# QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2019 SKQB 119**

Date: **2019 05 03**
Docket: QBG 2314 of 2013
Judicial Centre: Regina

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BETWEEN:

SEKERBANK T.A.S.

PLAINTIFF

- and -

HÜSEYIN ARSLAN and MURAD AL-KATIB

DEFENDANTS

**Counsel:**

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|---|---|
| Peter Bergbush | for the plaintiff |
| Kevin Mellor | for Hüseyin Arslan |
| Deron Kuski, Q.C. | for Murad Al-Katib |

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JUDGMENT
MAY 3, 2019

BARRINGTON-FOOTE J.A.
*ex officio*

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## I. INTRODUCTION

[1] In this action, the plaintiffs assert that a transfer of shares of Alliance GrainTraders [AGT] by the defendant Hüseyin Arslan to the defendant Murad Al-Katib was a fraudulent preference or fraudulent conveyance. On January 9, 2014, a preservation order [Order] was granted in favour of the plaintiff Sekerbank T.A.S. [Sekerbank] pursuant to s. 5 of *The Enforcement of Money Judgments Act*, SS 2010, c E-9.22 [*EMJA*]. The Order, which was granted by consent, prohibits any dealings with 850,000 AGT shares by the defendants, pending a final decision on the merits of the claims

of the plaintiff Sekerbank against Mr. Arslan in Turkey and the conclusion of this action.

[2] There are three applications before me. First, the plaintiffs applied to consolidate or have this action heard together with actions commenced by three other Turkish banks against Mr. Arslan. In *Fibabanka A.S. v Arslan*, 2019 SKQB 94, the court held that those three other actions (QBG 3263, QBG 427 and QBG 430 of 2017) are statute barred by *The Limitations Act*, SS 2004, c L-16.1 and must be struck. For that reason, it is not necessary to consider this application.

[3] Second, the plaintiffs served their affidavit of documents on February 2, 2018. They applied for an order compelling the defendants to serve their affidavits of documents within 30 days as required by Rule 5-5 of *The Queen's Bench Rules*, failing which their statements of defence shall be struck. I assume that application is now moot. If that assumption is incorrect, the plaintiffs are invited to advise the Registrar.

[4] Third, the defendants applied pursuant to s. 8 of the *EMJA* to terminate the Order. This is the fourth such application. It is their position Sekerbank has failed to prosecute the action without delay and no longer meets the condition specified in s. 5(5) of the *EMJA* that it will do so. For the reasons that follow, the defendants' application is denied.

## II. THE LEGAL TEST: SECTION 8 OF *THE ENFORCEMENT OF MONEY JUDGMENTS ACT*

[5] The defendants have applied pursuant to s. 8 of the *EMJA* to terminate a preservation order granted pursuant to s. 5(5) of the *EMJA*. Those provisions are as follows:

> 5(5) The court may grant a preservation order if the court is satisfied that:
>
> (a) the action would, if successful, result in:
>
> (i) a judgment in favour of the plaintiff; or
>
> (ii) an order described in subclause (1)(a)(ii);
>
> (b) if the preservation order is not granted, the enforcement of a judgment or order against the defendant or transferee is likely to be partially or totally ineffective as a result of the disposition of, damage to, dissipation of, destruction of, concealment of or any dealing with property, other than disposition for the purposes of:
>
> (i) meeting reasonable living expenses of the defendant and dependants of the defendant;
>
> (ii) carrying on the business of the defendant in the ordinary course; or
>
> (iii) acquiring income to pay the expenses of defending or responding to the action; and
>
> (c) the action will be prosecuted without delay, other than delay caused by the defendant or transferee.
>
> …
>
> 8(1) A plaintiff, judgment creditor, defendant, judgment debtor or any other person affected by a preservation order may apply to the court to have the preservation order extended, renewed, modified or terminated.
>
> (2) Section 5 applies, with any necessary modification, to an application made pursuant to this section.

> (3) In an application to extend, renew, modify or terminate a preservation order, the onus is on the applicant to establish that the preservation order should be extended, renewed, modified or terminated.
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> (4) On application made pursuant to this section, the court may make any order that the court considers appropriate in the circumstances, including:
>
> > (a) an order doing one or more of the things mentioned in subsection 5(6); and
> >
> > (b) an order extending, renewing, modifying or terminating a preservation order.



[6] The issue on a s. 5(5) application is whether the court is satisfied the three conditions specified in that subsection have been met. Where a defendant applies to terminate a preservation order, the same three conditions are at issue. Where, as here, the order is a consent preservation order, the test is that specified in *Sekerbank T.A.S. v Arslan*, 2014 SKQB 215 at para 55, 450 Sask R 76 [*Sekerbank #1*], which was affirmed in *Arslan v Sekerbank T.A.S.*, 2016 SKCA 77 at para 103, 400 DLR (4th) 193 [*Sekerbank CA#1*]:

> 103 …
>
> > [55] …It is open to the court to terminate a preservation order granted by consent pursuant to s. 8 of the *EMJA* if the applicant shows grounds that would vitiate a contract. It is also open to the court to terminate a consent preservation order if the facts or the law on which the consent order was based have changed to the extent that the plaintiff, as a result of those changes, no longer meets the three conditions specified in s. 5 of the *EMJA*. Failing that, the court should not terminate the order, or revisit the issues which the parties intended to resolve through that order. That is so regardless of whether the order is expressly made "until further order of the court", unless there is evidence that the parties intended that

> phrase to mean that the order was not intended to resolve the issues….

[7] As noted above, this is the fourth application to terminate the Order. Here, as on the prior applications, the issue is limited to compliance with the third condition, being the obligation to prosecute the action without delay. The correct approach in relation to this obligation in the context of a s. 8 application was described by Richards C.J.S. in *Arslan v Sekerbank T.A.S.*, 2018 SKCA 77 [*SekerbankCA#2*], which dealt with the third application to terminate:

> 48 As this test contemplates, a plaintiff's failure to diligently advance litigation will be a factor in forming a judge's determination of how to exercise his or her authority under s. 8 when faced with an application to terminate a preservation order obtained by consent. But, that said, a preservation order is not ended automatically because of a failure to move the underlying action forward with sufficient dispatch. In this regard, the Chambers judge correctly rejected the submission of Messrs. Arslan and Al-Katib that, as a matter of legal principle, he somehow was necessarily required to terminate the Consent Order if he found Sekerbank had failed to prosecute the Second Action without delay. The *EMJA* must be read so as to preserve the discretion conferred by s. 8 on a judge. Section 5(5)(c) anticipates proceedings being advanced without delay should a preservation order be granted. However, the consequences of failing to satisfy this expectation must be resolved in the context of s. 8.
>
> 49 I also agree with the Chambers judge that, in considering whether proceedings have been advanced without delay as contemplated by s. 5(5)(c), it is necessary to consider the whole of the relevant circumstances. In other words, the meaning of "without delay" is very contextual. See: *Sekerbank #1* at para 69. I endorse the Chambers judge's caution against adopting an overly literal view of the concept:
>
> > [34] However, I do not read the requirement that the action "be prosecuted without delay..." to mean that the plaintiff must litigate as if

> speed is the only consideration. Rather, the plaintiff must proceed expeditiously, in a manner intended to conclude the action as soon as is reasonably possible. Further, while the plaintiff must be held to a high standard, its actions should not be measured against a standard of perfection, with the benefit of hindsight.



## III. BACKGROUND

[8] Sekerbank commenced this action December 12, 2013. Its purpose was described in S*ekerbank #1*, which dealt with the first application to terminate the Order [first application]:

> 1 The plaintiff alleges that the defendant Hüseyin Arslan has defaulted on his obligation to pay the plaintiff $13,813,544.88 pursuant to certain guarantees. Mr. Arslan denies that the guarantees are binding or enforceable. The plaintiff has pursued various legal actions in Turkey in an attempt to prove and enforce those guarantees.
>
> 2 This action results from the plaintiff's concern that it will be unable to realize on any judgment which it may obtain in Turkey. The plaintiff wishes to ensure that it will be able to enforce that judgment against certain shares that Mr. Arslan transferred to Murad Al-Katib in trust. It accordingly commenced this action, which attacks this transfer as a fraudulent preference or fraudulent conveyance, and, as interim relief, [sought] a preservation order pursuant to s. 5 of *The Enforcement of Money Judgments Act*, S.S. 2010, c. E-9.22 ("*EMJA*").

[9] This description outlines the link between this action and a Turkish action commenced by Sekerbank [Turkish action] to prove that Mr. Arslan is indebted to Sekerbank [Arslan debt]. Indeed, that link is reflected in the Order, which states that it will remain in effect until the disposition of both actions. Simply put, the admission or proof of the Arslan debt is a pre-condition to this action.

[10] The existence of that debt is very much at issue. Mr. Arslan has vigorously defended the Turkish action and both defendants have denied the existence of the Arslan debt in this action. There is no evidence Sekerbank has other potential claims against Mr. Arslan. That being so, if Mr. Arslan prevails in the Turkish action, Sekerbank will not be a creditor and would have no standing to pursue this action: *Hamm v Metz*, 2002 SKCA 11 at paras 29-34, 209 DLR (4th) 385.

[11] The effect of this relationship between the two actions on the plaintiff's statutory obligation to prosecute this action without delay is a central issue on this application. In *Sekerbank #1*, I held that Sekerbank had to satisfy the court that the three-part test to obtain a preservation order specified by s. 5(5) of the *EMJA* had been met in relation to both this action and the Turkish action. In particular, I held (para. 45) that Sekerbank "had to satisfy the court that both the Turkish and Saskatchewan actions would be prosecuted without delay." By the same token, if the defendants could demonstrate that either action would not be prosecuted in accordance with that obligation, the court would terminate the Order under s. 8.

[12] The first application was based on the allegation Sekerbank had either failed to diligently pursue the Turkish action or that the Turkish action had failed. I was not satisfied there had been a sufficient change in the facts or the law in relation to any of the three conditions specified in s. 5(5) of the *EMJA* to justify termination of the Order. *Sekerbank#1* was affirmed in *Sekerbank CA#1*, leave to appeal to SCC refused (February 9, 2017), 2017 CanLII 5372 (SCC).

[13] The defendants made the second application to terminate the Order to the Court of Appeal, in the course of appealing *Sekerbank #1*. There is no written decision disposing of that application. Richards C.J.S. noted in *Sekerbank CA#2* (at para 37) that it was dismissed from the bench, on the basis that the Court of Appeal had no jurisdiction to hear the application and "because it was an inappropriate attempt to circumvent *The Court of Appeal Rules*".

[14] On January 20, 2016, while *Sekerbank #1* was under reserve in the Court of Appeal, the defendants filed the third application to terminate the Order [third application]. The third application, unlike the first, was made on the basis that Sekerbank had failed to prosecute this action without delay. I dismissed the third application in *Sekerbank T.A.S. v Arslan*, 2017 SKQB 205 [*Sekerbank #2*], which was affirmed by the Court of Appeal in *Sekerbank CA#2* on September 24, 2018. Richards C.J.S summarized and disposed of the defendants' position on that appeal as follows (referring to this action as the "Second Action"):

> 50 …I turn now to the particulars of the arguments advanced by Messrs. Arslan and Al-Katib. Most centrally, they contend the Chambers judge erred by proceeding on the basis that the claims in Turkey and the Second Action could not be prosecuted simultaneously. In other words, they contend the Chambers judge erroneously believed the Second Action could not be pursued until matters in Turkey were resolved.
>
> 51 In my respectful view, this line of argument misapprehends the reasoning of the Chambers judge. He did not find, or hold, that Sekerbank could not have done anything to advance the Second Action until the litigation in Turkey had concluded. Rather, he noted there appeared to have been a consensus among the parties that progress on the Second Action should await the outcome of the proceedings in

> Turkey. He went on, noting counsel for Messrs. Arslan and Al-Katib's submission that there had been no such consensus, to nonetheless say it was understandable why Sekerbank had thought otherwise. It was in light of this finding that the Chambers judge decided it would not be appropriate to terminate the preservation order. I see no error in his reasoning on this front.

[15] In *Sekerbank#2*, I also found there were other circumstances that weighed against the defendants' application. I noted that the delays in the Turkish action were attributable not to Sekerbank, but to Mr. Arslan and third parties. Further, Sekerbank had advised it was prepared to proceed with this action and had applied on March 14, 2016 for the appointment of a case management judge. I was appointed for that purpose March 17, 2016.

## IV. THE CURRENT APPLICATION TO TERMINATE

[16] The defendants filed this, the fourth application, to terminate the Order, on February 8, 2018, two days after the Court of Appeal reserved its decision in *Sekerbank CA#2*. This application was heard April 18, 2018 and the decision was reserved. *Sekerbank CA#2*, which related to the third application, was decided September 24, 2018. For reasons that are not clear, this current application was removed from the reserve list in September 2018. In February 2019, that error was corrected.

[17] In the result, 12 months have passed since this application was heard. However, I have not taken account of anything that occurred during that period. As the defendants note, the third application was concerned with delay in prosecuting this action from January 9, 2014 to March 17, 2016, the date of the order appointing the case management judge. The defendants submit this application to terminate relates solely to the delay in prosecuting this action

from March 18, 2016 to February 8, 2018. In my view, I can properly take account of what occurred from March 18, 2016 to April 18, 2018, the date this application was heard.

[18] The defendants filed the March 28, 2018 affidavit of the defendant, Murad Al-Katib, in support of this application. That affidavit notes the last statement of defence was filed in this action January 8, 2014, and that Sekerbank was accordingly obliged by *The Queen's Bench Rules* to serve its affidavit of documents by February 7, 2014. It says Sekerbank finally served its affidavit of documents February 2, 2018, and that Mr. Al-Katib was compiling documents and expected to serve his affidavit of documents before or shortly after the hearing. That affidavit was not filed before the hearing.

[19] Mr. Al-Katib's affidavit also addressed what he considered to be prejudice arising from the continuation of the Order. Mr. Al-Katib received the AGT shares from Mr. Arslan as trustee for a trust known as the Carme Trust. He asserts that he has been prejudiced by being unable to exercise his fiduciary duties to the Trust, by being unable to defeat Sekerbank's claim, and by having to annually disclose to securities regulators that he is the subject of a fraud claim. Mr. Al-Katib deposed that this duty of disclosure "creates personal anguish, embarrassment and prejudice". He did not specify any prejudice other than anguish and embarrassment.

[20] Sekerbank filed the April 3, 2018 affidavit of Dr. Oztunc in response to the application to terminate. Dr. Oztunc's affidavit provides an update as to the progress of the Turkish action. It appends copies of documents from Turkish courts which confirm that on January 27, 2017 and June 9, 2017, Mr. Arslan was found to be jointly and severally liable to

Sekerbank for 22,988,097 Turkish lira, plus interest of 40% for a period in excess of three years. Mr. Arslan and others appealed those judgments, and in the course of doing so, successfully petitioned for relief from the obligation to post an appeal fee on the basis of, among other things, a certificate of insolvency which stated that the defendants in those proceedings "do not possess the wealth to cover the debt". As to the progress of the appeals, Mr. Oztunc deposed as follows:

> 14. …Based upon the current status of the Turkish court proceedings, I anticipate that the two cases against Huseyin Arslan will be fully completed through all levels of appeal by September 2018. However, it is possible that Huseyin Arslan or the other defendants may make further court applications which could result in additional delay.

[21] Mr. Oztunc also deposed that in November 2017, counsel for Sekerbank and for the defendant Alternatifbank A.S. [Alternatifbank] - which was added as a party by *Sekerbank #2* - travelled to Istanbul to meet with representatives of the plaintiffs and the two other Turkish banks that had commenced actions in Saskatchewan and applied for joinder. Mr. Oztunc says counsel discussed the obligation to make full disclosure of all relevant documents with his clients and that as of April 3, 2018, Mr. Oztunc had provided counsel with English translations of "most if not all of the relevant documents for each of the four clients".

## VI. ANALYSIS

[22] As noted above, the link between the Turkish action and this action meant that to obtain a preservation order, Sekerbank "had to satisfy the court that both the Turkish and Saskatchewan actions would be prosecuted without delay." There is no suggestion it had failed or would fail to discharge

its obligations in relation to the Turkish action. There is, however, a fundamental disagreement between the parties as to the content of Sekerbank's obligation in this action, in large part due to the relationship between the two actions.

[23] The defendants submit that Sekerbank was obliged to take whatever steps it could in this action as soon as reasonably possible. They say Sekerbank was not entitled to take a sequential approach, pursuing the Turkish action first and this action only if and when Sekerbank proved its debt claim against Mr. Arslan. They note that Sekerbank knew, as a result of the first application, that the defendants did not agree to a sequential approach. They also emphasize that Sekerbank said during the second application that it was ready to proceed without delay and submit that its agreement to do so was part of the foundation for the Order. They express scepticism that Sekerbank - having failed to abide by that commitment - will act differently in future than it has in the past.

[24] Based on this general framework, the defendants submit Sekerbank was obliged to take several specific steps contemplated by *The Queen's Bench Rules*. They say Sekerbank was obliged to promptly serve its affidavit of documents, rather than delaying until February, 2018. They also say Sekerbank should have completed questioning in relation to all issues but the existence and amount of the debt, and adjourned questioning in relation to those issues pending the conclusion of the Turkish action. Indeed, it is their position a pre-trial conference could have taken place, that Sekerbank could have proved the Arslan debt in this action, notwithstanding the ongoing

proceedings in Turkey, and that this action accordingly could have been concluded.

[25] The defendants suggest Dr. Oztunc's evidence is unreliable, as he has been wrong before. Nonetheless, they also point to his opinion that the Turkish action should be completed in September. They say that if he is correct, there will be substantial delays going forward, as most of the steps necessary to conclude this action have not yet been taken. They argue those delays could have been avoided.

[26] The defendants also submit Sekerbank's failure to move the action forward has denied the defendants the ability to apply for summary judgment. In their view, that "prejudice", as well as the embarrassment caused to Mr. Al-Katib, should weigh against Sekerbank in the delay analysis. Indeed, they suggest litigation is prejudicial in and of itself and that delay will make it more difficult to find documents and may have resulted in the death of witnesses.

[27] With respect, it is my view the defendants' approach to the legal test is flawed in several respects. As noted above, Sekerbank was not obliged to litigate as if speed is the only consideration. They were obliged to proceed expeditiously, in a manner intended to conclude the action as soon as is reasonably possible. As such, I must decide whether they have failed to prosecute this action in a manner that will achieve that result. Their actions must not be measured against a standard of perfection. I must consider all relevant circumstances. In this case, that includes the key circumstance that proof of the Arslan debt in the Turkish action is a pre-condition not only to the conclusion of this action, but the continuation of this Sekerbank claim at all.

[28] Further, and even if I conclude that Sekerbank failed to meet this obligation in the period from March 28, 2016 to April 18, 2018, I am not obliged to terminate the Order. As noted above, Richards C.J.S. addressed this issue in *Sekerbank CA#2*, at para 48. It was also addressed in *Sekerbank#2*, as follows:

> 38 The defendants also submit that I must terminate the Order if I find that the plaintiff has failed to prosecute the action without delay. With respect, I do not agree. Section 5(5)(c) is forward looking. It is open to me to continue or modify the Order, provided that I am satisfied — as stated in s. 5(5)(c) — that the action will be prosecuted without delay. A past failure to prosecute without delay is relevant, but not conclusive.

[29] In my view, Sekerbank was not entitled to simply await the final outcome of the Turkish action. It was not necessary, and, given that a preservation order is an extraordinary remedy, would not be reasonable to delay document discovery and oral questioning pending the final outcome of the Turkish action. Sekerbank was obliged to deliver its affidavit of documents and conduct questioning in a manner intended to enable this action to be concluded as soon as reasonably possible. In my view, the evidence supports the conclusion that Sekerbank achieved that goal in relation to the affidavit of documents by serving it when it did. I am also satisfied there was sufficient time to conduct questioning before the predicted September, 2018 conclusion of the Turkish proceedings.

[30] It is also relevant that there is no suggestion Sekerbank has failed or will fail to meet its obligation to pursue the Turkish action without delay. For the reasons outlined above, that is part and parcel of its obligation to prosecute this action without delay and as such, weighs in its favour on this

application. Further, although Sekerbank did not serve its affidavit of documents until February 2, 2018, there was a relatively brief delay between the meetings between the plaintiffs and counsel in Turkey to discuss document production and the service of the affidavit. That supports the conclusion that Sekerbank has taken appropriate steps to directly advance this action since at least November 2017.

[31] I do not agree Sekerbank was obliged to request a pre-trial conference. Settlement is the central purpose of a pre-trial under *The Queen's Bench Rules*: Rule 4-12. There is nothing to suggest a settlement might have been in the cards. I note that, in this case, there is more than a simple denial of the Arslan debt and other elements of the causes of action pled by Sekerbank. There is, in addition, ample evidence of Mr. Arslan's demonstrated willingness to litigate the debt issue to the bitter end. I agree with the submission of counsel for Sekerbank that the entire complexion of this action would change if Sekerbank proves the existence of the Arslan debt.

[32] I am also entirely unsympathetic to the curious suggestion that Sekerbank should have litigated the Arslan debt in this action, notwithstanding the continuation of the Turkish action. That die has been cast.

[33] Several other issues raised by the defendants call for comment. First, Mr. Arslan submitted I should take account of the fact Sekerbank has failed to comply with the spirit and intent of *The Queen's Bench Rules*, and in particular, with the foundational Rules. I am not satisfied there has been such a breach. In any event, that is not the issue. This is not an application to strike for want of prosecution or for abuse of process. It is a s. 8 *EMJA* application.

The legal test is that described above. The issue of delay must be assessed accordingly.

[34] Second, I am not satisfied that Sekerbank has, as the defendants suggest, improperly used the Order as a tactical tool to extract a settlement. The extraordinary delay in this case is the result of the Turkish action. There is no evidence that delay is tactical. To the contrary, the evidence supports the conclusion it is primarily attributable to Mr. Arslan and other guarantors who are defending the Turkish action. Further, there is ample evidence Sekerbank may be unable to collect some or all of any judgment if the Order is terminated.

[35] Third, the defendants allege they have been prejudiced by the preservation order. The evidence and arguments relating to prejudice are extremely thin. Further, evidence of prejudice of the sort identified by the defendants is irrelevant in any event. Here, too, the point is that the factors that are properly considered on an application to terminate an order pursuant to s. 8 of the *EMJA* are those specified in s. 5(5). The specific factor at issue is delay. Sekerbank was and is obliged to proceed expeditiously in the sense specified in the case law. The fact the defendants' interests are affected by the Order does not mean Sekerbank was obliged to do more, or to do it sooner. It was not obliged to call for a pre-trial or to prove the Arslan debt in this action.

[36] As noted in *Sekerbank#1*, if the beneficiary of a preservation order continues to meet the three conditions specified in s. 5 of the *EMJA*, the court should not terminate the order. The fact a defendant has been or may be prejudiced by a preservation order does not change the analysis, including what constitutes delay in the circumstances of the case. Nor does prejudice

constitute an independent factor that could justify termination despite the fact the three conditions have been met. On a s. 8 *EMJA* application, the court does not consider the balance of convenience.

[37] For these reasons, it is my opinion that during the period at issue on this application, Sekerbank complied with its obligation to prosecute this action without delay within the meaning of the case law. It is fair to say it proceeded as if there was no great rush. As it happened, it was proven correct. In these circumstances, that is so despite the fact the Order had reached the ripe old age of four years and three months when this application was heard.

[38] I would finally note that just as a failure to prosecute without delay in the past does not mean a preservation order must be terminated, compliance with that obligation in the past does not mean the order cannot be terminated. The ultimate question on an application of this kind may be characterized as prospective. That is, have the applicants discharged the onus to satisfy me that Sekerbank will not prosecute this action without delay?

[39] Here, I must, among other things, consider the fact that Sekerbank said in March, 2016 that it was ready to pursue this action and applied for case management in an attempt to buttress its position. However, it did not move forward promptly after making those representations. Indeed, there is no evidence it did anything to directly advance this action until November, 2017.

[40] Having considered all of the circumstances, I am not satisfied Sekerbank will not prosecute this action without delay. If the defendants conclude they failed to comply with their obligation to prosecute without

delay after April 18, 2018, they have the right to pursue another application to terminate.

## VII. CONCLUSION

[41] For these reasons, the defendants' application to terminate the Order is dismissed, with one set of costs on Column 2 of the Tariff.

J.A.
B. A. BARRINGTON-FOOTE
*ex officio*