

**ONTARIO
SUPERIOR COURT OF JUSTICE**

- COMMERCIAL LIST

**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

**FACTUM OF KPMG INC.,
LIQUIDATOR OF RELIANCE CANADA**

(Motion Returnable June 25, 2014)

Date: June 23, 2014

GOODMANS LLP
Barristers & Solicitors
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, Ontario M5H 2S7

Gale Rubenstein (LSUC # 17088E)
Cathy Costa (LSUC # 46582L)
Tel: 416-979-2211
Fax: 416-979-1234

Lawyers for KPMG Inc.,
Liquidator of Reliance (Canada)

PART I. OVERVIEW

1. This Factum is respectfully submitted on behalf of KPMG Inc., the liquidator (“Liquidator”) of the insurance business in Canada of Reliance Insurance Company (“Reliance Canada”) in support of the Liquidator’s motion, among other things, seeking a claims bar date (the “Claims Bar Date”) in respect of policy loss claims (“Policy Loss Claims”), and ordering that Policy Loss Claims of which the Liquidator does not receive notice before the Claims Bar Date will be forever extinguished, waived and barred and will not participate in any future distributions. This Factum deals specifically with the Claims Bar Date aspect of the motion.

PART II. FACTS

2. By Orders of this Court made December 3, 2001, the insurance business of Reliance Canada was ordered wound-up pursuant to the provisions of the *Winding-up and Restructuring Act*, R.S.C. 1985, c.W-11 (“*WURA*”) and KPMG Inc. was appointed provisional liquidator.

Report of the Liquidator dated June 25, 2014 (the “Report”) at para. 20, Motion Record of the Liquidator, Tab 2.

3. The Liquidator has continued the run-off of Reliance Canada’s business in an orderly manner, dealing with policy liabilities and collection of reinsurance on a commercially reasonable basis. A complete run-off is expected to take many more years.

Report at para. 28, Motion Record of the Liquidator, Tab 2.

4. The Liquidator intends to pursue a transaction to transfer the policy liabilities to another insurer/reinsurer that would assume liability for them (an “Assumption Reinsurance Transaction”) as one means to expedite the completion of the liquidation and facilitate the release of surplus.

Report at para. 76, Motion Record of the Liquidator, Tab 2.

5. The Liquidator pursued an Assumption Reinsurance Transaction on several occasions, with no resulting transaction because of, among other things, uncertainties concerning potential liabilities given Reliance Canada is a branch, including the possibility that Non-Booked Claims (as defined in the Report) would arise.

Report at para. 77, Motion Record of the Liquidator, Tab 2.

6. The Liquidator believes the Claims Bar Date would introduce an element of certainty that would be helpful in the context of renewed marketing efforts.

Report at paras. 79, 80-81, Motion Record of the Liquidator, Tab 2.

7. On August 3, 2010, this Court granted an Order (the “Call for Policy Loss Claims Order”) approving a process in respect of the call for loss claims of holders under insurance policies issued by Reliance Canada (the “Policy Loss Claims”). The Call for Policy Loss Claims was widely publicized and proofs of claim were actively solicited.

Report at paras. 56, 82-85, Motion Record of the Liquidator, Tab 2.

8. The Call for Policy Loss Claims Order fixed December 17, 2010 under Section 74 of the *WURA* as the last day on which Policy Loss Claims could be sent to the Liquidator.

Report at para. 79, Motion Record of the Liquidator, Tab 2.

9. The Liquidator believes a Claims Bar Date would enhance the potential for a successful transaction because it would provide greater certainty as to the universe of potential claims in an unusually active estate with open and contingent claims and a long-tail book.

Report at para. 80, Motion Record of the Liquidator, Tab 2.

10. Given the extensive, costly and thorough Call for Policy Loss Claims undertaken in 2010, the Liquidator proposes that the Claims Bar Date be established and that the notices proposed in paragraph 86 of the Report be given.

Report at para. 86, Motion Record of the Liquidator, Tab 2.

11. The U.S. Liquidator, as Reliance Canada's major stakeholder, strongly supports the establishment of the Claims Bar Date as one of the steps towards the completion of the Canadian estate. The U.S. Liquidator has made significant progress in its own estate and has finalized approximately 98% of the proofs of claims filed in its estate.

Report at para. 80(c), Motion Record of the Liquidator, Tab 2.

12. Even if no Assumption Reinsurance Transaction is completed, the certainty brought by the Claims Bar Date will facilitate the completion of the liquidation, including potential commutations of reinsurance arrangements and a claims determination process.

Report at para. 81, Motion Record of the Liquidator, Tab 2.

PART III. LAW AND ARGUMENT

A. Purpose of the *WURA*

13. The fundamental intent of the *WURA* is to arrange for the orderly and expeditious closing down of the business: (i) while minimizing the losses and harm suffered by creditors and other interested parties, and (ii) by distributing the estate's assets in accordance with the Act.

Kansa General International Insurance Company Ltd. et. Alfieri, [2004] Q.J. No. 9807 at para. 44 (Sup. Ct.) [*Kansa General (2004)*], (citing Gonthier, J. in *Coopérants, Société mutuelle d'assurance-vie c. Raymond, Chabot, Fafard, Gagnon Inc.*, [1996] 1 S.C.R. 900 at 915), Liquidator's Book of Authorities, Tab 1.

Canada (Attorney General) v. Confederation Trust Co. (2003), 65 O.R. (3d) 519 at para. 32 (Sup. Ct. J.), (citing in part *Canada Deposit Insurance Corp. v. Canadian Commercial Bank* (1993), 21 C.B.R. (3d) 12 at 24 (Alta. Q.B.)), Liquidator's Book of Authorities, Tab 2.

14. Courts have recognized the need to bring an end to the filing of claims and establish a cut-off date so that liquidators and trustees in bankruptcy can "finally close their files." In insolvency matters, there must be "a defined beginning and a defined end of the existence of debts."

Kansa General (2004) at paras. 32 and 42, Liquidator's Book of Authorities, Tab 1.

15. Requiring a Liquidator to keep files open "for an excessive duration" would thwart the very underpinnings of insolvency law to ensure an orderly, cost-effective and speedy liquidation of the company's assets.

Kansa General (2004) at paras. 32, 36, 42 and 44, Liquidator's Book of Authorities, Tab 1.

B. The Liquidator and the Court Have Broad Powers

16. The principal duty of a liquidator is to ensure the orderly and expeditious liquidation of the company's assets. Under section 35(1)(h) of the *WURA*, liquidators have authority to do everything necessary to wind-up the affairs of the company and distribute its assets:

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

...

(h) do and execute all such other things as are necessary for winding-up the affairs of the company and distributing its assets....

Kansa General International Insurance Company Ltd. et Alfieri, [2003] Q.J. No. 14726 (Sup. Ct.) [*Kansa General 2003*] at para. 19, Liquidator's Book of Authorities, Tab 3.

WURA, section 35(1)(h), Schedule "B".

17. Courts have held that Section 35(1) of the *WURA* gives liquidators and courts, through whose authority liquidators act, a very wide breadth within which to complete the liquidation process quickly and efficiently. One of the duties of judges supervising the liquidation is to render such orders as necessary to assist the liquidator in this endeavour.

Canada Deposit Insurance Corp. v. Canadian Commercial Bank, 2000 ABQB 440 [CDIC] at para. 36 and citing also *Kansa General International Insurance Co. (liquidator of) v. Maska U.S. Inc.*, [1998] Q.J. No. 1410 (C.A.), Liquidator's Book of Authorities, Tab 4.

Kansa General 2003 at para. 19, Liquidator's Book of Authorities, Tab 3.

18. It is respectfully submitted that this broad scope of authority for liquidators and the courts that supervise them includes the authority to request and to order a bar date for claims.

19. Courts have the express authority under Section 74 of the *WURA* to fix a certain day or certain days on or within which creditors may send in their claims. Section 74 of the *WURA* provides:

74. A court may, with respect to the winding-up of a company, fix a certain day or certain days on or within which creditors of the company may send in their claims, and may direct notice thereof to be given by the liquidator, and may determine the manner in which notice of the day or days so fixed shall be given by the liquidator to the creditors.

WURA, section 74, Schedule "B".

20. The *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") similarly authorizes courts to fix deadlines regarding the filing of claims. Section 12 of the *CCAA* states:

12 Fixing deadlines - The court may fix deadlines for the purpose of voting and for the purposes of distributions under a compromise or arrangement.

CCAA, section 12, Schedule "B".

21. Although section 12 of the *CCAA* does not give courts express authority to grant claims bar orders, it has been interpreted as the source of the court's authority to do so. For example, the commentary on section 12 in Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *The 2013-2014 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 2013), includes the following statement:

The court has the authority to fix a deadline for creditors to file claims, often referred to as a claims bar date for the purposes of voting and for distribution under a compromise or arrangement.

In *CCAA* proceedings, a claims bar order can be made by the judge in charge of the proceedings. The purpose of the order is, amongst other things, to enable creditors to meaningfully assess

and vote on a plan of arrangement and *to ensure a timely and orderly completion of the CCAA proceedings*. [Emphasis added.]

Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *The 2013-2014 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 2013) at N§143(1), Liquidator's Book of Authorities, Tab 5.

22. Courts often look at related statutes when interpreting a provision and it is common ground that bankruptcy legislation and winding-up legislation are closely related.

CDIC at para. 17, Liquidator's Book of Authorities, Tab 4.

Kansa General 2004 at para. 31, Liquidator's Book of Authorities, Tab 1.

23. It is respectfully submitted that the interpretation of section 74 of the *WURA* should be aligned with the interpretation courts have given to section 12 of the *CCAA*. Section 74 should be interpreted to authorize courts to fix a date after which all claims will be forever barred, waived and extinguished.

C. Parts I and III of the *WURA* Must be Read Together and This Creates Uncertainty

24. The *WURA* has separate rules for insurance companies, found in Part III, and rules that apply to all other companies found in Part I.

25. Although Part I of the *WURA* is expressly subject to Part III of the *WURA* in the case of insurance companies, the relationship between the two sets of rules is not specified in *WURA*.

WURA, section 9, Schedule "B".

26. In the case of insurance liquidations, courts have recognized that, in applying Part I, it must be remembered that it was not enacted solely for insurance companies, and it is normal that it does not expressly contemplate every specific insurance situation.

Re Cie d'assurances g n rales Kansa Internationale, 2008 QCCS 100 at para. 15, 2008 CarswellQue 807, Liquidator's Brief of Authorities, Tab 6.

27. Courts have said that a provision in Part I is not inapplicable or qualified in the case of an insurance company unless it is contradicted by a provision of Part III, or its application to the liquidation of an insurance company undermines the legislative intent of Part III.

Kansa General 2004 at para. 37, Liquidator's Brief of Authorities, Tab 1.

28. Section 77 in Part I of the *WURA* entitles claimants having claims submitted after a partial distribution has been made by the liquidator, to participate in future distributions. Part III of the *WURA* contains a separate provision for the position of policyholders participating later in the claims process. Section 168(2) in Part III allows policyholders to rank as creditors for that portion of the policyholders' claims of which the liquidator receives notice after the date the liquidator prepares and files with the Office of the Superintendent, the statement of claimants and creditors required of it under sections 166(1) and 168(1).

WURA, sections 77, 166(1), 168(1), 168(2), Schedule "B".

29. Section 168(2) does not contradict or qualify section 77. Under the interpretive approach adopted by courts, section 77 applies to insurance companies. Specifically, in *Canada (Attorney General) v. Northumberland General Insurance Co.* (1986), 56 O.R. (2d) 609 (H. Ct. J.), the Court held that both sets of rules for addressing claims filed after the circumstances

contemplated in sections 77 and 168(2), or after a deadline for filing is fixed by the court under section 74, apply.

WURA, sections 9, 77, Schedule "B".

Canada (Attorney General) v. Northumberland General Insurance Co. (1986), 56 O.R. (2d) 609 (H. Ct. J.) at paras. 21, 22, 25, 27, 29, 30, 32, 33, Liquidator's Book of Authorities, Tab 7.

30. The uncertainty resulting from the potential that late claimants could continue to advance claims, bolsters the need in Reliance Canada's circumstances for a claims bar order. This uncertainty would likely hinder the success of marketing efforts for an Assumption Reinsurance Transaction.

D. Potential for Prejudice is Low

31. The potential prejudice to policyholders of a claims bar date being established with the proposed notices is low because:

- The last in-force claims-made policy expired in March 2007 (with an extended reporting period expiring May 30, 2007) and so, any claims under claims-made policies can no longer be reported.
- The last in-force occurrence-based policy expired in March 2004 and since the long-tail exposure under Reliance Canada's occurrence-based policies are sufficiently matured such that the likelihood that any asserted claims or prospective or potential claims under those policies would be known to insureds has significantly increased, along with the likelihood that there would be significantly fewer future or contingent claims.

- The liquidation began over 13 years ago and has been widely publicized.
- The date fixed by this Court for filing proofs of claim was over three years ago.
- The Call for Policy Loss Claims was widely publicized and proofs of claim were actively solicited. That process called for all Policy Loss Claims, even contingent claims.
- There were no unexpected claims filed in response to the Call for Policy Loss Claims.

32. It is respectfully submitted that, at this stage, any potential claims of which the Liquidator is unaware are too remote and speculative and are incapable of being valued. Remote and speculative claims of a nature that cannot be valued have been held not to be provable claims in proceedings under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended or the *CCAA*. In Reliance Canada's circumstances, these remote and speculative claims could indefinitely and unfairly hold up completion of Reliance Canada's administration and the successful completion of an Assumption Reinsurance Transaction, contrary to the very intent and purpose of the *WURA*.

Re AbitibiBowater Inc., 2012 SCC 67 at para. 36, [2012] 3 S.C.R. 443,
Liquidator's Book of Authorities, Tab 8.

E. RELIEF SOUGHT

33. Given: (i) the low potential for prejudice; (ii) the court's recognition that an insolvent estate ought not to remain open indefinitely; (iii) that claimants were given full opportunity to file their claims, including their contingent claims; (iv) the passage of time; and (v) that a claims

bar date would facilitate an Assumption Reinsurance Transaction, the Liquidator respectfully submits that a claims bar date is reasonable in the circumstances.

34. The Liquidator requests that this Honourable Court grant the claims bar order it seeks in its Motion Record.

**ALL OF WHICH IS RESPECTFULLY
SUBMITTED**



SCHEDULE "A"

AUTHORITIES

1. *Kansa General International Insurance Company Ltd. et. Alfieri*, [2004] Q.J. No. 9807 (Sup. Ct.).
2. *Canada (Attorney General) v. Confederation Trust Co.* (2003), 65 O.R. (3d) 519 (Sup. Ct. J.).
3. *Kansa General International Insurance Company Ltd. et Alfieri*, [2003] Q.J. No. 14726 (Sup. Ct.).
4. *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, 2000 ABQB 440, 269 A.R. 49.
5. Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *The 2013-2014 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 2013).
6. *Re Cie d'assurances générales Kansa Internationale*, 2008 QCCS 100, 2008 CarswellQue 807.
7. *Canada (Attorney General) v. Northumberland General Insurance Co.* (1986), 56 O.R. (2d) 609 (H. Ct. J.).
8. *Re AbitibiBowater Inc.*, 2012 SCC 67, [2012] 3 S.C.R. 443.

SCHEDULE “B”

LEGISLATION

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

Subject to Part III

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

Powers

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

...

- (h) do and execute all such other things as are necessary for winding-up the affairs of the company and distributing its assets;...

Time for sending in claims

74. A court may, with respect to the winding-up of a company, fix a certain day or certain days on or within which creditors of the company may send in their claims, and may direct notice thereof to be given by the liquidator, and may determine the manner in which notice of the day or days so fixed shall be given by the liquidator to the creditors.

Rank of claims sent in after distribution started

77. Where any claim or claims are sent in to the liquidator after any partial distribution of the assets of a company, the claim or claims, subject to proof and allowance as required by this Act, shall rank with other claims of creditors in any future distribution of assets of the company.

Liquidator to prepare statement of claimants and creditors

166. (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 that connection of all claims that have arisen in accordance with the terms of the policies of which the liquidator has notice.

Copy of statement filed in Office of the Superintendent

- **168. (1)** A copy of the statement referred to in subsection 166(1), certified by the liquidator, shall be filed in the Office of the Superintendent, after not less than 30 days' notice of the liquidator's 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 published at or nearest the place where

the head office of the company or the chief agency of the company, as the case may be, is situated.

When policyholder to rank as creditor

168. (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 a statement referred to in subsection 166(1) or an amended statement referred to in subsection 166(4) shall rank on the assets only for the values entered in the statement, unless the assets are sufficient to pay all claimants in full, and in that case the policyholder shall rank as a creditor for the balance of the policyholder's claim.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

12 Fixing deadlines - The court may fix deadlines for the purpose of voting and for the purposes of distributions under a compromise or arrangement.

**THE ATTORNEY GENERAL OF
CANADA**

and

**RELIANCE INSURANCE
COMPANY**

Court File No: 01-CL-4313

Applicant

Respondent

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at TORONTO

**FACTUM OF KPMG INC.,
LIQUIDATOR OF RELIANCE CANADA
Motion Returnable June 25, 2014**

GOODMANS LLP
Barristers & Solicitors
333 Bay Street, Suite 3400
Toronto, Canada M5H 2S7

Gale Rubenstein LSUC#: 17088E
Cathy Costa LSUC#: 46582L
Tel: 416-979-2211
Fax: 416-979-1234

Lawyers for KPMG Inc.,
Liquidator of Reliance (Canada)