney General) v. Confederation Life Insurance Co.*, [2001] O.J. No. 2610 at paras. 22-26 (S.C.J.)

[62] One final matter arises. Do the interim payments that were made to Over-Limits Claimants (authorized by the Court as funds were available) operate first to pay accruing interest so that the principal balance remains?

[63] I accept the submission of the Canadian Liquidator that the interest first approach is preferable and previously accepted in *Confederation Life*, *supra* at paragraphs 29-33.

[64] In the result, an Order will issue as proposed by the Canadian Liquidator at paragraph 81 of counsel's factum:

[81] The Liquidator therefore respectfully seeks an Order declaring that the Questions posed be answered as follows:

**Question 1:** Yes: subsection 95(2) of the *WURA* applies to the winding-up of Reliance Canada, so that interest on allowed claims in the winding-up of Reliance Canada is payable pursuant to subsection 95(2), in the case where there is a surplus, in priority to any release to Reliance Insurance Company (represented by the U.S. Liquidator) of the balance of any assets that the Court may ultimately approve under subsection 161(10) of the *WURA*.

**Question 2:** The proper construction and application of subsection 95(2) results in payment of post-liquidation interest to the Over-limits Claimants, but not to the Under-limits Claimants. The interest is to be calculated as simple interest (i.e., not compounded), at an annual rate of 5%, on the unpaid portion of each Over-limits Claimant's allowed claim from the time such claim was settled and allowed (or, (a) in the case of a Disputed Claim, from the time since the commencement of the winding-up that it

would have been eligible for pre-judgment interest, but for the winding-up, but not earlier than the commencement of the winding-up, and (b) in the case of an ordinary creditor claim that was already payable as of the commencement of the winding-up, from the commencement of the winding-up) until such portion was paid.

Any payments made to Over-limits Claimants by way of Interim Dividend Payments and/or Authorized Policy Payments during the course of the winding-up are to be treated as being allocated first toward any post-liquidation interest payable on the claim of an Over-limits Claimant, and then to the principal portion of such claim.

*Question 3-4:*

In light of the recommended answers to Questions 1 and 2 above, it is not necessary to answer Questions 3 and 4.

**At the Conclusion**

[65] I wish to acknowledge the assistance of all counsel, particularly the representative counsel, in this matter. Despite the amendments made in 1996, the WURA remains a difficult and at times contradictory statute in its application to different kinds of financial institutions.

[66] In the circumstances, I would not think a costs award appropriate, but if any party is of a contrary view, they may make written submissions.

**Released:**

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**C. CAMPBELL J.**

Court File No: 01-CL-4313

Date: 20090714

**SUPERIOR COURT OF JUSTICE**

**IN THE MATTER OF  
RELIANCE INSURANCE COMPANY**

**AND IN THE MATTER OF THE  
*INSURANCE COMPANIES ACT*, S.C. 1991,  
C.47, AS AMENDED**

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

**BETWEEN**

**THE ATTORNEY GENERAL OF CANADA**

**Applicant**

**-and-**

**RELIANCE INSURANCE COMPANY**

**Respondent**

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**REASONS FOR DECISION**

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**C. CAMPBELL J.**

**RELEASED: July 14, 2009**

2009 CanLII 37915 (ON SC)

## **APPENDIX "G"**





Court File No. 01-CL-4313

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

THE HONOURABLE

) TUESDAY, THE 14<sup>TH</sup>

JUSTICE C. CAMPBELL

) DAY OF JULY, 2009

**IN THE MATTER OF  
RELIANCE INSURANCE COMPANY**

**AND IN THE MATTER OF THE  
*INSURANCE COMPANIES ACT*, S.C. 1991, C.47, AS AMENDED**

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

**BETWEEN:**

**THE ATTORNEY GENERAL OF CANADA**

**Applicant**

**- and -**

**RELIANCE INSURANCE COMPANY**

**Respondent**

**ORDER**

**THIS MOTION** made by KPMG Inc., in its capacity as Liquidator ("Liquidator") of the insurance business in Canada of Reliance Insurance Company ("Reliance Canada"), for advice and directions in respect of post-liquidation interest on claims in the winding-up of Reliance Canada, was heard April 16 and 17, 2009, at 330 University Avenue, Toronto, Ontario.

ON READING the report of the Liquidator dated January 5, 2009 ("Preliminary Report"), filed, the supplementary report of the Liquidator dated February 10, 2009 ("Supplementary Report"), filed, the Affidavit of Art Mullin sworn March 5, 2009, filed, and upon hearing the submissions of counsel for the Liquidator, counsel for the Insurance Commissioner for the Commonwealth of Pennsylvania, as Liquidator of Reliance Insurance Company ("U.S. Liquidator"), representative counsel for the Over-Limits Claimants (as defined in the Order of this Court dated January 29, 2009), and representative counsel for the Under-Limits Claimants (as defined in the Order of this Court dated January 29, 2009),

1. **THIS COURT ORDERS, ADVISES AND DIRECTS** that the following four questions posed to the Court by the Liquidator:

- Question 1: Does subsection 95(2) of the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11 ("*WURA*") apply to the winding-up of Reliance Canada, so that interest on allowed claims in the winding-up of Reliance Canada is payable pursuant to subsection 95(2), in the case where there is a surplus, in priority to any release to Reliance Insurance Company of the balance of any assets that the Court may ultimately approve under subsection 161(10) of the *WURA*?
- Question 2: If the answer to Question 1 is yes, on what basis is post-liquidation interest to be determined? That is, on which type of claims is it payable, at what rate, is it simple or compounded, from what date(s) does it run, and are interim payments that were made on claims to be first applied toward the interest payable on the claim and then to the principal amount of the claim or first toward the principal amount of the claim?
- Question 3: If the answer to Question 1 is no, is interest payable in the winding-up of Reliance Canada on allowed claims on some basis other than subsection 95(2) of the *WURA*, in the case where there is a surplus, in priority to any release to Reliance Insurance Company of the balance of any assets that the Court may approve under subsection 161(10) of the *WURA*?

Question 4: If the answer to Question 1 is no, and the answer to Question 3 is yes, on what basis is post-liquidation interest to be determined?

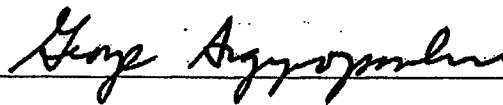
are respectively answered as follows:

Question 1: Yes: subsection 95(2) of the *WURA* applies to the winding-up of Reliance Canada, so that interest on allowed claims in the winding-up of Reliance Canada is payable pursuant to subsection 95(2), in the case where there is a surplus, in priority to any release to Reliance Insurance Company (represented by the U.S. Liquidator) of the balance of any assets that the Court may be ultimately approve under subsection 161(10) of the *WURA*.

Question 2: The proper construction and application of subsection 95(2) results in payment of post-liquidation interest to the Over-limits Claimants, but not to the Under-limits Claimants. The interest is to be calculated as simple interest (i.e., not compounded), at an annual rate of 5%, on the unpaid portion of each Over-limits Claimant's allowed claim from the time such claim was settled and allowed (or, (a) in the case of a Disputed Claim (as defined in the Preliminary Report), from the time since the commencement of the winding-up that it would have been eligible for pre-judgment interest, but for the winding-up, but not earlier than the commencement of the winding-up, and (b) in the case of an ordinary creditor claim that was already payable as of the commencement of the winding-up, from the commencement of the winding-up) until such portion was paid.

Any payments made to Over-limits Claimants by way of Interim Dividend Payments and/or Authorized Policy Payments (as those terms are defined in the Preliminary Report) during the course of winding-up are to be treated as being allocated first toward any post-liquidation interest payable on the claim of an Over-limits Claimant, and then to the principal portion of such claim.

Questions 3-4: In light of the recommended answers to Questions 1 and 2 above, it is not necessary to answer Questions 3 and 4.




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G. Argyropoulos, Registrar  
Superior Court of Justice

ENTERED AT / INSCRIT A TORONTO  
ON / BOOK NO:  
LE / DANS LE REGISTRE NO.:

NOV 24 2009

PER / PAR: 

Joanne Nicoara  
Registrar, Superior Court of Justice

THE ATTORNEY GENERAL OF  
CANADA

and

RELIANCE INSURANCE COMPANY

Commercial List Court File No: 01-CL-4313

Applicant

Respondent

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
- COMMERCIAL LIST**

Proceeding commenced at Toronto

**ADVICE AND DIRECTIONS ORDER  
(Post-liquidation Interest Motion)**

**GOODMANS LLP  
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Graham D. Smith (LSUC# 26377D)  
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Fax: (416) 979-1234

Solicitors for KPMG Inc.,  
Liquidator of Reliance Canada

## APPENDIX "H"

COURT FILE NO.: 97-CL-000543A

DATE: 2003/06/27

ONTARIO

SUPERIOR COURT OF JUSTICE

IN THE MATTER OF CONFEDERATION  
TRUST COMPANY

AND IN THE MATTER OF THE *TRUST AND*  
*LOAN COMPANIES ACT*, S.C. 1991, C.45

AND IN THE MATTER OF THE *WINDING-UP*  
*ACT*, R.S.C. 1985, C. W-11, AS AMENDED

**B E T W E E N:**

THE ATTORNEY GENERAL OF  
CANADA

Applicant

- and -

CONFEDERATION TRUST COMPANY

Respondent

)  
)  
) *Robb C. Heintzman and C.D. Mathias,*  
) *for PricewaterhouseCoopers Inc.,*  
) *Liquidator for Confederation Trust*  
) *Company*  
)

)  
)  
) *Graham Smith and Gale Rubenstein, for*  
) *KPMG Inc., Liquidator for*  
) *Confederation Life Insurance Company*  
)

) *Michael J. MacNaughton for Canada*  
) *Deposit Insurance Corporation*  
)

) **HEARD:** April 17, 2003  
)  
)  
)

## REASONS FOR DECISION

**R. A. BLAIR R.S.J.:**

“This is a curious point which cannot often have arisen and is not likely to arise with any frequency hereafter. The strange feature of the case is that a company in the process of being wound up on the footing that it was an insolvent company now finds itself in the position, in the person of its liquidator, being in possession of a substantial surplus”<sup>1</sup>

2003 CanLII 18103 (ON SC)

### Overview

[1] Such is the case here.

[2] Confederation Trust Company is in liquidation. Its Liquidator reasonably expects, however, that after all contested claims have been resolved there will be about a \$30 million surplus available for distribution following the payment in full of all proper claims against the estate.

[3] This application involves a fight over the quantum of interest to be paid out of that surplus, and the method by which such payments, if any, are to be calculated. The Liquidator for Confederation Trust, PricewaterhouseCoopers Inc., makes the following recommendations to this Court and seeks declaratory relief accordingly. It recommends:

- a) that the holders of all proper claims against Confederation Trust's estate receive out of any surplus, post-liquidation interest on the outstanding balances of their claims for the

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<sup>1</sup> *In re Fine Industrial Commodities Ltd.*, [1956] 1 Ch. 256, per Vaisey J. at 260.



period from the date of liquidation (August 14, 1994) to the date on which final payment of the full principal amount of their claims is made;

- b) that post-liquidation interest be paid at the rate provided for in any contract between a creditor of the estate and Confederation Trust or, in the absence of any contractual provision, at the rate provided for in the *Courts of Justice Act*<sup>2</sup>; and,
- c) that, depending on the amount of the available surplus, distributions to creditors should first be made on account of interest and thereafter on account of the principal balances of their claims, all as more particularly set out in the Liquidator's Reports No. 36 and No. 36A.

[4] The Liquidator's recommendations are opposed by KPMG Inc., the Liquidator of the estate of Confederation Life Insurance Company, and by Canada Deposit Insurance Corporation.

[5] Confederation Life is the 100% indirect parent of Confederation Trust, as well as a significant creditor. In its parental capacity, it thus stands to benefit to the extent that a greater portion of the Confederation Trust surplus is available for distribution to the insolvent corporation.

[6] Canada Deposit Insurance Corporation ("CDIC") is Confederation Trust's largest creditor. It has a subrogated claim against the estate by reason of having

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<sup>2</sup> R.S.O. 1990, c. C.43, as amended.

complied with its obligations under the *Trust and Loan Companies Act*<sup>3</sup> to guarantee the payment of Confederation Trust's deposits.

[7] What is at issue in this application is,

- (a) whether post-liquidation interest is payable out of the surplus in accordance with subsection 95(2) of the *Winding-up and Restructuring Act*,<sup>4</sup> (at 5% per annum) or in accordance with a combination of contractual and "pre-judgment interest" type of rates; and,
- (b) whether surplus payments are to be made to claimants based upon a "payment of interest first" or a "payment of principal first" methodology.

[8] Depending upon the answers to these questions, the parties calculate the range of payments to claimants to be between about \$4.5 million and \$35.5 million. The answers are therefore of some significance both to the claimant creditors of Confederation Trust and to Confederation Life and CDIC, as the beneficiaries of the return of any surplus to the insolvent company.

### Facts

[9] Confederation Trust – together with its parent Confederation Life – was placed in liquidation under the *Winding-up Act* in August 1994. The liquidator of

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<sup>3</sup> S.C. 1991, c.45, as amended.

<sup>4</sup> R.S.C. 1985, c. W-11, as amended by S.C. 1966, c. 6, s. 155. The *Winding-up Act* was renamed the *Winding-up and Restructuring Act* in 1996.

Confederation Trust was required to realize upon the property of two types of funds, one known as the "Guarantee Fund", the other as the "Company Fund".

[10] The Guarantee Fund was comprised of property held by the Company in trust for depositors. These deposits were in the form of guaranteed investment certificates (the "Deposit Certificates") issued by Confederation Trust to investors. They constituted "guaranteed trust funds" under the *Trust and Loan Companies Act* and were insured by CDIC. They were for varying terms and called for repayment of principal on the stipulated maturity dates. Interest was payable on each of the deposits at the rate set out in the Deposit Certificates to their date of maturity, but none provided for interest after maturity. Each Deposit Certificate stated that Confederation Trust "guarantees payment of interest at the rate and terms shown from the date of issue to the date of maturity [but Confederation Trust] will not be liable for interest after maturity date".

[11] The balance of Confederation Trust's assets consisted of its own property and comprised what is known in the liquidation as the Company Fund.

[12] On February 23, 1995, the Court approved a scheme of distribution for the Guaranteed Fund and, as well, a first distribution out of that Fund. In August 1997, a claims procedure was approved respecting the Company Fund claims. By order dated April 22, 1998, a fifth and final distribution from the Guarantee Fund was approved, and the shortfall claims were admitted as claims against the Company Fund.

[13] This was followed in April 2000 by what is known as "the Co-operation Agreement" between Confederation Life and CDIC, whereby they settled their respective claims as creditors of Confederation Trust. This settlement broke the log jamb in the Confederation Trust liquidation and facilitated the

payment of 100 cents on the dollar to Company Fund claimants on account of their proven claims, together with the payment of post-liquidation interest. Under the Cooperation Agreement, Confederation Life and CDIC have agreed, as between themselves, on a split of the surplus proceeds. CDIC therefore finds itself in the position of supporting Confederation Life in its opposition to the recommendations put forward here by the Liquidator of Confederation Trust.

[14] By order dated January 30, 2001, the Court authorized an interim payment of post-liquidation interest at the rate of 5% on the proven claim amounts of all admitted claims against the Company Fund, on deposits determined by CDIC to be uninsured, and to CDIC with respect to the amounts paid by it on account of insured deposits.

### **Analysis**

#### **Subsection 95(2)**

[15] To answer the questions posed above, it is necessary, in the first place, to determine whether or not subsection 95(2) of the *Winding-up and Restructuring Act* (the "Act") applies to the Confederation Trust liquidation.

[16] Prior to the enactment of subsection 95(2) in 1996, the *Winding-up Act* did not contain any provision for the payment of post-liquidation interest. Section 95 (now subsection 95(1)) read as follows:

The Court shall distribute among the persons entitled thereto any surplus that remains after the satisfaction of the debts and liabilities of the company and the winding-up charges, costs and expenses, and unless otherwise provided by law or by the *Act*, charter or instrument of incorporation of the company, any property or assets

remaining after the satisfaction shall be distributed among the members or shareholders according to their rights and interests in the company.

[17] In 1996, at the same time as the Act was renamed the *Winding-up and Restructuring Act*, subsection 95(2), providing for the payment of interest out of surplus, was added. It states:

Any surplus referred to in subsection 95(1) shall first be applied in payment of interest from the commencement of the winding-up at the rate of 5% per annum on all claims proved in the winding-up and according to their priority.

[18] KPMG Inc., as Liquidator of the Confederation Life estate, and CDIC contend that subsection 95(2) applies to the Confederation Trust liquidation. PricewaterhouseCoopers Inc., as Liquidator of the Confederation Trust estate, contends that it does not.

[19] Counsel for PricewaterhouseCoopers Inc. submits that subsection 95(2) does not have retroactive effect and therefore does not apply to the Confederation Trust liquidation because it came into effect after August 14, 1994, the date of liquidation (the "Liquidation Date"). In this respect he relies upon two rebuttable presumptions of statutory interpretation, namely, the presumption against retroactivity and the presumption against interfering with vested rights. Parliament has not expressly stated its intentions regarding the retroactive impact of the amendment, he says, and the right to assert a claim is not to be adversely affected by a statute that comes into force after the right to assert the claim arises, in the absence of sufficient evidence of Parliament's intention to the contrary. Here, he submits, there is no sufficient evidence to the contrary and the creditors'

rights to assert their claim for interest arose as at the Liquidation Date, the date as of which the validity of all claims and the rights of all claimants are to be determined. The amendment, therefore, cannot interfere with those vested rights.

[20] In rebuttal, the Respondents make three submissions. First, they argue Parliament has indicated its intention in the language of subsection 95(2). When read in the context of other provisions in the Act, namely, the express choice to provide in Part III that other amendments applying to the winding-up of insurance companies would operate only prospectively, thus signaling that provisions such as subsection 95(1), which are not limited to applying only prospectively, were to apply retroactively as well. Secondly, they claim that subsection 95(2) has immediate effect in the circumstances of this case because it is being applied to an incomplete and continuing fact situation – the ongoing liquidation of the Confederation Trust estate – and therefore does not have any retroactive effect at all. Finally, the Respondents submit that claimants cannot be said to have acquired a “vested right” to post-liquidation interest as at the Liquidation Date because the existence and extent of any surplus is uncertain and contingent, and cannot be determined until the end of the liquidation process – a point in time *after* the enactment of subsection 95(2), in the circumstances of this case.

[21] At common-law the “interest stops” rule applied in winding-up proceedings. The rule provided that interest on provable claims stops as at the commencement of the winding-up and that no interest is payable on claims from that date forward, unless there is a surplus in the estate. In the event of a surplus, post-liquidation interest was payable on debts in respect of which there was a right to interest prior to the liquidation. That right could arise contractually, or by virtue of a course of conduct or a judgment, or by some statutory provision. In the

absence of such a right, however, no interest was payable for the period following the commencement of the liquidation. See *In re Humber Ironworks and Shipbuilding Company; Warrant Finance Company's Case* (1869), 4 Ch. App. 643, at 645-647; *Bower v. Marris* (1841), Cr. & Ph. 351; *Re Robertson and Carlisle Ltd.*, [1949] 2 D.L.R. 525 (Alta. C.A.); *In re McDougall* (1883), 8 O.A.R. 309 (C.A.); O'Donovan J., *The Law of Company Liquidation*, 3d ed. (1987) at 368-369.

[22] Thus, even without specific reference to post-liquidation interest in winding-up legislation, there *were* circumstances at common-law where such interest could be paid out of surplus. Indeed, it is not contested that, in the Confederation Trust context, the claimants are entitled to *some* post-liquidation interest out of the surplus liquidation proceeds. On consent, the Court approved payment of such interest, on an interim basis, at the rate of 5% by Order dated January 30, 2001. The dispute is over whether the interest is to be paid in accordance with the provisions of subsection 95(2), or on some other basis, and whether the surplus proceeds should be applied utilizing an "interest first" or a "principal first" focus as a starting point.

[23] In addition to the common-law exception, PricewaterhouseCoopers Inc. argues that the Court has power to authorize the payment of post-liquidation interest to those claimants who do not have a contractual or other right to interest existing at the Liquidation Date, on the basis of its power under ss. 128 and 130 of the *Courts of Justice Act* to award pre-judgment interest. It is the combination of this power plus the exceptional power of the courts at common-law that forms the basis for the recommendation that post-liquidation interest should be payable at the rates provided for in the Deposit Certificates to their dates of maturity and at the *Courts of Justice Act* rates thereafter.

[24] It is not necessary to pursue this line of enquiry further, however, because subsection 95(2) of the *Winding-up and Restructuring Act* applies to the Confederation Trust liquidation, in my opinion.

[25] To say this is not to give the provision retroactive effect. Although it is not free from doubt, I do not accept the contention that the Claimants acquired a vested right to post-liquidation interest at the Liquidation Date. In my opinion, they acquired, at best, a contingent right to the payment of post-liquidation interest conditional upon there being a surplus in the liquidated estate after payment of all the Company's debts and obligations and of the costs associated with the liquidation. The condition cannot be determined and satisfied until the liquidation of the estate is at least substantially completed.

[26] Here, the liquidation of the Confederation Trust estate was active and ongoing, and far from substantially completed in June 1996, when the amendment adding subsection 95(2) to the *Act* came into effect. It was not known at that time there would be a surplus. The processing of the estate was a continuing fact situation, and the application of a law that comes into effect during such a situation has "immediate", as opposed to "retroactive" effect.

[27] In *Wasserman, Arsenault Ltd. v. Sone*<sup>5</sup>, the Ontario Court of Appeal upheld a decision of Farley J. holding that a guardian appointed by the Superintendent of Bankruptcy under the *Bankruptcy and Insolvency Act* (the "BIA")<sup>6</sup> to complete the administration of a complicated series of estates was entitled to priority for its fees over the claim of a prior trustee in bankruptcy<sup>7</sup> for

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<sup>5</sup> (2002), 33 C.B.R. (4<sup>th</sup>) 145 (Ont. C.A.), at p. 158, affirming 2000 Carswell Ont. 4934, 22 C.B.R. (4<sup>th</sup>) 153 (Ont. S.C.).

<sup>6</sup> R.S.C. 1985, c. B-3, as amended

<sup>7</sup> Also appointed by the Superintendent in Bankruptcy.



its fees. The BIA had been amended to provide specifically for such priority, but the amendment came into force after the prior trustee had substantially completed its work on the estates. The argument that to give priority to the guardian's claim would be to give the amendment retroactive application was rejected. The following passage from the judgment of Weiler J.A., at pp. 158-159 explains why, and the principles enunciated there apply equally to the winding-up of the Confederation Trust estate, in my opinion:

The appellant alleges, secondly, that Farley J. applied s. 136(1)(b) [of the BIA] retroactively. Section 136(1)(b), which gives priority to the fees of a person acting under the direction of the Superintendent over the trustee, came into force on September 30, 1997. Prior to this amendment the expenses of a trustee had first priority. Rumanek submits that on a number of files its work was substantially completed, with only certain procedural or administrative steps remaining, and that it had a vested right to payment for these files prior to the coming into force of s. 136(1)(b). Accordingly, Rumanek submits that it is entitled to payment on these files in priority to the Guardian, and that Farley J. erred in not recognizing this.

The commentary in *Driedger on the Construction of Statutes*, 3<sup>rd</sup> ed. (1994) at p. 517 is helpful in dealing with this submission. It states:

Legislation clearly is retroactive if it applies to facts all of which have ended before it comes into force. Legislation clearly is prospective if it applies to facts all of which began after its coming into force. But what of on-going facts, facts in progress? These are either continuing facts, begun but not ended when the legislation comes into force, or successive facts, some occurring before and some after commencement. The application of legislation to on-going facts is not retroactive because, to use the language of Dickson J. in *[Gustavson Drilling (1964) Ltd. v. M.N.R., [1977]*

1 S.C.R. 271], there is no attempt to reach into the past and alter the law or the rights of persons as of an earlier date. The application is prospective only to facts in existence at the present time. Such an application may affect existing rights and interests, but is not retroactive.

Legislation that applies to on-going facts is said to have “immediate effect”. Its application is both immediate and general: “immediate” in the sense that the new rule operates from the moment of commencement displacing whatever rule was formerly applicable to the relevant facts, and “general” in the sense that the new rule applies to all relevant facts, on-going as well as new.

I agree with Farley J. that these files should be viewed as a continuing fact situation. Rumanek ceased its work prior to the enactment of s. 136(1)(b), but the files were not complete by that date. They were on-going in varying degrees. The Guardian was appointed to complete the administration of these files. Certificates of completion had not been filed. Strictly speaking, there is no entitlement to compensation and hence no vested right to payment until a certificate of completion has been filed. It is at the time of payment that priority is determined and, hence, the application of s. 136(1)(b) does not have retrospective effect. Rumanek does not have a vested right to any fees or disbursements arising from the completion of the Sone estates by the Guardian. Farley J. did not err in his appreciation of s. 136(1)(b).

(Underlining added.)

[28] Similarly, in this case, the winding-up of the Confederation Trust estate may be “viewed as a continuing fact situation” that is “on-going in varying degrees”. There is no entitlement to post-liquidation interest on the part of the Claimants unless and until a surplus emerges in the estate, and hence there is “no vested right to payment” of such interest until that condition of entitlement has

been satisfied. Thus, subsection 95(2) of the *Winding-up and Restructuring Act* applies to the situation because it has “immediate” and not “retroactive” effect in the circumstances.

The Calculation of Interest under subsection 95(2)

[29] The traditional rule in insolvency situations is that dividends are to be applied first to the payment of interest and then to the payment of principal. This is said to prevent injustice, promote equity amongst the creditors, and protect the contractual relationship between the parties. See *Bower v. Marris, supra*, at 527-528; *In re Humber Ironworks and Shipbuilding Company, supra*, at 645. PricewaterhouseCoopers Inc. submits the traditional rule should be applied to the payment of post-liquidation interest pursuant to subsection 95(2). The Respondents contest this interpretation of the provision and contend for the reverse methodology.

[30] There is nothing in the language of s. 95 of the *Winding-up and Restructuring Act* itself to indicate that Parliament intended to alter this traditional methodology in the case of a post-liquidation surplus. The Respondents submit, however, that post-liquidation interest is only payable after payment in full of all proven claims and that there is nothing in the legislation to suggest a recalculation is to be done regarding distributions already made (which would be necessary if the interest portion of the surplus is to be distributed on a “payment of interest first” basis). Section 95 therefore mandates that distributions are to be credited, first, to the proven claim amounts, they say. Consistent with its choice of a

common and consistent rate of interest (5%), Parliament has chosen not to differentiate between claimants based upon the composition of claims as between principal and interest. Such a methodology is also consistent with the statutory regime of pre-judgment interest under provincial legislation, where interim payments are credited towards payment of unliquidated claims for damages first, then to interest: see, for example, *Downey v. Maes* (1992), 8 O.R. (3d) 440 (Gen. Div.); *Illingworth v. Elford*, [1996] O.J. No. 2893 (Gen. Div.).

[31] *Downey v. Maes* and *Illingworth v. Elford*, though, involved the affect of pre-payments on the calculation of pre-judgment interest in insurance cases involving claims for unliquidated damages. In my view, this principle is not of much assistance in considering the methodology for calculating interest payments out of a surplus in a winding-up proceeding. Claims proven in a liquidation are for the most part liquidated claims, arising out of a debtor-creditor relationship. In the case of the claims proven against the Confederation Trust Guaranteed Fund, they were all liquidated. Absent a stipulation as to the manner of allocation of payments on a debt – by agreement, course of conduct, or statute – the general rule in debtor-creditor relationships is the same as the general rule in insolvency situations, namely that payments are credited on account of interest first, then principal: see *McGregor v. Gaulin* (1848), 4 U.C.Q.B. 378, per Robinson C.J. at 384.

[32] I see no reason why s. 95 should be interpreted in a fashion that departs from the traditional approach. The general purpose of winding-up legislation is to ensure the rateable distribution of the assets of the insolvent company, in accordance with the creditors' priorities. In the rare circumstance of a winding-up surplus, creditors who have proven their claims ought to be placed – as closely as the surplus permits – in the same position they would have been in if

the proven claims had been paid on the date of the winding-up. The comments of Wachowich A.C.J. (as he then was) in *Canada Deposit Insurance Corp. v. Canadian Commercial Bank* (1993), 21 C.B.R. (3d) 12, at 24, are apt:

The passage of time alone should not alter the ratio of the funds available to the different classes of creditors. In the present circumstances, the priority creditors have been deprived of their funds for nearly a decade. As Mutual Life pointed out, the unsecured creditors as a class will be enriched with every passing year of delay in the distribution of the estate. One might add to Lord Selwyn's statement<sup>8</sup> "that no person should be prejudiced by the accidental delay which, in consequence of the form and proceedings of the Court and other circumstances, actually occur in realizing the assets" a further caution: no person should be so prejudiced by such delay in the *distribution of assets*. (Emphasis in original.)

[33] In the circumstances of this case, it is not so much the unsecured creditors who will be enriched by the passing of time as it is Confederation Life in its capacity as the 100% indirect shareholder of Confederation Trust (and CDIC, as a result of the Co-operation Agreement between it and Confederation Life). While I agree with the Respondents' submission that there is no inherent policy or goal of maximizing post-liquidation interest so as to minimize any recovery to the debtor or the shareholder of the debtor pursuant to subsection 95(1) of the *Winding-up and Restructuring Act*, I do not see why the insolvent company and its shareholders should receive a windfall out of the insolvency before the Claimants have been made as whole as possible in the circumstances. I am satisfied that "the interests of fairness, equality and predictability" amongst the creditors and as

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<sup>8</sup> *Re Humber Ironworks and Shipbuilding Company* (sub. nom. *Warrant Finance Company's Case*), *supra*, at 645-646.

between the debtor company and its creditors, call for the application of the generally accepted rule for the allocation of payments made: see *In re Cardelucci*, 2002 U.S. App. LEXIS 6770 (U.S.C.A., Ninth Circuit), at p. 2.

[34] In its Report 36A, PricewaterhouseCoopers Inc. has calculated the post-liquidation interest payable from the available surplus, depending upon various assumptions respecting the rate and methodology to be applied. On the assumption that subsection 95(2) applies and that the applicable rate is 5%, the Liquidator calculates the total post-liquidation interest payable in respect of all admitted claims to be as follows:

- a) \$4,459,032, if distributions are applied first on account of principal; and,
- b) \$17,866,181, if distributions are applied first on account of post-liquidation interest and then on account of principal.

[35] The Liquidator estimates the surplus available for the payment of post-liquidation interest will be approximately \$30 million.

### **Conclusion and Disposition**

[36] I therefore conclude that the Confederation Trust surplus should be applied first (before the distribution of any remaining surplus to the shareholders) towards the payment of interest at the rate of 5% per annum on all claims proved in the winding-up in accordance with their priority. The post-liquidation interest is to be calculated on the basis of a "payment of interest first" methodology which,

according to the Liquidator, leads to an additional payment to creditors in the aforesaid amount of \$17,866,181.

[37] It is not clear to me from the materials whether the foregoing amount includes the payment of post-liquidation interest in respect of what the parties have referred to as the "Stub Period". The Stub Period represents the time between the Liquidation Date and the date on which CDIC satisfied its obligations under the CDIC Act to Depositors in respect of insured deposits. The Insured Depositors retain their claims against Confederation Trust for post-liquidation interest for the Stub Period and should, in my opinion, be treated in the same fashion as all other claimants against the Confederation Trust estate.

[38] There will therefore be an Order,

a) declaring that post-liquidation (being interest on valid claims against Confederation Trust Company in respect of the period following the issuance of the Order winding-up the Company) is payable on all Court-approved Guaranteed Fund and Company Fund claims (as defined in the Liquidator's Report No. 36);

b) authorizing the Liquidator of Confederation Trust Company to allocate payments to Claimants as between principal and post-liquidation interest in the manner described in paragraph 11 of Report No. 36;

c) authorizing the Liquidator of Confederation Trust Company to calculate post-liquidation interest in accordance with the provisions of subsection 95(2) of the *Winding-up and Restructuring Act* and on a "payment of interest first" methodology, as set out in Column 1B of Schedule B to the Liquidator's Report No. 36A.

[39] If costs are an issue I may be spoken to in that regard.

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R.A. Blair R.S.J.

**Released:** June 27, 2003



COURT FILE NO.: 97-CL-000543A

DATE: 2003/06/27

ONTARIO

SUPERIOR COURT OF JUSTICE

IN THE MATTER OF CONFEDERATION  
TRUST COMPANY

AND IN THE MATTER OF THE *TRUST AND  
LOAN COMPANIES ACT*, S.C. 1991, C.45

AND IN THE MATTER OF THE *WINDING-  
UP ACT*, R.S.C. 1985, C. W-11, AS  
AMENDED

**B E T W E E N:**

THE ATTORNEY GENERAL OF CANADA

Applicant

- and -

CONFEDERATION TRUST COMPANY

Respondent

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REASONS FOR DECISION

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R.A. BLAIR R.S.J.

Released: June 27, 2003

2003 CanLII 18103 (ON SC)

## **SCHEDULE "B"**

Commercial List File No. 85-RE001780-0000

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
- COMMERCIAL LIST**

**IN THE MATTER OF NORTHUMBERLAND  
GENERAL INSURANCE COMPANY;**

**AND IN THE MATTER OF THE  
CANADIAN AND BRITISH INSURANCE COMPANIES ACT,  
R.S.C. 1970, c. I-15, as amended;**

**AND IN THE MATTER OF THE  
WINDING-UP ACT, R.S.C. 1970, c. W-10, as amended.**

**BETWEEN:**

**THE ATTORNEY GENERAL OF CANADA**

**Applicant**

**- and -**

**NORTHUMBERLAND GENERAL INSURANCE COMPANY**

**Respondent**

**REPORT DATED MAY 10, 2010  
(Motion Returnable May 20, 2010)**

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**ONTARIO  
SUPERIOR COURT OF JUSTICE  
- COMMERCIAL LIST**

**IN THE MATTER OF NORTHUMBERLAND  
GENERAL INSURANCE COMPANY;**

**AND IN THE MATTER OF THE  
CANADIAN AND BRITISH INSURANCE COMPANIES ACT,  
R.S.C. 1970, c. I-15, as amended;**

**AND IN THE MATTER OF THE  
WINDING-UP ACT, R.S.C. 1970, c. W-10, as amended.**

**BETWEEN:**

**THE ATTORNEY GENERAL OF CANADA**

**Applicant**

**- and -**

**NORTHUMBERLAND GENERAL INSURANCE COMPANY**

**Respondent**

**REPORT DATED MAY 10, 2010  
(Motion Returnable May 20, 2010)**

**I. THE MOTION**

1. This Report is filed in support of a motion by PricewaterhouseCoopers Inc. ("PwC Inc."), as Agent (the "Agent") to the Superintendent of Financial Institutions (the "Superintendent"), in her capacity as provisional liquidator (the "Liquidator") of Northumberland General Insurance Company ("Northumberland").

2. This motion is for an Order:

- (a) passing the accounts and approving the activities of the Agent and the Liquidator for the period July 24, 1985 to January 31, 2010 (the "Period");
- (b) approving the professional fees of the Agent and of its counsel for the Period;
- (c) approving and authorizing a sixth interim distribution ("Proposed Distribution"), namely (i) payment to Her Majesty the Queen in right of Canada ("Her Majesty") of the Industry-Funded Expenses (as defined below) in connection with the Northumberland liquidation in respect of the period April 1, 2002 to January 31, 2010, and interest thereon to the date of payment, at the rate that has been specified by the Superintendent pursuant to statute; and (ii) compensation to the Superintendent's office in the amount of \$167,000.00 in respect of the liquidation;
- (d) approving and authorizing the release to Her Majesty of the Industry Interest Holdback (as described below), including the interest earned thereon;
- (e) continuing the appointment as representative counsel of James H. Grout for the Included Creditors, Ronald N. Robertson for the Included Policyholders, and Lyndon A. J. Barnes for the Assessed Insurance Companies (all as hereinafter defined);
- (f) approving the stepping down of, and discharging, the Superintendent as Liquidator, and dispensing with any requirement that she pass further accounts, ordering that further passings will be the responsibility of the Permanent Liquidator (as defined below);
- (g) appointing the Agent as permanent liquidator (the "Permanent Liquidator");
- (h) approving the amendment of the agreements dated July 17, 1989 and August 5, 1994, described further below, to replace the Superintendent as a party thereto with the Permanent Liquidator; and
- (i) discharging the representative counsel for the Assessed Insurance Companies upon the granting of the Order requested.

## II. BACKGROUND

### A. The Company

3. Northumberland was a property and casualty insurance company, licensed to do business in Canada under federal legislation. Northumberland was engaged in the underwriting of, among other products, significant liability insurance policies, including many with "long-tail" coverage (where exposures may not be manifest until long after the expiry of the policy term), and complex coverage including asbestos, alcohol, tobacco and environmental exposures.

4. In the late 1970's, Northumberland also began to sell policies to companies in the United States, on an "excess and surplus lines" basis. This meant that, in times of limited insurance capacity in the marketplace, Northumberland could sell insurance to policyholders in the United States that was not being offered by domestic insurers. Pursuant to Regulation 41 of the *Insurance Law* of the State of New York (the "*New York Insurance Law*"), Northumberland deposited funds in trust for the protection of its U.S. policyholders and beneficiaries resident in the United States (the "Regulation 41 Trust Funds").

5. In January 1983, Northumberland opened a branch for doing business in the State of New York (the "U.S. Branch"). Pursuant to the *New York Insurance Law*, Northumberland's U.S. Branch deposited further assets for the protection of its policyholders and creditors in the United States (the "U.S. Branch Deposit").

**B. The Insolvency Proceedings**

**(i) Liquidation Orders**

6. By Orders of this Court made July 24, 1985, Northumberland was ordered wound-up pursuant to what is now the *Winding-up and Restructuring Act* ("WURA"), and the Superintendent of Insurance (Canada) was appointed provisional liquidator of Northumberland. Copies of the July 24, 1985 Orders are attached as Schedules "A" and "B."

7. The Superintendent of Insurance appointed Coopers & Lybrand Limited (now PwC Inc.) as his Agent to conduct the liquidation. By Order of this Court dated October 8, 1987, the Superintendent of Insurance was replaced as provisional liquidator of Northumberland by the Liquidator. A copy of the October 8, 1987 Order is attached as Schedule "C".

8. By Order of the Supreme Court of the State of New York (the "New York Court") made on August 2, 1985, the Superintendent of Insurance of the State of New York (the "New York Superintendent") was appointed liquidator of the U.S. Branch and was directed to take possession of the property of the U.S. Branch, including the U.S. Branch Deposit, and to liquidate its business under Article 74 of the *New York Insurance Law*.

9. By Order of the New York Court made on February 24, 1988, the New York Superintendent was appointed as Conservator of, and was directed to take possession of and conserve, the Regulation 41 Trust Funds, and to take such other steps as may be required to protect those policyholders and beneficiaries for whose benefit Northumberland had deposited the Regulation 41 Trust Funds (the "Regulation 41 Claimants").



(ii) *Regime for Industry-Funded Expenses*

10. Under the provisions of the *Insurance Companies Act* (and its predecessor legislation) that apply to the Northumberland liquidation, with the Superintendent as the Liquidator the expenses of the liquidation (the "Industry-Funded Expenses") are borne by the Superintendent on behalf of Her Majesty. These are, in turn, assessed against and paid by those members of the insurance industry that carry on a similar business to that of Northumberland (the "Assessed Insurance Companies").<sup>1</sup>

11. Over the course of the liquidation, the Superintendent has assessed the Assessed Insurance Companies in respect of the Industry-Funded Expenses relating to the Northumberland liquidation, and they have thereby effectively funded the Industry-Funded Expenses. (As of April 1, 2001 the liquidity of the estate was such that the liquidation expenses, excepting the Agent's fees, were paid directly from the estate. The Agent's fees have continued to be funded by the Superintendent on behalf of Her Majesty.)

12. Under the priority provisions of the *WURA* as they apply to the Northumberland liquidation, the Industry-Funded Expenses (with interest) are to be repaid to Her Majesty, subsequent to policyholder claims being paid in full. These recovered Industry-Funded Expenses, and interest thereon, either are applied by Her Majesty to reduce assessments that would otherwise be made against the Assessed Insurance Companies or are actually repaid to the Assessed Insurance Companies.

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<sup>1</sup> This statutory regime for funding expenses of the liquidation was originally implemented to provide a benefit to policyholders before consumer compensation funds were established. Once a compensation fund was established for the property and casualty insurance industry, however, and funds were thereby made available to qualified policyholders up to specified limits, the funding of expenses by the industry was considered no longer necessary, and, as a result of statutory amendments in 1996 that prevented the Superintendent from being appointed as a liquidator, the liquidation expenses for liquidations commenced post-amendments are funded directly from the estate as a first charge.

*(iii) Two Initial Interim Distributions*

13. On November 1, 1989, this Court approved the payment of a first interim dividend of 15¢ on the dollar on policy claims against Northumberland. On December 7, 1990, this Court approved the payment of a second interim dividend of 25¢, bringing the cumulative interim distribution paid on these claims to 40¢ on the dollar. Copies of the November 1, 1989 and December 7, 1990 Orders are attached as Schedules "D" and "E", respectively.

*(iv) Resolution of U.S. Creditor Issues*

14. Early in the liquidation, the Liquidator had made demands on the New York Superintendent for the return of the Regulation 41 Trust Funds and the U.S. Branch Deposit under what was then section 165 (now section 164) of the *WURA*. The New York Superintendent refused. The Liquidator, therefore, took the position that the claims being administered by him excluded the claims of policyholders of the U.S. Branch (the "U.S. Branch Policyholders"), the ordinary creditors of the U.S. Branch (the "U.S. Branch Ordinary Creditors") and the Regulation 41 Claimants. The New York Superintendent disputed this position.

15. Accordingly, in June 1993, the Liquidator brought a motion (the "Distribution Motion") seeking the approval of this Court to his proposed scheme for the distribution of the estate being administered by the Liquidator (the "Canadian Estate"). The Liquidator sought approval to distribute the Canadian Estate in the following order of priority:

- (a) to the policyholders of Northumberland other than the Regulation 41 Claimants and the U.S. Branch Policyholders (the "Included Policyholders");
- (b) to Her Majesty, in respect of Industry-Funded Expenses incurred on or after April 1, 1986, together with interest thereon;

- (c) to the ordinary creditors of Northumberland other than the U.S. Branch Ordinary Creditors (the "Included Ordinary Creditors"); and
- (d) to Her Majesty, in respect of Industry-Funded Expenses incurred before April 1, 1986, together with interest thereon.

In addition, the Liquidator sought a declaration that the Regulation 41 Claimants, the U.S. Branch Policyholders and the U.S. Branch Ordinary Creditors were deemed to have forfeited all rights and claims against the Canadian Estate.

16. This Court declared that the following were the classes of parties affected by the Distribution Motion, and appointed the following as their respective representative counsel:

- Included Policyholders - Ronald N. Robertson, Q.C.;
- Included Ordinary Creditors - Paul S.A. Lamek, Q.C.;
- Regulation 41 Claimants - William G. Horton;
- U.S. Branch Policyholders - Geoffrey B. Morawetz; and
- Assessed Insurance Companies - Lyndon A.J. Barnes.

Copies of the Orders of this Court dated June 24, 1993, September 20, 1993 and September 28, 1993 in this regard are attached as Schedules "F", "G" and "H", respectively.

17. A settlement was reached in the Distribution Motion with respect to the issues relating to the U.S. Branch Policyholders and Regulation 41 Claimants. The settlement was approved by this Court. Under the settlement, the Liquidator agreed to make certain payments from the Canadian Estate to the New York Superintendent in respect of claims of the Regulation 41 Claimants and the U.S. Branch Policyholders, in exchange for a release from the New York Superintendent with respect to issues raised on the Distribution Motion.

18. As noted in the Report in support of the fourth interim distribution (described below), the grandfathered provisions of the *WURA* which deal with the payment of Industry-Funded Expenses contemplate that interest thereon shall have the same priority as the Industry-Funded Expenses to which it relates. The Superintendent and the Assessed Insurance Companies accordingly took a position consistent with this. However, at the time of the Distribution Motion, the Representative Counsel on behalf of the Included Policyholders raised a concern as to the priority of the interest portion of this claim.

19. To facilitate the settlement of the Distribution Motion therefore, the Superintendent agreed, with the concurrence of the Assessed Insurance Companies, that the statutory claim for interest on the Industry-Funded Expenses would be subordinated to the allowed claims of the Included Policyholders and Included Ordinary Creditors.

20. The Superintendent specified, in accordance with the *WURA*, the rate that would apply to the claim for interest on the Industry-Funded Expenses.

(v) *Third Interim Distribution*

21. Pursuant to an Order dated September 9, 1994, this Court:

- (a) approved the settlement regarding the U.S. creditors;
- (b) discharged the representative counsel on behalf of the Regulation 41 Claimants and the U.S. Branch Policyholders;
- (c) authorized the Liquidator to pay a third interim dividend of 60¢ on the dollar of the claims of Included Policyholders, bringing their cumulative distributions to 100¢ on the dollar; and
- (d) ordered that the balance of the Distribution Motion regarding the application for approval of the proposed scheme of distribution be adjourned *sine die*, to be brought on notice to the representative counsel on behalf of the Included

Policyholders, the Included Ordinary Creditors and the Assessed Insurance Companies.

A copy of the September 9, 1994 Order is attached as Schedule "I".

22. The September 9, 1994 Order was made subject to the approval of the settlement by the New York Court with respect to both the liquidation proceedings for the U.S. Branch and the conservation proceedings for the Regulation 41 Trust Funds. These approvals were granted on November 15 and 28, 1994, respectively. Copies of the Orders of the New York Court in this regard are attached as Schedules "J" and "K".

**(vi) Fourth Interim Distribution**

23. By Order dated October 1, 1996, this Court approved the payment of a fourth interim dividend of 100¢ on the dollar of the claims of:

- (i) the Included Ordinary Creditors;
- (ii) Her Majesty in respect of the principal amount of the Industry-Funded Expenses from April 1, 1986 to March 31, 1996; and
- (iii) Her Majesty in respect of the principal amount of the Industry-Funded Expenses from July 24, 1985 to March 31, 1986.

These have been paid. A copy of the October 1, 1996 Order is attached as Schedule "L".

**(vii) Fifth Interim Distribution**

24. After the payment of the fourth interim distribution, the Representative Counsel on behalf of the Included Policyholders advised that he would not oppose the position of the Superintendent and the Assessed Insurance Companies with respect to the priority of the interest payable on Industry-Funded Expenses.

25. However, to facilitate the payment of the fifth interim distribution, the Assessed Insurance Companies agreed:

- (a) that the Liquidator would hold back 30% of the interest component on the Industry-Funded Expenses (the "Industry Interest Holdback"), being \$8.1 million<sup>2</sup>, to be available to be used to meet existing outstanding claims; and
- (b) that a portion (up to \$2.5 million) of the interest on the Industry-Funded Expenses, which would otherwise be payable to Her Majesty, would be available, if needed, to pay post-liquidation pre-judgment interest claims ("PJI Claims") for which Northumberland's insureds were liable. To date, the sum of \$1.48 million was so applied to PJI Claims. In light of the liquidity in the liquidation at this point, the Liquidator proposes to pay any further PJI Claims from the general assets in the Canadian Estate, and estimates that these will total less than \$1 million.

26. By Order dated February 13, 2003, this Court approved the payment of a fifth interim distribution as follows:

- (a) payment to Her Majesty of the portion of the Industry-Funded Expenses assessed and paid by the Assessed Insurance Companies relating to the period April 1, 1996 to March 31, 2002, and interest thereon at the rate that was specified by the Superintendent pursuant to statute;
- (b) payment to Her Majesty of interest on the portion of the Industry-Funded Expenses that had already been paid to Her Majesty relating to the period July 24, 1985 to March 31, 1996, also at the specified rate;
- (c) payment of an amount equal to 5% of the allowed claims of the Included Policyholders and Included Ordinary Creditors of Northumberland, on account of post-liquidation interest on such claims.

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<sup>2</sup> Amounts expressed as "million" in this Report have been rounded.

A copy of the February 13, 2003 Order is attached as Schedule "M". This distribution was made, after deduction of the Industry Interest Holdback, referred to above, from the interest amounts in (a) and (b) referenced immediately above.

**III. ACTIVITIES OF THE LIQUIDATOR AND STATEMENT OF RECEIPTS AND DISBURSEMENTS OVER THE PERIOD**

**A. Activities**

27. Since the commencement of its appointment, the Agent has engaged on behalf of the Liquidator in the following activities in connection with the winding-up of Northumberland:

- administration of all claims-related matters, including adjusting claims, defending claims on behalf of policyholders, and disputing coverage where applicable;
- conducting the call for claims for both policyholders and claimants and ordinary creditors (claims totalling approximately \$131 million and contingent claims totalling approximately \$9 billion were filed);
- negotiating and collecting reinsurance of over \$81 million;
- ongoing negotiations and arrangements with the New York Superintendent regarding shared reinsurance collections and commutations, and claims administration for the Regulation 41 claims;
- investment of assets and administration of all investments;

- the making of five interim distributions, each to in excess of 48,000 policyholders and claimants;
- preparation and filing of corporate income tax returns, in a timely fashion; and
- reporting to the Superintendent as Liquidator and the New York Superintendent.

**B. Receipts and Disbursements**

28. Attached as Schedule "N" hereto is a statement of receipts and disbursements for the estate over the Period. The Agent is of the view that the receipts and disbursements are proper and reasonable.

**C. Ongoing Reporting**

29. The Agent reported on a quarterly basis to the Superintendent as Liquidator. Each report contained a Statement of Affairs and a Statement of Receipts and Disbursements. In the early part of the liquidation, the Superintendent also met with the Assessed Insurance Companies on a regular basis, and continued thereafter to regularly report to them.

**D. Budgets**

30. Annual budgets were prepared and updated by the Agent and provided to the Liquidator, who reviewed and approved each of the budgets and, in the early years, reviewed these with the Assessed Insurance Companies.



**E. Professional Fees**

31. The Agent provided its own professional services to the Superintendent as Liquidator and retained counsel - namely, Goodmans LLP and its predecessors ("Goodmans") - to assist and advise in the administration of the liquidation, including with respect to resolution of certain claim litigation matters.

32. The services of the two main professional advisors are discussed more particularly below.

**(i) Goodmans**

33. Goodmans have acted as counsel to the Agent from the commencement of the liquidation, and have acted or advised on most of the matters described in this Report. The Agent is familiar with Goodmans' services. Detailed invoices were received on a timely basis and carefully reviewed by senior members of the Agent's staff. The invoices were reviewed for accuracy, adequate detailed information about the work performed and by whom, the time spent and when it was spent, the rate and the amount billed, possible duplicative charges, reasonableness and overall compliance with the terms of retention. Clarifications and adjustments of items included in Goodmans' invoices were requested where it appeared appropriate.

34. A summary of the invoices for Goodmans is attached as Schedule "O" hereto. A summary of the hours and average hourly rates of Goodmans personnel is attached as Schedule "P" hereto.

35. The hourly billing rates charged by Goodmans have not been increased since the commencement of the liquidation and reflect a very significant discount from regular rates over the course of the liquidation.

36. The Agent is satisfied that Goodmans' fees are proper, fair and reasonable, that time was appropriately spent, and the Goodmans' fees were incurred in furtherance of the interest of the estate.

(ii) *PwC Inc.*

37. The Agent applied the same standard of review to its own accounts as to the accounts of counsel described above. The accounts of the Agent were provided to the Superintendent on a monthly basis for review and approval, and the supporting documents were examined by the Superintendent on a periodic basis.

38. A summary of the invoices for the Agent is attached as Schedule "Q" hereto. A summary of the hours and average hourly rates of the Agent's personnel is attached as Schedule "R" hereto.

39. The hourly billing rates charged by the Agent have not been increased since the commencement of the liquidation, with the exception of a cumulative annual increase equal to the annual increase in the Consumer Price Index for the immediately preceding year, and reflect a very significant discount from regular rates over the course of the liquidation.

40. The Agent is satisfied that its fees are proper, fair and reasonable, that time was appropriately spent, and that its fees were incurred in furtherance of the interest of the estate,

41. The Agent's accounts and the accounts of Goodmans have been approved by the Liquidator.

#### **IV. FINANCIAL STATUS OF THE ESTATE**

##### **A. Assets**

42. The assets of the Canadian Estate as at January 31, 2010 consist of cash or near cash in the amount of \$64.8 million. The majority of reinsurance has now been collected, including through commutation of reinsurance treaties. The Canadian Estate maintains a contingent interest in any surplus in the conservation proceedings of the Regulation 41 Claims. However, as a conservative measure the Liquidator is not, at this time, ascribing a value to this contingent interest.

##### **B. Liabilities**

43. At the commencement of this liquidation, the books and records of Northumberland reflected claims known to Northumberland with a claim value in excess of \$100 million.

44. In addition to the known claims reflected in the books and records of Northumberland, 190 policyholders filed 403 contingent claims, having an aggregate claimed value of approximately \$9 billion. These contingent claims related to potential occurrences during the respective policy periods for which claims had not yet been reported.

45. Over the course of the liquidation, all but 17 of the filed contingent claims were withdrawn or settled, with these 17 claims having a total claimed value of \$14 million.

46. To permit distributions on settled claims while still maintaining appropriate reserves for the remaining unsettled claims and the filed contingent claims, the Agent retained the services of a firm of consulting actuaries - Tillinghast, a Towers Perrin Company ("Tillinghast") - to perform actuarial projections of the policy liabilities. Tillinghast has performed reviews at least as frequently as annually since 1989. The Liquidator has made all distributions relying both on the opinion of Tillinghast and the Agent's own internal reviews.

47. The outstanding policy claims as at January 31, 2010 are comprised of:

- (a) unclaimed dividends of \$5.5 million for policyholders who cannot be located;
- (b) reserves of \$19.3 million for:
  - (i) known unsettled claims of \$5.3 million for policyholders, comprised of corporations and insurers that Northumberland reinsured. In addition to Tillinghast, Liquidator has retained an experienced claims consultant as needed in establishing these reserves, which include a factor for both related adjusting and defence costs, and a provision for adverse development; and
  - (ii) the 17 contingent claims totalling \$14 million, filed by three policyholders. For this component of the reserves, the Liquidator has conservatively used the amount of the filed claims and has made no judgment on the value of the claims.

#### V. POST-LIQUIDATION INTEREST

48. Part III of the *WURA* (both in its "grandfathered" pre-1996 version as it applies to this liquidation, and its amended version as it applies to liquidations commenced after the 1996 amendments) does not address post-liquidation interest on policy loss or ordinary creditor claims in this liquidation, or the ranking, if any, to be given thereto.

49. However, subsection 95(2) in Part I of the *WURA*, enacted in 1996, provides for post-liquidation interest on claims to be paid from a surplus at the rate of 5% *per annum*, but it does not state whether, or how, it applies to the liquidation of an insurance company.

50. In the liquidation of Confederation Trust Company this Court held that subsection 95(2) applies even though the subject liquidation began (as did the Northumberland liquidation) prior to the enactment of subsection 95(2). In July 2009, in the liquidation of the Canadian branch of Reliance Insurance Company, this Court ruled on the effect of subsection 95(2) in the liquidation of a property and casualty insurance company (the "Reliance Ruling").

51. In brief, the Reliance Ruling held that post-liquidation interest under subsection 95(2) of the *WURA* is payable on policyholder loss and ordinary creditor claims that were not paid-in-full immediately as the claims were settled and allowed during the liquidation: i.e., it is payable on claims where the liquidation caused a delay in their being paid-in-full (*vis-à-vis* when they would have been paid contractually, absent a liquidation). The Reliance Ruling specified that the post-liquidation interest is to be calculated as simple interest at an annual rate of 5%, on the unpaid portion of each such claimant's allowed claim, from the time such claim was settled and allowed, and that any payments by way of interim dividends during the course of the liquidation are to be treated as being allocated first toward any post-liquidation interest payable on the claim and then to the "principal" portion of the claim.

52. As discussed above, by virtue of the fifth distribution in this liquidation in 2003, 5% of the principal amount of allowed claims (or approximately 0.3% interest per annum) was paid to claimants on account of post-liquidation interest, without there being a final determination as to the applicability of ss. 95(2) of the *WURA*. As it was uncertain at that time

whether, or how, ss. 95(2) interest applied in the liquidation of an insurance company, with the Court's approval the 5% distribution was made "across the board", including on those claims that had been settled and allowed after the 100¢ dividend rate had been reached (and which claims were accordingly paid-in-full on a timely basis, without delay by virtue of the liquidation).

53. Accordingly, in a very few cases, a distribution (totalling less than \$400,000.00) was authorized on claims that had been paid-in-full without any delay because of the liquidation, which distribution likely would not have been authorized had the Reliance Ruling been in place at that time.

54. On a go-forward basis, in light of the Reliance Ruling, it is proposed, and in due course it will be recommended, that post-liquidation interest only be payable on claims that were not paid-in-full upon their being settled and allowed, consistent with the Reliance Ruling.

## **VI. REPRESENTATIVE COUNSEL**

55. By Order dated January 16, 2003, this Court appointed James H. Grout to replace the late Paul S.A. Lamek, Q.C. as representative counsel on behalf of the Included Ordinary Creditors. A copy of the January 16, 2003 Order is attached as Schedule "S".

56. The respective representative counsel on behalf of the Included Policyholders, the Included Ordinary Creditors and the Assessed Insurance Companies are being served with the materials in respect of this motion. The representative counsel will advise this Court as to their positions with respect to the Proposed Distribution and the release of the Industry Interest Holdback.

57. The Agent understands that the representative counsel support or do not oppose the Proposed Distribution and the stepping down of the Liquidator (discussed below).

## **VII. PROPOSED SIXTH INTERIM DISTRIBUTION**

### **(i) *Statutory Priority Scheme***

58. In summary, the following is the priority of claims in the estate of Northumberland by virtue of Part III of the *WURA*, as it applies to the Northumberland liquidation:

- (a) claims of policyholders for loss (or, if there is no claim for loss, unearned premiums);
- (b) the claim of Her Majesty in respect of the post-March 31, 1986 Industry-Funded Expenses, together with interest at such rate as is specified by the Superintendent;
- (c) claims of ordinary creditors and certain policyholders of Northumberland, which did not receive priority as set out in (a) above; and
- (d) the claim of Her Majesty in respect of the pre-April 1, 1986 Industry-Funded Expenses, together with interest at such rate as is specified by the Superintendent.

59. As noted above, by agreement a portion of Her Majesty's claims in respect of interest on Industry-Funded Expenses was subject to the Industry Interest Holdback.

### **(ii) *Canadian Estate Financial Status/Overview of Effect of Proposed Distribution***

60. In considering whether the Proposed Distribution (being a sixth interim distribution) should be paid at this time, the Agent has taken into account the assets available for distribution, the estimated claims exposure to both known and contingent claims, future investment income and estimated future costs including income taxes.

61. There would remain in the Canadian Estate a surplus of approximately \$24.4 million following the making of the Proposed Distribution, given the reserves for future liabilities. The Agent is of the view that this represents a conservative estimate of the surplus, and that the remaining surplus of distributable assets provides an adequate cushion for potential future adverse development.

**(iii) *Proposed Distribution to Her Majesty for Current Industry-Funded Expenses and Interest***

62. The Liquidator proposes to pay to Her Majesty the Industry-Funded Expenses for the period April 1, 2002 to January 31, 2010 in the amount of \$2,253,286.98 and the interest thereon for the period April 1, 2002 to the date of the distribution (being approximately \$367,459.00 assuming a distribution in June 2010). This amount is calculated on a simple interest basis, at the rate specified by the Superintendent.

**(iv) *Proposed Release of Industry Interest Holdback***

63. The Industry Interest Holdback of \$8.1 million, described above, was not needed to pay outstanding claims in the winding-up, and those claims have been paid or will be paid out of the general funds remaining in the Canadian Estate. The Industry Interest Holdback was invested separately from the general assets and has earned interest.

64. The Agent therefore proposes, and recommends, that the Industry Interest Holdback plus the interest earned thereon be released to Her Majesty, to be used to make whole the Assessed Insurance Companies in respect of the Industry-Funded Expenses that they funded for the period up to March 31, 2002.



**(v) Proposed Compensation to Superintendent**

65. The Superintendent has fixed a reimbursement amount of \$167,000.00 in respect of all costs incurred by the Superintendent's office in connection with the liquidation. In accordance with the practice approved by this Court in other insurance company liquidations where the Superintendent has contributed substantial resources to the liquidation, it is recommended that the Superintendent be compensated accordingly.

**(vi) Summary**

66. The total of the Proposed Distribution is \$13.7 million.

67. Attached as Schedule "T" is a summary of the Proposed Distribution.

68. Following the Proposed Distribution, \$51.1 million will remain in the Canadian Estate, of which \$24.4 million will be surplus over the remaining claims reserves. It is anticipated that a further distribution to policyholders in respect of post-liquidation interest will be recommended in 2010.

**VIII. STEPPING DOWN AND DISCHARGE OF LIQUIDATOR**

**A. Appointment of the Superintendent as Provisional Liquidator**

69. The provisions of the *Insurance Companies Act* as it read at the commencement of the winding-up of Northumberland permitted the Superintendent (and previously the Superintendent of Insurance) to act as liquidator of an insurance company which was ordered wound-up under the *WURA*. In fact, the Superintendent (and previously the Superintendent of Insurance) was appointed liquidator in respect of all the liquidations of insolvent insurance companies and branch operations under federal jurisdiction in Canada until 1996, when the

*WURA* and the *Insurance Companies Act* were amended to provide that the Superintendent could no longer be appointed as liquidator of insurance companies.

**B. The Role of the Agent**

70. The *Insurance Companies Act* also provided in section 690 that, where the Superintendent has been appointed liquidator of an insurance company, the Superintendent may appoint an agent to assist in the liquidation. As noted, in the case of Northumberland, the Superintendent appointed PwC Inc. as his Agent for the administration of the liquidation.

71. The Agent has been responsible to the Liquidator for the day to day operations and administration of the liquidation. The Liquidator has provided oversight and control functions.

**C. Regulation 41 Agreement and Settlement Agreement between Liquidator and New York Superintendent**

72. The Liquidator and the New York Superintendent, as Conservator of Northumberland, entered into an agreement dated July 17, 1989 (the "Regulation 41 Agreement") which was approved by Order of this Court dated November 1, 1989 and by Order of New York Court dated December 1, 1989, copies of which are attached as Schedules "U" and "V", respectively. The Regulation 41 Agreement provided, inter alia, for the Liquidator to administer the claims of the Regulation 41 Claimants.

73. The Liquidator and the New York Superintendent, in his capacity as both Conservator and as liquidator of Northumberland's U.S. Branch, entered into an agreement dated August 5, 1994 which was approved by this Court on September 9, 1994 and by the New York Court on November 15, 1994 and November 28, 1994 (Schedules "T", "J" and "K").

74. The New York Superintendent has throughout the liquidation dealt with the Agent in respect of all matters relating to the Canadian Estate and the interests of the Regulation 41 Claimants and U.S. Branch Policyholders. The New York Superintendent does not object to the replacement of the Superintendent by the Agent.

**D. Passing of Accounts**

75. The Liquidator has not previously passed Northumberland's accounts. The accounts and the Liquidator's activities have been reviewed and accepted by the Superintendent during the course of the liquidation, and by way of reports in respect of the interim distributions, the Court has been kept apprised of the activities and developments in the liquidation.

76. The financial affairs of the estate are complex. As noted above, the Agent reported on a quarterly basis to the Superintendent as Liquidator. Each report contained a Statement of Affairs and a Statement of Receipts and Disbursements. In the early part of the liquidation, the Superintendent also met with the Assessed Insurance Companies on a regular basis, and continued thereafter to regularly report to them. If this Court approves the Liquidator's stepping down and discharge, the Liquidator also respectfully seeks the Court's dispensing with a requirement that she pass further accounts, and instead confirming that the Period is the last period for which the Liquidator will be responsible for passing accounts and that further passings will be the responsibility of the Permanent Liquidator. The Superintendent has and will continue to provide oversight and control functions to the date of her stepping down, and will provide any comments thereon to the Court at the application for passing of accounts for the subsequent period from February 1, 2010 to the stepping-down.

77. The professional fees of the Agent and Goodmans have been charged at significantly discounted rates. A discount will continue to be applied to the professional fees, but such fees will be increased to those which are more reflective of current market conditions. The rates and professional fees will be subject to Court approval.

**E. Discharge of the Superintendent as Provisional Liquidator and Appointment of PwC Inc. as Permanent Liquidator**

78. Significant progress has been made in the liquidation of the Northumberland estate. The Superintendent considers it appropriate that she step down as Liquidator at this time, considering:

- (a) policyholders and creditors have been paid 100¢ the dollar, with some post-liquidation interest;
- (b) the Industry-Funded Expenses are being repaid 100¢ on the dollar, with interest;
- (c) the New York Superintendent does not object; and
- (d) the amendments to *WURA* and to the *Insurance Companies Act* indicate that the Superintendent can no longer be appointed as liquidator of insurance companies.

79. The Liquidator recommends that the Agent be appointed as Permanent Liquidator, effective on the date of the Superintendent's discharge, since:

- (a) as Agent, PwC Inc. has in practice been responsible to the Liquidator for the administration of Northumberland since the commencement of the winding-up proceedings. The Agent has the knowledge of the estate that it would have had it been liquidator. It will not require any additional time to become familiar with

the operations of Northumberland and to assume the role of Permanent Liquidator;

- (b) the Agent has worked directly with all of the significant stakeholders in the Northumberland estate, including policyholders, reinsurers, ordinary creditors and other insurers on subscription policies; and
- (c) the Agent has been involved with all litigation involving or affecting the estate, is familiar with the issues and can ensure consistency in the approach to dealing with both ongoing and future disputes or litigation.

80. The Liquidator is of the view that the stepping down of the Liquidator and the corresponding appointment of the Agent as Permanent Liquidator will not disrupt or prejudice the administration of the liquidation.

81. Subsection 23(2) of the *WURA* requires that the person to be appointed as liquidator of a company must be a licensed trustee under the *Bankruptcy and Insolvency Act*. The Agent is a licensed trustee under the *Bankruptcy and Insolvency Act*. A copy of its consent to act as Permanent Liquidator is attached as Schedule "W" to this Report.

82. The Liquidator recommends that upon the Superintendent stepping down as Liquidator, the representative counsel appointed to represent the interests of the Assessed Insurance Companies be discharged, subject to the assessment of his accounts as provided in the Order dated September 20, 1993 appointing him.

**IX. RECOMMENDATION**

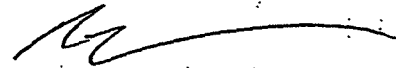
83. The Agent therefore respectfully recommends an Order be granted for the relief claimed in the within motion.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED,**

**PRICEWATERHOUSECOOPERS INC.,  
Agent for the Superintendent of Financial  
Institutions, Provisional Liquidator of  
NORTHUMBERLAND GENERAL  
INSURANCE COMPANY**

Date: May 10, 2010

Per:



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**Robert T. Chapman  
Senior Vice-President**

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## **SCHEDULE "C"**

IN THE SUPREME COURT OF ONTARIO

THE HONOURABLE ) WEDNESDAY, THE 24TH DAY OF  
MR. JUSTICE CATZMAN ) JULY, 1985.

IN THE MATTER OF NORTHUMBERLAND GENERAL INSURANCE COMPANY

AND IN THE MATTER OF THE CANADIAN AND BRITISH INSURANCE  
COMPANIES ACT, R.S.C., 1970, c. I-15, AS AMENDED

AND IN THE MATTER OF THE WINDING-UP ACT, R.S.C.  
1970, c. W-10, AS AMENDED

B E T W E E N:

THE ATTORNEY GENERAL OF CANADA

Applicant

- and -

NORTHUMBERLAND GENERAL INSURANCE COMPANY

Respondent

O R D E R

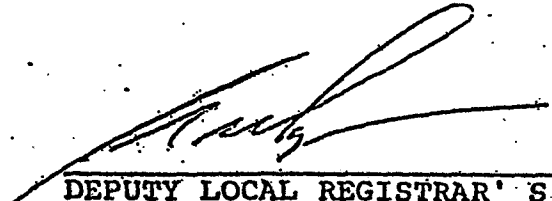
THIS application made on Wednesday, the 24th day of July, 1985, unto this Court by Counsel on behalf of the Applicant, for an Order directing the Superintendent of Insurance to take control of the Respondent and to wind it up pursuant to the provisions of the Winding-Up Act, and upon hearing read the Affidavits of Robert McIntosh Hammond and Richard H. Mabee, the Exhibits thereto, and upon hearing Counsel for the Applicant, no one appearing for the Respondent, although duly served:

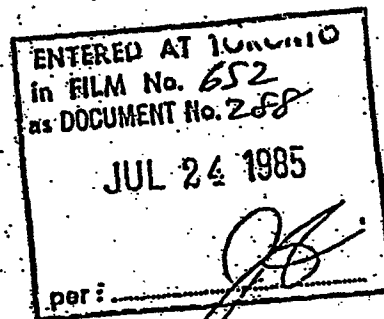


1. IT IS HEREBY DECLARED that Northumberland General Insurance Company is an incorporated Company within the provisions of the Winding-Up Act and is liable to be wound up by this Court pursuant to the Winding-Up Act.

2. AND IT IS ORDERED that the said Company be wound up by this Court under the provisions of the Winding-Up Act.

3. AND IT IS FURTHER ORDERED that the Superintendent of Insurance be and is hereby directed to take control of the said Company for the purpose that it be wound up by this Court pursuant to the provisions of the Winding-Up Act.

  
DEPUTY LOCAL REGISTRAR S.C.O.



Applicant

Respondent

IN THE SUPREME COURT OF ONTARIO

IN THE MATTER OF NORTHERLAND GENERAL  
INSURANCE COMPANY

AND IN THE MATTER OF THE CANADIAN AND  
BRITISH INSURANCE COMPANIES ACT, R.S.C.  
1970, c. I-15, AS AMENDED

AND IN THE MATTER OF THE WINDING-UP ACT,  
R.S.C. 1970, c. W-10, AS AMENDED

O R D E R

P.A. Vita,  
Barrister and Solicitor,  
P.O. Box 57,  
Toronto-Dominion Centre,  
Toronto, Ontario,  
M5K 1E7.

(416) 369-3451

## **SCHEDULE "D"**

Ke: 1789/85 28  
SUPREME COURT OF ONTARIO  
Schedule "D"

THE HONOURABLE  
MR. JUSTICE CATZMAN

) WEDNESDAY, THE 24TH DAY OF  
) JULY, 1985  
)

IN THE MATTER OF NORTHUMBERLAND GENERAL INSURANCE  
COMPANY

AND IN THE MATTER OF THE CANADIAN AND BRITISH  
COMPANIES ACT, R.S.C., 1970, c. 1-15, AS AMENDED

AND IN THE MATTER OF THE WINDING-UP ACT,  
R.S.C., 1970, c. W-10 AS AMENDED

B E T W E E N:

THE ATTORNEY GENERAL OF CANADA

Applicant

- and -

NORTHUMBERLAND GENERAL INSURANCE COMPANY

Respondent

O R D E R

THIS application made on Wednesday the 24th day of  
July, 1985 unto this Court by Counsel on behalf of the  
Applicant, for an Order directing the Superintendent of  
Insurance to take control of the Respondent and to wind it up  
pursuant to the provisions of the Winding-up Act, and upon  
hearing read the Affidavits of Richard Mabee and Robert McIntosh

Hammond, the Exhibits thereto and upon hearing Counsel for the Applicant, no one appearing for the Respondent, although duly served:

1. IT IS HEREBY ORDERED that the Superintendent of Insurance is hereby appointed as provisional Liquidator of the estate and effects of Northumberland General Insurance Company, hereinafter referred to as the "Company".

2. AND IT IS FURTHER ORDERED that the provisional Liquidator may, until further Order of the Court, to the extent that the provisional Liquidator deems it prudent so to do:-

- (i) bring or defend any action, suit or prosecution or other legal proceeding, civil or criminal, in his own name as provisional Liquidator or in the name or on behalf of the Company, as the case may be;
- (ii) carry on the business of the Company so far as is necessary to the beneficial winding up of the same;
- (iii) sell the real and personal property of the Company, by public auction or private sale and receive payment of the purchase price either in cash or otherwise;
- (iv) do all acts, and execute, in the name of and on behalf of the Company, all deeds, receipts and

other documents, and for that purpose use, when necessary, the seal of the Company;

(v) draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the Company;

(vi) take out in his official name letters of administration of the estate of any deceased contributory and do in his official name any other act that is necessary for obtaining payment of any money due from a contributory or from his estate and which act cannot be done conveniently in the name of the Company;

(vii) have the Company's mail re-directed; and

(viii) do and execute such other things as are necessary in the winding-up of the affairs of the Company, and take into his custody and control all of the property, effects and choses in action of the Company;

3. AND IT IS FURTHER ORDERED that the provisional Liquidator may compromise all calls, liabilities to calls, debts and liabilities capable of resulting in debts and all claims.

demands and matters in dispute in any way relating to or affecting the assets of the Company or the winding up of the Company on such terms as may be agreed upon and make such other compromise or other arrangements with creditors or persons claiming to be creditors of the Company as he deems expedient.

4. AND IT IS FURTHER ORDERED that the provisional Liquidator, until further Order of the Court, shall not make any payment to any holder of an investment instrument of the Company.

5. AND IT IS FURTHER ORDERED that (without limiting the powers of the provisional Liquidator hereby conferred) the provisional Liquidator, until further Order of the Court and to the extent that the provisional Liquidator deems it prudent so to do, may give discharges of mortgages and other securities, partial discharges of mortgages and other securities, and pay property taxes and insurance premiums on mortgages and other securities taken in favour of the Company.

6. AND IT IS FURTHER ORDERED that the provisional Liquidator, until further Order of the Court, be at liberty to raise money upon the security of the assets of the Company.

7. AND IT IS FURTHER ORDERED that the provisional Liquidator shall inquire into the affairs, dealings, estate and effects of the Company with respect to all matters relating to

the preservation, conservation and realization of the assets and claims of the Company, and in the course of such inquiry shall apply to the Court for leave to examine any persons he deems appropriate.

8. AND IT IS FURTHER ORDERED that, without in any way limiting or restricting the other powers or duties of the provisional Liquidator, within 90 days next following the date of this Order or such greater period as this Court may order, the provisional Liquidator shall inquire into such matters as he may deem appropriate and consider whether there are any reasonably feasible and commercial means by which a more expeditious or less costly winding-up of the Company and its affairs and distribution of its assets might be achieved for the benefit of the Policyholders, whether through a proposed arrangement pursuant to sections 65 and 66 of the Winding-up Act, as amended, or otherwise.

9. AND IT IS FURTHER ORDERED that, in the course of his inquiry and consideration aforesaid, the provisional Liquidator may consult with the Company or such Claimants, Policyholders, Creditors or other persons as he may deem appropriate, and the costs and expenses of the provisional Liquidator, in so doing



and generally in carrying out his inquiry and consideration and in reporting to the Court thereon shall be expenses of the winding-up of the Company.

10. AND IT IS FURTHER ORDERED that within such 90 day period, or at such later date as this Court may order, the provisional Liquidator shall, upon at least two clear days notice to the Company and to such other persons as this Court may direct, report to this Court the results of his inquiry and consideration aforesaid.

11. AND IT IS FURTHER ORDERED that the provisional Liquidator is hereby authorized to cure such defaults and effect such arrangements as may be required to reinstate such Reinsurance Agreements affecting the operations of the Company, as are deemed in the interest and for the protection of Claimants, Policyholders and Creditors of the Company over the period to the date of filing of Company's Statement of Liabilities in the Department of Insurance.

12. AND IT IS FURTHER ORDERED that the provisional Liquidator may, with the consent of the Minister of Finance, carry on any business that is reasonably ancillary to the business of insurance transacted by the Company.

13. AND IT IS FURTHER ORDERED that the provisional Liquidator may open one or more accounts with one or more

Canadian chartered banks for the purposes of the Company and may pay monies, drafts, bills and notes received by him into any such accounts as he may deem necessary for the due performance of his duties hereunder.

14. AND IT IS FURTHER ORDERED that the provisional Liquidator and his appointee may engage such agents and lawyers in Canada or elsewhere as he deems necessary to assist him in fulfilling his duties.

15. AND IT IS FURTHER ORDERED that it shall not be necessary for the provisional Liquidator to give security for the performance of his duties.

16. AND IT IS FURTHER ORDERED that it be referred to the Master at Toronto to take hereafter all necessary proceedings for and in connection with the winding up of the Company, and who may fix the expenses incurred by the provisional Liquidator in winding up the Company, and to tax or otherwise dispose of any legal costs relevant to the winding up proceedings or to refer such matters to the Taxing Officer.

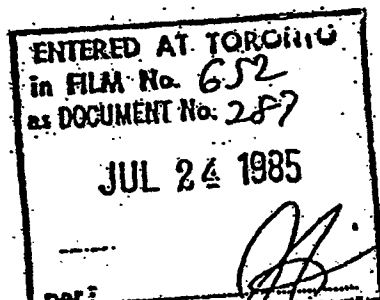
17. AND IT IS FURTHER ORDERED that the Company, its officers, directors, trustees, servants, solicitors, auditors and agents, do forthwith deliver over to the provisional Liquidator all property and all books, documents, papers and records of every nature and kind of the Company, including and

without limiting the generality of the foregoing, all such property, books, documents, papers and records of the Company which may be in the possession or under the control or on the premises of the accounting firm of Clarkson & Gordon.

18. AND IT IS FURTHER ORDERED that no action or other proceeding shall be taken or continued against the Company or the provisional Liquidator without leave of this court first being obtained.

19. AND IT IS FURTHER ORDERED in pursuance of Section 112 of the Winding-up Act, as amended, all such powers as are conferred upon the Court by the said Statute as may be necessary for the winding up of the Company be and the same are hereby delegated to the Master at Toronto.


20. AND IT IS FURTHER ORDERED that the costs incidental to the Order directing that the Company be wound up, and of the Order for Winding-up, and of this Motion of the Applicant be taxed and be paid by the provisional Liquidator out of the assets of the Company which shall come into his hands.



40G/13158

  
DEPUTY LOCAL REGISTRAR, S.C.O.

This is to certify that this Document, each page of which is stamped with the Seal of The Supreme Court of Ontario, is a true copy of An Order made by this Court, entered at Toronto on Film No. 652 as Document No. 287. Dated at Toronto this 15<sup>th</sup> day of August 1985.

  
Deputy Local Registrar, S.C.O.

Applicant

Respondent

IN THE SUPREME COURT OF ONTARIO

IN THE MATTER OF NORTHUMBERLAND GENERAL  
INSURANCE COMPANY

AND IN THE MATTER OF THE CANADIAN AND  
BRITISH INSURANCE COMPANIES ACT, R.S.C.  
1970, c. I-15, AS AMENDED

AND IN THE MATTER OF THE WINDING-UP ACT,  
R.S.C. 1970, c. W-10, AS AMENDED

O R D E R

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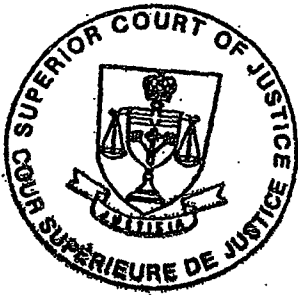
(416) 369-3451

## **SCHEDULE "E"**

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**- COMMERCIAL LIST**

THE HONOURABLE MADAM  
JUSTICE PEPALL

) THURSDAY THE 20<sup>th</sup> DAY  
) OF MAY, 2010.  
)



**IN THE MATTER OF NORTHUMBERLAND  
GENERAL INSURANCE COMPANY**

**AND IN THE MATTER OF THE  
CANADIAN AND BRITISH INSURANCE COMPANIES ACT,  
R.S.C. 1970, c. I-15, AS AMENDED**

**AND IN THE MATTER OF THE  
WINDING-UP ACT, R.S.C. 1970, C.W-10, AS AMENDED**

**BETWEEN:**

**THE ATTORNEY GENERAL OF CANADA**

**Applicant**

**- and -**

**NORTHUMBERLAND GENERAL INSURANCE COMPANY**

**Respondent**

**ORDER**

**THIS MOTION** made by PricewaterhouseCoopers Inc., Agent ("Agent") to the Superintendent of Financial Institutions (the "Superintendent"), in her capacity as provisional liquidator (the "Liquidator") of Northumberland General Insurance Company ("Northumberland"), was heard on this day at 330 University Avenue, Toronto, Ontario.

**ON READING** the Report of the Liquidator dated May 10, 2010 (the "Report"), the Affidavit of Gale Rubenstein sworn April 30, 2010 and the Affidavit of Robert Chapman sworn

May 10, 2010, filed, and on hearing submissions of counsel for the Agent, and of the representative counsel on behalf of each of the Assessed Insurance Companies, the Included Policyholders and the Included Ordinary Creditors, all as defined in the Report,

1. **THIS COURT ORDERS** that the service of the Notice of Motion and materials herein is good and sufficient service of this motion, that the motion is properly returnable before this Court, and that any further service thereof upon any interested parties other than those parties served is hereby dispensed with.
2. **THIS COURT ORDERS** that the accounts and activities of the Agent and the Liquidator for the period July 24, 1985 to January 31, 2010 (the "Period"), as reflected in the Statement of Receipts and Disbursements attached to the Report, be and they are hereby passed and approved as submitted.
3. **THIS COURT ORDERS** that the fees and disbursements of the Agent and of its counsel, Goodmans LLP, for the Period be and they are hereby approved as submitted.
4. **THIS COURT ORDERS** that the Liquidator is hereby authorized to pay a distribution (i) to Her Majesty the Queen in right of Canada ("Her Majesty") of the Industry-Funded Expenses (as defined in the Report) relating to the period April 1, 2002 to January 31, 2010, and interest thereon to the date of payment at the rate that has been specified by the Superintendent pursuant to statute, and (ii) to the Superintendent's office in the amount of \$167,000.00 in respect of the liquidation.
5. **THIS COURT** approves and authorizes the release to Her Majesty of the Industry Interest Holdback (as defined in the Report), including the interest earned thereon.

6. **THIS COURT ORDERS** that the terms of the appointments as representative counsel of the following:

- (a) James Grout, to represent the interests of the Included Ordinary Creditors;
- (b) Ronald N. Robertson, Q.C., to represent the interests of the Included Policyholders; and
- (c) Lyndon A.J. Barnes, to represent the Assessed Insurance Companies,

are hereby extended to authorize the representative counsel to represent the interests of their respective classes of parties in connection with the motion herein, and, in the case of Messrs. Grout and Robertson, the liquidation, until further Order of the Court.

7. **THIS COURT ORDERS** that effective at midnight on May 20, 2010, the Superintendent be and she is hereby discharged as Liquidator of Northumberland.

8. **THIS COURT ORDERS** that effective immediately upon the discharge of the Superintendent, PricewaterhouseCoopers Inc. be and it is hereby appointed permanent liquidator (the "Permanent Liquidator") of Northumberland in place of the Superintendent, without security and it may act through such officers or employees as it may deem appropriate, and that the Superintendent's custody and control of all the property, effects and *choses in action* of Northumberland shall be transferred to the Permanent Liquidator.

9. **THIS COURT ORDERS AND DECLARES** that the Liquidator is not required to apply to this Court for further orders passing and approving her accounts, and that the Permanent Liquidator shall be responsible for the passing and approving of the accounts, and the



fees and disbursements of the professional advisors, effective with the period commencing February 1, 2010.

10. **THIS COURT ORDERS** that the rights of the Liquidator to apply to this Court for Orders approving further payments of all or any portion of the costs incurred by her in connection with the liquidation of the estate of Northumberland to the date hereof be and the same are hereby reserved.

11. **THIS COURT ORDERS** that:

- (a) the Permanent Liquidator shall have all the authority, rights, powers, privileges and protections granted to the Liquidator by this Court;
- (b) all Orders of this Court and agreements made by the Liquidator with respect to the liquidation of Northumberland during the appointment of the Liquidator shall apply to, bind and benefit the Permanent Liquidator as if the Permanent Liquidator were referred to therein in place of the Liquidator; and
- (c) the Permanent Liquidator has the authority to continue and maintain all actions or other proceedings to which Northumberland is a party.

12. **THIS COURT ORDERS** that this Order and any other orders in these proceedings shall have full force and effect in all Provinces and Territories in Canada.

13. **THIS COURT ORDERS** that the agreements dated July 17, 1989 and August 5, 1994, as described in the Report be and the same are hereby amended to replace the Liquidator as a party thereto with the Permanent Liquidator.

14. **THIS COURT ORDERS** that upon the discharge of the Superintendent as Liquidator of Northumberland, and subject to the assessment of his accounts as provided in the Order of September 20, 1993 appointing him, Mr. Barnes, as representative counsel appointed to represent the interests of the Assessed Insurance Companies, be and is hereby discharged from his duties as representative counsel.

824 P. Ball, J.

ENTERED AT / INSCRIT A TORONTO  
ON / BOOK NO:  
LE / DANS LE REGISTRE NO.:

MAY 21 2010

PER/PAR: Q

THE ATTORNEY GENERAL OF  
CANADA

and

NORTHUMBERLAND GENERAL  
INSURANCE COMPANY

Court File No. CV-85-RE001780-00

Applicant

Respondent

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
- COMMERCIAL LIST**

Proceeding commenced at Toronto

**ORDER  
(May 20, 2010)**

**Goodmans LLP**  
Barristers & Solicitors  
333 Bay Street  
Suite 3400  
Toronto, Ontario  
M5H 2S7

Gale Rubenstein\LSUC #17088E  
Graham D. Smith\LSUC#26377D  
Tel: 416-979-2211  
Fax: 416-979-1234

Lawyers for PricewaterhouseCoopers Inc., Agent  
to the Superintendent of Financial Institutions,  
Provisional Liquidator of Northumberland  
General Insurance Company

V5788706

## **SCHEDULE "F"**

Court File Number: 85 - RZ 001780Superior Court of Justice  
Commercial List

## FILE/DIRECTION/ORDER

Re Northumberland General Insurance  
Company AND Plaintiff(s)

Defendant(s)

Case Management ☐ Yes ☒ No by Judge: \_\_\_\_\_

Counsel	Telephone No.:	Facsimile No.:
<u>see attached</u>		

- ☒ Order ☐ Direction for Registrar (No formal order need be taken out)  
☐ Above action transferred to the Commercial List at Toronto (No formal order need be taken out)

- ☐ Adjourned to: \_\_\_\_\_  
☐ Time Table approved (as follows): \_\_\_\_\_

Practitioner House Corp. Inc. as agent to the  
superintendent of financial institutions in her  
capacity as provisional liquidator of  
Northumberland General Insurance Company  
("Northumberland") seeks a variety of relief.

The proposes a distribution of \$13.7  
million (approximately) comprised of payment  
of industry funded expenses for the  
period Apr 1, 2002 to Jan 31, 2010 plus  
interest, repayment of the interest  
held back plus interest + compensation  
to the superintendent's office. Conservative  
reserves + provisions have been  
established leaving a surplus of  
approximately \$24.4 million. The agent  
proposed the assets available for  
distribution, the estimated claims  
exposure to both known + contingent

May 20, 2010

Date

Bob Spall, J

Judge's Signature

☒ Additional Pages 3

Court File Number: \_\_\_\_\_

Superior Court of Justice  
Commercial List

## FILE/DIRECTION/ORDER

## Judges Endorsement Continued

claims, future investment income + estimated future costs including income, taxes. The agent also retained the services of a firm of consulting actuaries - Tillinghast & Towers Kern company - to perform actuarial projections of the policy liabilities.

In my view, approval of the proposed distribution should be granted. It is anticipated that a further distribution to policyholders in respect of post-liquidation interest will be recommended in 2010.

A request is also made that I pass the accounts + approve the activities of the agent + the liquidator for the period July 24, 1985 - Jan 31, 2010 + approve the professional fees of the agent + its counsel for that same period. As noted by Mr. Robertson, counsel for the included Policy Holders, this liquidation has been effectively + well handled. No one opposed the relief sought and those who did appear expressed some satisfaction with the results of the liquidation. In passing the accounts + approving the activities, I am expressly approving the distribution of approximately \$400,000 described in paras 52 + 53 of the May 10, 2010 Report which was made relying on Farley J's order of Feb 13, 2003. Approval of the professional fees of the agent + its counsel Goodman, is also granted. They were approved by the liquidator, are fair + reasonable.

Court File Number: \_\_\_\_\_

Superior Court of Justice  
Commercial List

## FILE/DIRECTION/ORDER

## Judges Endorsement Continued

- were incurred in preference of the interests of the estate. Mr. Groat ~~at~~ on behalf of the ordinary creditors, also attested his review + expressed no objections.

The request relating to representative counsel is sound + is granted.

Turning lastly to the request for a discharge of the Superintendent as Provisional Liquidator + the appointment of PWC Inc as permanent liquidator, this too should be granted. In this regard I note:

- particular - creditors have been paid 100¢ on the dollar, with partial post-liquidation interest.
- the liquidating - funded expenses are being repaid 100¢ on the dollar with interest.
- the NY Superintendent does not object nor did anyone appear to object.
- PWC Inc. has been intimately involved in the administration of Northumberland since the commencement of the winding-up proceedings + no prejudice or disruption in the administration of the liquidation is expected.
- the appointment of PWC Inc is consistent with the current provisions of the WURA.
- There is precedent for such an order.

In the circumstances, I am satisfied

Court File Number: \_\_\_\_\_

Superior Court of Justice  
Commercial List

## FILE/DIRECTION/ORDER

Judges Endorsement Continued

that the order requested should be  
granted.

W. Repault, J.



**ONTARIO  
SUPERIOR COURT OF JUSTICE  
- COMMERCIAL LIST**

**IN THE MATTER OF  
NORTHUMBERLAND GENERAL INSURANCE COMPANY**

**AND IN THE MATTER OF THE  
CANADIAN AND BRITISH INSURANCE COMPANIES ACT,  
R.S.C. 1970, C. I-15, AS AMENDED**

**AND IN THE MATTER OF THE  
WINDING-UP ACT, R.S.C. 1970, C. W-10, AS AMENDED**

**BETWEEN:**

**THE ATTORNEY GENERAL OF CANADA**

**Applicant**

**- and -**

**NORTHUMBERLAND GENERAL INSURANCE COMPANY**

**Respondent**

**UNOFFICIAL TRANSCRIPTION OF ENDORSEMENT OF  
THE HONOURABLE MADAM JUSTICE PEPALL**

PricewaterhouseCoopers Inc. as agent to the Superintendent of Financial Institutions in her capacity as provisional liquidator of Northumberland General Insurance Company ("Northumberland") seeks a variety of relief.

PWC proposes a distribution of \$13.7 million (approximately) comprised of a payment of Industry Funded Expenses for the period April 1, 2002 to January 31, 2010 plus interest; repayment of the Interest Holdback plus interest; and compensation to the Superintendent's office. Conservative reserves and provisions have been established leaving a surplus of approximately \$24.4 million. The agent considered the assets available for distribution, the estimated claims exposure to both known and contingent claims, future investment income and estimated future costs including income taxes. The agent also retained the services of a firm of consulting actuaries – Tillinghast, a Towers Perrin company – to perform actuarial projections of the policy liabilities.

In my view, approval of the proposed distributions should be granted. It is anticipated that a further distribution to policyholders in respect of post-liquidation interest will be recommended in 2010.

A request is also made that I pass the accounts and approve the activities of the agent and the liquidator for the period July 24, 1985 – January 31, 2010 and approve the professional fees of the agent and its counsel for that same period. As noted by Mr. Robertson, counsel for the Included Policy Holders, this liquidation has been effectively and well handled. No one opposed the relief sought and those who did appear expressed some satisfaction with the results of the liquidation. In passing the accounts and approving the activities, I am expressly approving the distribution of approximately \$400,000 described in paras 52 and 53 of the May 10, 2010 Report which was made relying on Farley J's order of February 13, 2003. Approval of the professional fees of the agent and of its counsel, Goodmans, is also granted. They were approved by the Liquidator, are fair and reasonable and were incurred in the furtherance of the interests of the estate. Mr. Grout on behalf of the ordinary creditors also outlined his review and expressed no objections.

The request relating to representative counsel is sound and is granted.

Turning lastly to the request for a discharge of the Superintendent as Provisional Liquidator and the appointment of PWC Inc. as permanent liquidator, this too should be granted. In this regard I note:

- policyholders and creditors have been paid 100¢ on the dollar, with partial post-liquidation interest.
- the Industry-Funded Expenses are being repaid 100¢ on the dollar with interest.
- the NY Superintendent does not object nor did anyone appear to object.
- PWC Inc. has been intimately involved in the administration of Northumberland since the commencement of the winding-up proceedings and no prejudice or disruption in the administration of the liquidation is expected.
- The appointment of PWC Inc. is consistent with the current provisions of the WURA.
- There is precedent for such an order.

In the circumstances, I am satisfied that the order requested should be granted.

May 20, 2010

S. E. Pepall, J

## **SCHEDULE "G"**

**ONTARIO COURT (GENERAL DIVISION)**

**THE HONOURABLE                    ) THURSDAY, THE 24TH DAY**  
**)**  
**MR. JUSTICE SAUNDERS        ) OF JUNE, 1993.**

**IN THE MATTER OF  
NORTHUMBERLAND GENERAL INSURANCE COMPANY;**

**AND IN THE MATTER OF THE  
CANADIAN AND BRITISH INSURANCE COMPANIES ACT,  
R.S.C. 1970, c.I-15, AS AMENDED;**

**AND IN THE MATTER OF THE  
WINDING-UP ACT, R.S.C. 1970, c.W-10, AS AMENDED**

**BETWEEN:**

**THE ATTORNEY GENERAL OF CANADA**

**Applicant**

**- and -**

**NORTHUMBERLAND GENERAL INSURANCE COMPANY**

**Respondent**

**ORDER**

**THIS MOTION made by the Superintendent of Financial Institutions, provisional  
liquidator (the "Liquidator") of Northumberland General Insurance Company  
("Northumberland") for an Order:**

- (i) Dispensing with service of the Notice of Motion and the Report of the Liquidator (the "Report") on interested parties;
- (ii) Declaring the classes of parties affected by a further motion (the "Distribution Motion") to be brought by the Liquidator on September 27, 1993, for an order:
  - (a) approving a scheme of distribution with respect to the assets of the estate of Northumberland in Canada (the "Canadian Estate"); and
  - (b) declaring that the Regulation 41 Claimants and the U.S. Branch Claimants (both as defined below) have forfeited all right and claim to any share of the Canadian Estate;
- (iii) Appointing representative counsel to represent the interests of certain classes of parties affected by the Distribution Motion; and
- (iv) Giving directions as to service of the Notice of Motion by the Liquidator,

was heard this day.

ON READING the Report, filed, the consents of Ronald N. Robertson, Q.C., Paul S.A. Lamek, Q.C., William G. Horton and Geoffrey B. Morawetz, all filed, upon being advised that copies of the Report and the Order sought herein were provided to the

representative counsel, the Insurance Bureau of Canada, and the New York Superintendent of Insurance, and upon hearing counsel for the Liquidator and on the recommendation of the Liquidator that the ordinary creditors of the U.S. Branch, as hereinafter defined, although affected not be represented,

1. **THIS COURT ORDERS** that the requirement for service of the Notice of Motion and the Report upon interested parties is hereby dispensed with.
2. **AND THIS COURT FURTHER ORDERS AND DECLARES** that the following are the classes of parties affected by the Distribution Motion:
  - (a) those policyholders and claimants of Northumberland for whose protection Northumberland deposited trust funds pursuant to Regulation 41 of the Insurance Law of the State of New York (hereinafter referred to as the "Regulation 41 Claimants");
  - (b) those persons claiming under policies issued by the branch office (the "U.S. Branch") which Northumberland opened in New York pursuant to the provisions of the Insurance Law of the State of New York and for whose protection Northumberland made a deposit pursuant to section 1320(a) of the Insurance Law of the State of New York (hereinafter referred to as the "U.S. Branch Policyholders");

- (c) the policyholders of Northumberland other than the Regulation 41 Claimants and the U.S. Branch Policyholders (hereinafter referred to as the "Included Policyholders");
- (d) the ordinary creditors of Northumberland, including, in the case of Included Policyholders with both claims for loss and claims for return of unearned premium in the same policy period, Included Policyholders in respect of their claims for the lower of the two amounts, but excluding claims of ordinary creditors of the U.S. Branch (hereinafter referred to as the "Included Ordinary Creditors"); and
- (e) the ordinary creditors of the U.S. Branch.

3. **AND THIS COURT FURTHER ORDERS** that the following be and are hereby appointed representative counsel, to represent the interests of the following classes of parties at the hearing of the Distribution Motion with respect to the issues raised on the Distribution Motion:

- (a) Ronald N. Robertson, Q.C., to represent the interests of the Included Policyholders;
- (b) Paul S.A. Lamek, Q.C., to represent the interests of the Included Ordinary Creditors;

(c) William G. Horton to represent the interests of the Regulation 41 Claimants;

(d) Geoffrey B. Morawetz to represent the interests of the U.S. Branch Policyholders;

4. AND THIS COURT FURTHER ORDERS that no representative counsel be appointed at this time to represent the interests of the ordinary creditors of the U.S. Branch.

5. AND THIS COURT FURTHER ORDERS that the representative counsel shall, from time to time, have their accounts assessed on a solicitor and client basis by this Court and for such purpose the said accounts be referred to a Master of the Court or to an Assessment Officer or other designated person.

6. AND THIS COURT FURTHER ORDERS that the remuneration, costs and expenses of representative counsel be treated as part of the costs and expenses of the liquidation of Northumberland.

7. AND THIS COURT FURTHER ORDERS that notice of the Distribution Motion be given to the following parties in the following manner:

(a) representative counsel, for each of their respective classes of parties;



(b) the advisory committee which represents the insurance industry in advising on the liquidation of Northumberland; and

(c) the New York Superintendent of Insurance, both in his capacity as Conservator of the Regulation 41 Trust and in his capacity as liquidator of the U.S. Branch,

all by delivering a copy of this Order, together with a Notice of Motion and material in support thereof, to such parties no later than August 13, 1993; and

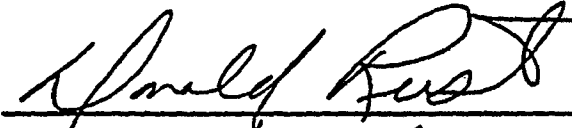
(d) the Regulation 41 Claimants who filed notices of dispute with the Liquidator as further described in the Report; and

(e) the majority shareholder of Northumberland, holding 100 % of the preference shares and 99.72 % of the common shares, as shown in its shareholders' register,

by mailing a copy of this Order, together with the Notice of Motion and a letter substantially in the form annexed as Schedule "A" hereto (in the case of the Regulation 41 Claimants) or Schedule "B" hereto (in the case of the majority shareholder), by ordinary first class prepaid mail addressed to each of them at their last known address shown on the books and records of Northumberland or addressed to their counsel of record, no later than July 30, 1993.

8. AND THIS COURT FURTHER ORDERS that an advertisement in substantially the form annexed as Schedule "C" hereto be published in the *Canada Gazette*, the national edition of the *Globe and Mail*, and the *Wall Street Journal* on at least two (2) occasions no later than August 8, 1993.

9. AND THIS COURT FURTHER ORDERS that any party wishing to attend and make submissions on the return of the Distribution Motion shall serve a notice of its intention to attend on counsel to the Liquidator and on the representative counsel appointed herein in the form attached as Schedule "D" hereto, and file a copy of such notice with the Court, all no later than September 12, 1993; and shall serve on the aforementioned parties and on all other parties having filed notices of their intention to attend, and file with the Court, any material on which it intends to rely, including a factum if it intends to file a factum with the Court, no later than September 17, 1993.

  
JR-DEWY Local REGISTRAR

INSCRIT / ENTERED AT TORONTO  
IN FILM No.: 924  
DANS FILM No.:

ON/LE: 3000 1993

AS DOCUMENT No.: 24  
A TITRE DE DOCUMENT No.:  
PER/PAR: 

**SCHEDULE "A"**

**[LETTERHEAD OF COOPERS & LYBRAND LIMITED]**

July \*, 1993

**TO: THE REGULATION 41 CLAIMANTS**

**Dear Sirs:**

**Re: Northumberland General Insurance Company, in Liquidation  
- Motion before the Ontario Court (General Division) for  
Approval of a Proposed Scheme of Distribution**

Coopers and Lybrand Limited, as Agent to the Superintendent of Financial Institutions, the provisional liquidator (the "Liquidator") of Northumberland General Insurance Company ("Northumberland") intends to move before the Ontario Court (General Division) (the "Court") to determine whether the Regulation 41 Claimants (as defined below) have a right to share in the assets of the estate of Northumberland in Canada (the "Canadian Estate"). A copy of the Notice of Motion with respect to this motion (the "Distribution Motion") is enclosed.

The Distribution Motion will be heard by the Court on September 27, 1993. The Distribution Motion will deal solely with categories of claims against Northumberland. It will not address the inclusion or exclusion of any individual claimant in or from any particular category of creditors. It will also not address the validity of any particular claim.

Pursuant to an Order of the Court dated June 24, 1993 (the "Order"), William G. Horton of McMillan Binch, Barristers & Solicitors, South Tower, 35th Floor, Royal Bank Plaza, Toronto, Ontario, M5J 2J7, was appointed as counsel to appear on the Distribution Motion to represent the interests of those policyholders and claimants of Northumberland for whose protection Northumberland deposited trust funds pursuant to Regulation 41 of the Insurance Law of New York (the "Regulation 41 Claimants"). A copy of the Order is enclosed.

If you wish to receive a copy of the materials in support of the Distribution Motion, you should write to Coopers & Lybrand Limited as Agent at the address below. If you intend to appear at the Distribution Motion either in person or by your counsel, you must serve a Notice of Intention in the form attached to the Order on Goodman & Goodman, as counsel to the Agent, and on the representative counsel listed on the Notice of Intention, and file it with

the Office of the Commercial Court, 145 Queen Street West, Toronto, Ontario, M5H 2N9, all no later than September 12, 1993. You will be notified of those persons to be served with any materials on which you intend to rely and will be informed as to the manner of filing your materials with the Court. If you intend to rely on a statement of fact and law in support of your position, you must serve it on Goodman & Goodman, as counsel to the Agent, and on all other persons to be served, and file copies of all such materials with the Court, all no later than September 17, 1993.

This letter, together with copies of the Order and the Notice of Motion, is being served upon you pursuant to the Order.

Yours very truly,

**COOPERS & LYBRAND LIMITED,**  
Agent to the Superintendent of Financial  
Institutions, Provisional Liquidator of  
Northumberland General Insurance  
Company

415 Yonge Street  
14th Floor  
Toronto, Ontario  
M5B 2E7

**SCHEDULE "B"**

**[LETTERHEAD OF COOPERS & LYBRAND LIMITED]**

July \*, 1993

**IVANHOE INSURANCE MANAGERS LIMITED**  
4920 Bench Road, R.R. 1  
Cowichan Bay, British Columbia  
V0R 1N0

Dear Sirs:

**Re: Northumberland General Insurance Company, in Liquidation -  
Motion before the Ontario Court (General Division) for Approval of a  
Proposed Scheme of Distribution**

---

Coopers and Lybrand Limited, as Agent to the Superintendent of Financial Institutions, the provisional liquidator (the "Liquidator") of Northumberland General Insurance Company ("Northumberland") intends to move before the Ontario Court (General Division) (the "Court") to determine which creditors of Northumberland have a right to share in the assets of the estate of Northumberland in Canada (the "Canadian Estate"). A copy of the Notice of Motion with respect to this motion (the "Distribution Motion") is enclosed.

The Distribution Motion will be heard by the Court on September 27, 1993. In a preliminary order dated June 24, 1993, the Court appointed counsel to represent the interests of certain creditors of Northumberland on the Distribution Motion. A copy of the Order is enclosed. The Court did not appoint representation counsel to represent the interests of the shareholders of Northumberland because it is unlikely that there will be any distributions to the shareholders.

If you wish to receive a copy of the materials in support of the Distribution Motion, you should write to the Agent at the address below. If you intend to appear at the Distribution Motion either in person or by your counsel, you must serve a notice of intention in the form attached to the Order on Goodman & Goodman, as counsel to the Agent, and on the representative counsel listed on the form of notice, and file it with the Office of the Commercial Court, 145 Queen Street West, Toronto, Ontario, M5H 2N9, all no later than September 12, 1993. You will then be notified of those persons to be served with any materials you intend to

rely on at the Motion. If you intend to rely on a statement of fact and law in support of your position, you must serve it on counsel to the Agent and on all other persons to be served, and file copies of all such materials with the Court, all no later than September 17, 1993.

This letter, together with copies of the Order and the Notice of Motion, is being served upon you pursuant to the Order.

Yours very truly,

**COOPERS & LYBRAND LIMITED,**  
Agent to the Superintendent of Financial  
Institutions, Provisional Liquidator of  
Northumberland General Insurance  
Company

415 Yonge Street  
14th Floor  
Toronto, Ontario  
M5B 2E7

cc: **Blake, Cassels & Graydon**  
**Barristers & Solicitors**  
**Box 25, Commerce Court West**  
**Toronto, Ontario**  
**M5L 1A9**

Attention: Mr. J.W. Mik

**SCHEDULE "C"**

**[FORM OF ADVERTISEMENT]**

**No. 1780/85**

**ONTARIO COURT (GENERAL DIVISION)**

**IN THE MATTER OF  
NORTHUMBERLAND GENERAL INSURANCE COMPANY;**

**AND IN THE MATTER OF THE  
CANADIAN AND BRITISH INSURANCE COMPANIES ACT,  
R.S.C. 1970, c.I-15, AS AMENDED;**

**AND IN THE MATTER OF THE  
WINDING-UP ACT, R.S.C. 1970, c.W-10, AS AMENDED**

**B E T W E E N:**

**THE ATTORNEY GENERAL OF CANADA**

**Applicant**

**- and -**

**NORTHUMBERLAND GENERAL INSURANCE COMPANY**

**Respondent**

**NOTICE OF MOTION**

**Take notice that on September 27, 1993, Coopers and Lybrand Limited,  
agent (the "Agent") to the Superintendent of Financial Institutions, provisional liquidator (the**

**"Liquidator") of Northumberland General Insurance Company ("Northumberland") will move before the Ontario Court (General Division) (the "Court") at 145 Queen Street West, Toronto, Ontario, for an order approving a scheme of distribution with respect to the assets of the estate of Northumberland in Canada (the "Canadian Estate") and declaring that certain policyholders and claimants for whose benefit Northumberland deposited funds and securities in the State of New York are deemed to have forfeited all right and claim to the Canadian Estate.**

**Legal representatives have been appointed to appear on the motion to represent the interests of parties affected by the motion but who cannot be readily ascertained, found or served, as follows:**

- (a) Ronald N. Robertson, Q.C., to represent the interests of those policyholders of Northumberland other than the policyholders referred to in paragraphs (b) and (c), below;**
- (b) William G. Horton to represent the interests of those policyholders and claimants of Northumberland for whose protection Northumberland deposited trust funds pursuant to Regulation 41 of the Insurance Law of the State of New York;**
- (c) Geoffrey B. Morawetz to represent the interests of those persons claiming under policies issued by the United States branch of Northumberland and for whose protection Northumberland made a deposit pursuant to Section 1320(a) of the Insurance Law of the State of New York; and**
- (d) Paul S.A. Lamek, Q.C., to represent the interests of the ordinary creditors of Northumberland other than the ordinary creditors of the United States branch.**



The Court has further ordered that the ordinary creditors of the United States branch are affected but that no representative counsel be appointed at this time to represent their interests.

If you wish to make an inquiry with respect hereto, please contact the Agent at the address below.

If you wish to attend and make submissions at the return of the motion, you must serve a notice of your intention to do so on the Agent and on the legal representatives and file such notice with the Office of the Commercial Court no later than September 12, 1993, and you must serve on the Agent and on all other parties having filed a notice of intention, any material on which you intend to rely, including a factum, and file copies of such materials with the Court no later than September 17, 1993. A form of notice of intention is available from the Agent at the address below.

This Notice is being published pursuant to an Order of the Ontario Court (General Division) dated June 24, 1993.

The Superintendent of Financial  
Institutions, Provisional Liquidator  
of Northumberland General  
Insurance Company, by his Agent,  
Coopers & Lybrand Limited

415 Yonge Street  
14th Floor  
Toronto, Ontario  
M5B 2E7

**SCHEDULE "D"**

**ONTARIO COURT (GENERAL DIVISION)**

**IN THE MATTER OF  
NORTHUMBERLAND GENERAL INSURANCE COMPANY;**

**AND IN THE MATTER OF THE  
CANADIAN AND BRITISH INSURANCE COMPANIES ACT,  
R.S.C. 1970, c.I-15, AS AMENDED;**

**AND IN THE MATTER OF THE  
WINDING-UP ACT, R.S.C. 1970, c.W-10, AS AMENDED.**

**B E T W E E N :**

**THE ATTORNEY GENERAL OF CANADA**

**Applicant**

**- and -**

**NORTHUMBERLAND GENERAL INSURANCE COMPANY**

**Respondent**

**NOTICE OF INTENTION  
TO APPEAR**

**The undersigned intends to appear at the Distribution Motion on  
September 27, 1993 in person/by counsel (strike out one).**

**Basis of Claim:**

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[Please summarize briefly the basis of your claim against Northumberland General Insurance Company.]

**Position on the Distribution Motion:**

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[Please summarize briefly the position you intend to take on the Distribution Motion.]

\_\_\_\_\_  
**Name of Claimant**

\_\_\_\_\_  
**Name of Solicitor (if applicable)**

\_\_\_\_\_  
**Address**

\_\_\_\_\_  
**Telephone No.**

\_\_\_\_\_  
**Date**

**TO:** Goodman & Goodman  
Barristers & Solicitors  
250 Yonge Street  
Suite 2400, Box 24  
Toronto, Ontario  
M5B 2M6

**Fax No.:** 979-1234

**Attention:** Gale Rubenstein  
Benjamin Zarnett  
Solicitors for Coopers & Lybrand Limited, Agent to the Superintendent of  
Financial Institutions, Provisional Liquidator of Northumberland General  
Insurance Company

**AND TO:** Fasken Campbell Godfrey  
Barristers & Solicitors  
Toronto-Dominion Bank Tower  
Toronto-Dominion Centre  
Toronto, Ontario  
M5K 1N6

**Fax No.:** 364-7813

**Attention:** Ronald N. Robertson, Q.C.  
Representative of the interests of the Included Policyholders

**AND TO:** Genest, Murray, DesBrisay, Lamek  
Barristers & Solicitors  
Suite 200  
4 King Street West  
Toronto, Ontario  
M5H 1B6

**Fax No.:** 360-2625

**Attention:** Paul S.A. Lamek, Q.C.  
Representative of the interests of the Included Ordinary Creditors

**AND TO: McMillan Binch  
Barristers & Solicitors  
Box 38  
Royal Bank Plaza  
Toronto, Ontario  
M5J 2J7**

**Fax No.: 865-7048**

**Attention: William G. Horton  
Representative of the interests of the Regulation 41 Claimants**

**AND TO: Borden & Elliott  
Barristers & Solicitors  
Suite 4100  
40 King Street West  
Toronto, Ontario  
M3H 3Y4**

**Fax No.: 361-7067**

**Attention: Geoffrey B. Morawetz  
Representative of the interests of the U.S. Branch Policyholders**

**THE ATTORNEY GENERAL OF CANADA**

- and -

**NORTHUMBERLAND GENERAL INSURANCE COMPANY**

**Applicant**

**Respondent**

**Court File No. 1780/85**

**ONTARIO COURT (GENERAL DIVISION)**

**Proceedings commenced at: Toronto**

**O R D E R**

**GOODMAN & GOODMAN**

**Box 24, Suite 2400  
250 Yonge Street  
Toronto, Ontario  
M5B 2M6**

**Gale Rubenstein  
Benjamin Zarnett  
(416) 979-2211**

**Solicitors for Coopers & Lybrand Limited,  
Agent to the Superintendent of Financial  
Institutions, Provisional Liquidator of  
Northumberland General Insurance Company**

## **SCHEDULE "H"**

ONTARIO COURT (GENERAL DIVISION)

THE HONOURABLE MR. JUSTICE ) MONDAY, THE 20TH DAY  
 )  
SAUNDERS ) OF SEPTEMBER, 1993

IN THE MATTER OF  
NORTHUMBERLAND GENERAL INSURANCE COMPANY;

AND IN THE MATTER OF THE  
CANADIAN AND BRITISH INSURANCE COMPANIES ACT,  
R.S.C. 1970, c.I-15, AS AMENDED;

AND IN THE MATTER OF THE  
WINDING-UP ACT, R.S.C. 1970, c.W-10, AS AMENDED

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

- and -

NORTHUMBERLAND GENERAL INSURANCE COMPANY

Respondent

ORDER

THIS MOTION made by the Superintendent of Financial Institutions,  
provisional liquidator (the "Liquidator") of Northumberland General Insurance  
Company ("Northumberland") for an Order:

- (a) declaring that the insurance companies which have been assessed for  
the expenses described in paragraph 686(1)(a) of the *Insurance  
Companies Act* incurred by the Superintendent of Financial



Institutions in carrying out as Liquidator the winding-up of Northumberland (the "Expenses") and which have paid the Expenses pursuant to that act and to the *Canadian and British Insurance Companies Act* (the "Assessed Insurance Companies") are a class of parties affected by the motion by the Liquidator returnable before this Honourable Court on September 27, 1993 (the "Distribution Motion"); and

- (b) appointing Lyndon A.J. Barnes to represent the interests of the Assessed Insurance Companies at the Distribution Motion with respect to the issues raised on the Distribution Motion,

was heard this day.

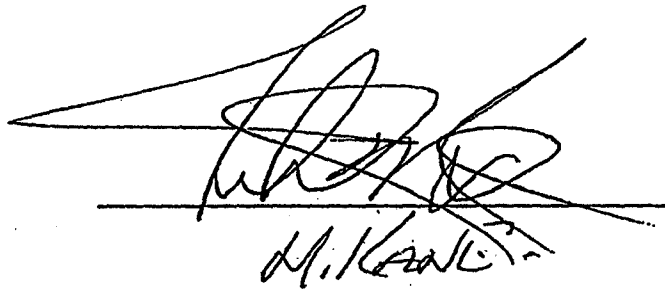
ON READING the Second Supplementary Report of the Liquidator dated the 15th day of September, 1993, filed and the consent of Lyndon A.J. Barnes, filed,

1. THIS COURT ORDERS AND DECLARES that the Assessed Insurance Companies are a class of parties affected by the motion by the Distribution Motion.
2. AND THIS COURT FURTHER ORDERS that Lyndon A.J. Barnes be appointed (the "Representative Counsel") to represent the interests of the Assessed Insurance Companies at the Distribution Motion with respect to the issues raised on the Distribution Motion including any resolution thereof and that the Representative Counsel take instructions from the Special Committee Appointed to Advise the Federal Superintendent on the Winding-Up of Northumberland

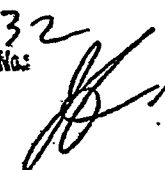
pursuant to the *Canadian and British Insurance Companies Act*, R.S.C. 1970, c.I-15, as amended.

3. AND THIS COURT FURTHER ORDERS that the Representative Counsel shall, from time to time, have his accounts assessed on a solicitor and client basis by this Court and for such purpose the said accounts be referred to a Master of the Court or to an Assessment Officer or other designated person.

4. AND THIS COURT FURTHER ORDERS that the remuneration, costs and expenses of the Representative Counsel be treated as part of the costs and expenses of the liquidation of Northumberland.



M. K. A. L. C.

INSCRIT / ENTERED AT TORONTO  
IN FILM No.: 931  
DANS FILM No.:  
ON/LE: 24091993  
AS DOCUMENT No.: 32  
À TITRE DE DOCUMENT No.:  
PER/PAR: 

ONTARIO COURT (GENERAL DIVISION)

Proceeding commenced at Toronto

ORDER

GOODMAN & GOODMAN  
P.O. Box 24  
Suite 2400  
250 Yonge Street  
Toronto, Ontario  
M5B 2M6

Gale Rubenstein  
Benjamin Zarnett  
(416) 979-2211

Solicitors for Coopers & Lybrand Limited,  
Agent to the Superintendent of Financial  
Institutions, Provisional Liquidator of  
Northumberland General Insurance  
Company

## **SCHEDULE "I"**

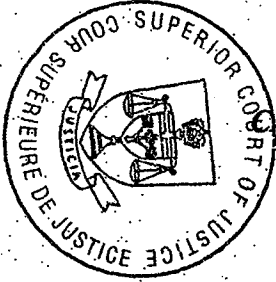
**ONTARIO SUPERIOR COURT OF JUSTICE**

THE HONOURABLE MR.  
JUSTICE FARLEY

)  
)

THURSDAY THE 16th DAY  
OF JANUARY, 2003

**IN THE MATTER OF NORTHUMBERLAND  
GENERAL INSURANCE COMPANY**



**AND IN THE MATTER OF THE  
CANADIAN AND BRITISH INSURANCE COMPANIES ACT,  
R.S.C. 1970, c. I-15, AS AMENDED**

**AND IN THE MATTER OF THE  
WINDING-UP ACT, R.S.C. 1970, C.W-10, AS AMENDED**

**BETWEEN:**

**THE ATTORNEY GENERAL OF CANADA**

**Applicant**

**- and -**

**NORTHUMBERLAND GENERAL INSURANCE COMPANY**

**Respondent**

**ORDER**

**THIS MOTION** made by PricewaterhouseCoopers Inc., Agent to the Superintendent of Financial Institutions, provisional liquidator (the "Liquidator") of Northumberland General Insurance Company ("Northumberland"), was heard this day at 393 University Avenue, Toronto, Ontario.

**ON READING** the Report of the Liquidator dated the 10<sup>th</sup> day of January, 2003 (the "Report"), filed, and upon hearing the submissions of counsel for the Liquidator and being advised of the consent of James H. Grout.

1. **THIS COURT ORDERS** that the service made of the Notice of Motion and supporting materials herein is good and sufficient notice of this motion, that this motion is properly returnable today, and that any further service or notice of the Notice of Motion and supporting materials be and the same is hereby dispensed with.

2. **THIS COURT FURTHER ORDERS** that James H. Grout be appointed representative counsel to represent the interests of the Included Ordinary Creditors with respect to the issues raised on the Interest Motion (both as defined in the Report) including any resolution thereof.


3. **THIS COURT ORDERS** that in discharging their duties hereunder, Mr. Grout on behalf of the Included Ordinary Creditors and the representative counsel appointed on behalf of the Included Policyholders and the Assessed Insurance Companies, both as defined in the Report, (collectively, the "Representative Counsel"):

- (a) may consult with identifiable members of the class represented by such Representative Counsel but shall not be obliged to follow the instructions of, or provide opinions to, individual members of such class;
- (b) shall act in the best interests of the represented class as a whole and take such necessary and appropriate steps and actions as such Representative Counsel shall deem fit from time to time;
- (c) may seek the advice and direction of this Court from time to time in connection with their appointments, upon notice to the Liquidator and the other Representative Counsel, unless otherwise ordered by the Court; and
- (d) shall incur no liability to any party other than in respect of their own negligence or wilful misconduct.

4. **THIS COURT FURTHER ORDERS** that the remuneration, costs and expenses of the Representative Counsel be treated as part of the costs and expenses of the liquidation of Northumberland and that the Representative Counsel may be required to have their accounts assessed on a solicitor and client basis by the Court from time to time.

5. **THIS COURT FURTHER ORDERS** that service of the Report and of any material in connection with the Interest Motion be made on the Representative Counsel.

6. **THIS COURT FURTHER ORDERS** that service or publication of notice in connection with the Interest Motion on any other parties be dispensed with.

  
L. Regehr

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ENTERED AT/INSCRIT A TORONTO  
ON/BOOK NO:  
LE/DANS LE REGISTRE NO:

JAN 16 2003

PER/PAR: 

**THE ATTORNEY GENERAL OF CANADA**

Applicant

and

**NORTHUMBERLAND GENERAL  
INSURANCE COMPANY**

Respondent

Court File No: RE1780/85

**SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

**ORDER**

**Goodmans LLP**  
Barristers & Solicitors  
250 Yonge Street  
Suite 2400, Box 24  
Toronto, Ontario  
M5H 2M6

Gale Rubenstein\LSUC #17088E  
Tel: 416.597.4148  
Fax: 416.979.1234

Solicitors for PricewaterhouseCoopers Inc.,  
Agent to the Superintendent of Financial  
Institutions, Provisional Liquidator of  
Northumberland General Insurance Company

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## **SCHEDULE "J"**

# Schedule "J"

## Northumberland General Insurance Company

### Calculation of funds available for interest dividend distribution

	Canadian	U.S.	Total (Note 5)
	\$	\$	\$
Cash available as of April 30, 2011 (Note 1)	47,965,456	3,232,079	51,024,296
<b>Less Known and Potential Liabilities</b>			
Unpaid dividends from previous distributions (Note 2)	5,045,169	328,437	5,356,002
Outstanding loss reserves (Note 3)	5,503,300	240,896	5,731,284
Contingencies (Note 4)	15,000,000	-	15,000,000
<b>Total Known and Potential Liabilities</b>	<b>25,548,469</b>	<b>569,333</b>	<b>26,087,286</b>
 Surplus available as at April 30, 2011	 22,416,987	 2,662,746	 24,937,010

#### Notes:

- 1 These amounts represent the market value as reported by Richardson GMP Ltd at April 30, 2011, and do not include any projection for future income. They exclude funds held on behalf of the US Conservator (approx. US \$10.8million) in which the Liquidator has a contingent interest.
- 2 These represent the unpaid dividends from previous distributions for claimants for which we do not have current addresses and unpaid interest dividends under \$10 from distribution 5.
- 3 These are the reserves on the books of Northumberland as of April 30, 2011 and include a component for IBNR ("incurred but not reported") and adverse loss development of \$890,000 calculated by Towers Watson as of December 31, 2010. Also included are a few unresolved claims of ordinary creditors.
- 4 The contingency of \$15million represents an additional provision to cover (i) the ultimate resolution of the contingent claims filed, (ii) any other adverse claim development and (iii) any future administration costs not covered by income from funds invested.
- 5 Based on US\$1 = Can \$.9494

## **SCHEDULE "K"**

Schedule "K"

**[COVER LETTER  
TO TOP 10 UEP AND TOP 10 PLC]**

**[Addressee]**

**Re: Northumberland General Insurance Company ("Northumberland")  
Your Claim Reference No. ● ("Claim")  
And Re: Post-liquidation Interest Motion**

Dear Sir/Madam:

We are the Court-appointed Liquidator of Northumberland. You filed the Claim for **[policy loss/unearned premium]** in the winding-up of Northumberland, and the total Claim was accepted and paid in the amount of \$●.

By virtue of a surplus of assets over liabilities in the Northumberland winding-up, in 2003 a payment was made on account of post-liquidation interest on the Claim as authorized by the Court supervising the winding-up. The Liquidator continues to anticipate a surplus, although the ultimate amount of the surplus cannot yet be determined. The Liquidator accordingly will seek the authority of the Court to pay further post-liquidation interest on eligible claims. However, because there is ambiguity concerning the relevant statutory provisions, the relative priority of policy loss claims and unearned premium claims is not clear with respect to post-liquidation interest.

The Liquidator is therefore seeking the advice and directions of the Court to resolve the issue and to confirm the methodology for calculation of post-liquidation interest.

Pursuant to the Preliminary Directions Order of the Honourable Mr. Justice Colin Campbell dated ●, 2011, you are being served with a copy of that Order and the Liquidator's Motion Record in respect of its Post-liquidation Interest Motion scheduled to be heard ●, 2011.

The financial impact on your claim of the outcome of the Post-Liquidation Motion is reflected on the attached schedule. This is based on an estimated distribution of \$25 million in respect of post-liquidation interest, as set out in the Liquidator's report.

The Order made ●, 2011 appoints representative counsel for each of the Policy Loss Claimants as a class and Unearned Premium Claimants as a class, and your interests as a member of the appropriate class will be represented by the respective representative counsel. However, you may retain counsel and participate directly in the Post-liquidation Interest Motion by following the directions to become an Appearing Party set out in the Order.

Yours very truly,

## **SCHEDULE "L"**

Schedule "L"

**[COVER LETTER TO REMAINING CONTINGENT CLAIMANTS]**

**[Addressee]**

**Re: Northumberland General Insurance Company ("Northumberland")  
Your Contingent Claim Reference Nos. ●**  
**And Re: Post-liquidation Interest Motion**

Dear Sir/Madam:

We are the Court-appointed Liquidator of Northumberland. You have outstanding contingent claims in the winding-up of Northumberland, which claims have not been valued or accepted.

By virtue of a surplus of assets over liabilities in the Northumberland winding-up, in 2003 a payment on account of post-liquidation interest was authorized by the Court supervising the winding-up. The Liquidator continues to anticipate a surplus, although the ultimate amount of the surplus cannot yet be determined. The Liquidator accordingly will seek the authority of the Court to pay further post-liquidation interest on eligible claims. However, because there is ambiguity concerning the relevant statutory provisions, the relative priority of policy loss claims and unearned premium claims is not clear with respect to post-liquidation interest.

The Liquidator is therefore seeking the advice and directions of the Court to resolve the issue and to confirm the methodology for calculation of post-liquidation interest.

Pursuant to the Preliminary Directions Order of the Honourable Mr. Justice Colin Campbell dated ●, 2011, you are being served with a copy of that Order and the Liquidator's Motion Record in respect of its Post-liquidation Interest Motion scheduled to be heard ●, 2011.

Your contingent claims are claims in respect of loss. To the extent such claims are allowed, you would therefore be a Policy Loss Claimant.

The Order made ●, 2011 appoints representative counsel for each of the Policy Loss Claimants as a class and Unearned Premium Claimants as a class, and your interests as a member of the appropriate class will be represented by the respective representative counsel. However, you may retain counsel and participate directly in the Post-liquidation Interest Motion by following the directions to become an Appearing Party set out in the Order.

Yours very truly,

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## **SCHEDULE "M"**

Schedule "M"

**IN THE MATTER OF THE WINDING-UP OF NORTHUMBERLAND  
GENERAL INSURANCE COMPANY ("Northumberland")**

**IMPORTANT NOTICE TO ALL CLAIMANTS OF NORTHUMBERLAND**

PricewaterhouseCoopers Inc., as permanent liquidator (the "Liquidator") of Northumberland under the provisions of the *Winding-up and Restructuring Act*, hereby gives notice that it will seek the advice and directions of the Ontario Superior Court of Justice – Commercial List ("Court") in respect of post-liquidation interest, by way of a motion ("Post-liquidation Interest Motion") scheduled to be heard by the Court on ●, 2011.

By the Post-liquidation Interest Motion, the Liquidator will be seeking the advice and directions of the Court with respect to the appropriate methodology for calculation of post-liquidation interest on claims in the estate of Northumberland, the priority ranking for post-liquidation interest as between claimants with claims for indemnity for property or liability losses covered by policies (the "Policy Loss Claimants") and claimants with claims for refund of premium paid for policies that were cancelled early (the "Unearned Premium Claimants").

By Order made ●, 2011 ("Preliminary Directions Order"), the Court has determined the procedure for service and filing of materials for the Post-liquidation Interest Motion, and has appointed representative counsel for each of the Policy Loss Claimants class and the Unearned Premium Claimants class, as set out below. The Preliminary Directions Order is posted on the Liquidator's website at ●.

You may request from the Liquidator an estimate of the effect of the disposition of the priority ranking issue on post-liquidation interest payable on your claim(s).

Please note that the Post-liquidation Interest Motion is not a request or recommendation to the Court to authorize the making of a distribution by the Liquidator at this time. Depending on the Court's ruling, the Liquidator will seek authorization for any future distribution at the appropriate time.

For the purposes of the Post-liquidation Interest Motion, the Court has appointed Edmond Lamek as counsel to represent the Policy Loss Claimants and James H. Grout as counsel to represent the Unearned Premium Claimants. The contact information for the respective representative counsel is:

**For the Policy Loss Claimants:**

Edmond Lamek  
Fasken Martineau DuMoulin LLP  
333 Bay Street, Suite 2400  
Toronto, ON M5H 2T6  
Tel.: 416-366-8381

**For the Unearned Premium Claimants:**

James H. Grout  
Thornton Grout Finnigan LLP  
Suite 3200, Canadian Pacific Tower  
100 Wellington St. West  
P.O. Box 329  
Toronto-Dominion Centre

Fax: 416-364-7813  
E-mail: elamek@fasken.com

Toronto, ON M5K 1K7

Tel.: 416-304-1616  
Fax: 416-304-1313  
E-mail: jgrout@tgf.ca

**The members of each class are bound by the acts of their respective representative counsel. However, if you desire to be individually represented and heard at the hearing of the Post-liquidation Interest Motion, you may do so by following the procedures set out in the Preliminary Directions Order. Please note that in order to be individually represented at the hearing you are required to serve a Notice of Appearance by ●.**

This Notice is being given pursuant to the Preliminary Directions Order of the Court.

PricewaterhouseCoopers Inc., Permanent Liquidator  
of Northumberland General Insurance Company  
145 King Street West, 26<sup>th</sup> Floor  
Toronto, Ontario  
M5H IV8

Attention: ●  
Fax: 416-●  
Tel: 416-●  
E-mail: ●