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Shareholder Liability in Nova Scotia Unlimited Companies

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Unlimited Companies incorporated under the Nova Scotia Companies Act (NSULCs) have, in recent decades, become recognized as tax efficient forms of business organizations. NSULCs differ from conventional business corporations in that their shareholders are exposed to liability for corporate obligations under the enabling legislation. This paper attempts to provide an analysis of the precise nature of unlimited liability faced by shareholders in such entities in response to recent bankruptcy litigation in the U.S. that raised the issue of the relationship between a shareholder's liability for a debt of the firm under the enabling legislation and under a contractual guarantee provided by the shareholder for the same debt. It is argued that the enabling legislation does not create a separate and independent claim against the shareholder and a contractual guarantee for a debt of the firm acts as a substitute for enforcing liability against the shareholder.

Au cours des dernières décennies, les sociétés à responsabilité illimitée constituées en vertu de la Companies Act de la Nouvelle-Écosse ont été reconnues comme étant des structures d'entreprise fiscalement avantageuses. La différence entre ces sociétés et les sociétés commerciales conventionnelles réside dans le fait que leurs actionnaires peuvent être tenus responsables des obligations de la société en vertu de la loi habilitante. Cet article tente d'analyser la nature de la responsabilité illimitée assumée par les actionnaires de ces entités, à la suite de récents litiges en matière de faillite aux États-Unis qui ont soulevé la question de la relation entre la responsabilité d'un actionnaire pour une dette de la société en vertu de la loi habilitante et sa responsabilité en vertu d'une garantie contractuelle qu'il aurait donnée pour la même dette. L'auteur avance que la loi habilitante ne crée pas de recours séparé et indépendant contre l'actionnaire, et qu'une garantie contractuelle pour une dette de la société est une autre façon de forcer l'actionnaire à assumer sa responsabilité.

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Introduction

I. *Analysis*

1. *The history and policy of s. 135 of the NSCA*
2. *Statutory interpretation of s. 135 of the NSCA*
3. *The nature of shareholder liability under s. 135*
4. *The rule against double proof*

Conclusion

Introduction

The Nova Scotia *Companies Act*¹ is one of the oldest general incorporation statutes in Canada. It is also the only general incorporation statute in Canada to have provided for the option to incorporate an unlimited company (NSULC) throughout its history.² Separate legal personality and limited liability are widely recognized as two of the most essential characteristics of conventional business corporations.³ The concept of separate corporate legal personality means that the corporation is a person in law distinct from its shareholders.⁴ Limited liability signifies that the liability of shareholders for the debts and other obligations of the corporation is limited to the amount, if any, remaining unpaid on their shares.⁵ An NSULC, however, differs from a conventional business corporation in that its shareholders

1. RSNs 1989, c 81 [NSCA].

2. Recently, Alberta and British Columbia have added the option to incorporate an unlimited company to their general incorporation statutes; see *Business Corporations Act*, RSA 2000, c B-9, s 1.1 [ABCA] and *Business Corporations Act*, SBC 2002, c 57, s 10 [BCBCA]. However, the nature of a shareholder's liability in unlimited companies incorporated under these statutes differs from that under the NSCA. Under both statutes, a shareholder's liability is defined as being joint and several; ABCA, s 15.2; BCBCA, s 51.3. Therefore, the analysis of the nature of a shareholder's liability in NSULC's presented in this paper does not apply to unlimited companies incorporated under the Alberta or British Columbia legislation.

3. General corporate law textbooks tend to include lists describing the essential characteristics of business corporations and such lists invariably include separate legal personality and limited liability. See, e.g., Christopher C Nicholls, *Corporate Law* (Toronto: Emond Montgomery, 2005) [Nicholls, *Corporate Law*] at 59, 62-82; Bruce Welling, *Corporate Law in Canada: The Governing Principles*, 3d ed (Mudgeeraba, Queensland: Scribblers, 2006) at 81-85; Paul L Davies & Sarah Worthington, *Gower and Davies' Principles of Modern Company Law*, 9th ed (London: Sweet and Maxwell, 2012) at 35-42; Reinier Kraakman et al, *The Anatomy of Corporate Law*, 2d ed (Oxford: Oxford University Press, 2009) at 5-11.

4. The principle that a corporation is a separate legal person has statutory support. See, e.g., *Canada Business Corporations Act*, RSC 1985, c C-44, s 15(1) [CBCA]; *Interpretation Act*, RSC 1985, c I-21, s 35(1).

5. The principle of limited liability is usually provided for in Canadian general incorporation statutes. See, e.g., CBCA, *ibid*, s 45(1).

do not benefit from limited liability.⁶ In other words, such entities expose shareholders to liability for corporate obligations, pursuant to a defined statutory regime.⁷

For much of the twentieth century, NSULCs were rarely incorporated.⁸ However, the U.S. implemented check-the-box rules in the 1990s, which provided that a Canadian incorporated entity could be treated as a flow-through entity for tax purposes if its shareholders had unlimited liability.⁹ U.S. tax professionals were quick to realize that NSULCs would be very attractive to U.S. investors for the purposes of cross-border investment and tax planning, which led to a surge in the number of such entities being incorporated.¹⁰ Given that NSULCs have only relatively recently emerged as a prominent form of business organization, it is not surprising that the precise nature of the unlimited liability faced by shareholders in such entities has been subject to little scholarly analysis.¹¹ This paper attempts to fill that gap.

Recently, in *Re Smurfit-Stone Container*,¹² the United States Bankruptcy Court for the District of Delaware had the opportunity to comment on the nature of shareholder liability in NSULCs. In that case, the debtors were a group of companies and included Finance II, an NSULC incorporated under the *NSCA*. Smurfit-Stone Container Enterprises (SSCE) was the parent corporation shareholder of Finance II. Shortly after the debtors had filed for bankruptcy, the trustee in bankruptcy for Finance II filed a proof of claim against SSCE for \$222,647,120 asserting that it was responsible, pursuant to the member liability provisions of the *NSCA*, for the debts and liabilities of Finance II. However, SSCE had fully guaranteed the repayment of these debts and liabilities and had already made a distribution to the relevant creditors on account of the guarantee. Therefore, the debtors objected to the claim, arguing that double recovery on a single debt was impermissible. Specifically, they argued that the claim under the *NSCA* was duplicative of the already-paid guarantee claim because the underlying debt for the claims was the same. As a result,

6. The *NSCA* itself refers to shareholders as “members” and in this paper the two expressions used to denote equity investors in NSULC’s are used interchangeably.

7. *NSCA*, *supra* note 1, s 135.

8. Sarah P Bradley, *Nova Scotia Companies Act & Commentary*, 2014 edition (Toronto: LexisNexis Canada, 2013) at 8. Virtually no NSULCs were incorporated prior to 1996; Wayne D Gray, “Corporations as Winners Under CBCA Reforms” (2003) 39 CBLJ 4 at 23, note 124.

9. Barry D Horne, “The Nova Scotia Unlimited Company: Surf and Turf” in *Report of the Proceedings of the Fifty-seventh Tax Conference, 2005 Conference Report* (Toronto: Canadian Tax Foundation, 2006) 26:1 at 26:15 to 26:20.

10. For a technical explanation of the utility provided by an NSULC, see *ibid* at 26:20 to 26:38.

11. Bradley, *supra* note 8 at 78-79.

12. *In Re Smurfit-Stone Container Corp*, 411 BR 111 (Del Bankr Ct 2011) [*Smurfit-Stone*].

the relevant creditors had already been compensated for their loss. On the other hand, the trustee in bankruptcy argued that the claim under the guarantee and the claim under the *NSCA* were not duplicative since they stemmed from two different liabilities. Specifically, the trustee argued that the claim under the *NSCA* was being asserted against SSCE on behalf of Finance II and the claim under the guarantee was being asserted by the creditors on account of SSCE's direct liability as the guarantor.

Ultimately, the U.S. court denied the trustee in bankruptcy's claim under the *NSCA* but on the basis of a different argument made by the debtors. The member liability provisions of the *NSCA* explicitly permit parties to contractually waive or limit the statutory liabilities of members that arise from the winding-up of an NSULC.¹³ The relevant creditors of the NSULC in the case at bar were noteholders whose investment was governed by a trust indenture. This indenture contained a no-recourse provision and the debtors argued, alternatively, that this provision barred the claim under the *NSCA*. The court agreed and found that, because SSCE was a party covered by the no-recourse provision, the claim against it under the *NSCA* member liability provisions was disallowed. Given that the dispute was resolved by way of the language in the trust indenture, the court declined to comment further on the nature of shareholder liability in NSULCs.¹⁴

This paper will undertake the analysis of the nature of shareholder liability in NSULCs that would be necessary if, as was not the case in *Smurfit-Stone*, creditors of the NSULC have not explicitly waived the claim under the *NSCA* against members of the NSULC for its debts and liabilities. The member liability provisions in s. 135 of the *NSCA* provide that shareholders of NSULCs shall "be liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities..."¹⁵ This statutory mechanism under the *NSCA* will be referred to as a contribution claim. However, members of NSULCs (such as SSCE in *Smurfit-Stone*) may additionally provide a guarantee directly to creditors of the NSULC for the latter's debts and liabilities to those creditors. Such a contractual claim is referred to as a guarantee claim. Whether both a contribution claim and a guarantee claim are allowable against the same member concurrently has much to do with how the nature of shareholder liability in NSULCs under the *NSCA* is understood.

13. *NSCA*, *supra* note 1, s 135(f).

14. *Smurfit-Stone*, *supra* note 12 at note 17.

15. *NSCA*, *supra* note 1, s 135.

It is argued that a contribution claim against members of NSULCs is not a separate and independent claim held by the NSULC. Instead, it is merely a procedural mechanism for the collection of claims against the NSULC held by creditors of the NSULC from members of the NSULC. An historical and policy analysis of the *NSCA* and the contribution claim provided in it will illustrate that it exists to ensure that shareholders may be held accountable for the debts of their firm without the potential for abuse and unfairness associated with the prior statutory vacuum under which individual creditors could bring their own direct actions against individual shareholders. It does not and was not intended to create a new or independent liability owed to the NSULC by its members. Therefore, it follows that a contribution claim is redundant where an individual member and creditor have agreed privately on direct liability by way of a contractual guarantee as the guarantee claim acts as a substitute for enforcing liability against the member through a contribution claim.

I. *Analysis*

It has been noted recently that the contribution claim mechanism set out by the *NSCA* imposes a “unique form of unlimited liability on its members that is distinguishable from the liability of a partner for partnership obligations or a guarantor for a guarantee debt.”¹⁶ Specifically, it has been pointed out that that, under the statutory contribution claim mechanism, “the liability of a [NSULC] member is to the corporation only.”¹⁷ The analysis that follows refutes the notion that, as was argued by the trustee in bankruptcy in *Smurfit-Stone*, a contribution claim under s. 135 amounts to a liability imposed upon members to the NSULC. The underlying policy and objective of s. 135 is that members of NSULCs should be held accountable for the debts incurred by their firms through a unified, fair and orderly mechanism that avoids the chaos experienced under prior statutes when individual creditors were allowed to assert their claims directly. The statutory provisions do not (and were not intended to) impose double liability on a member who separately agreed to be accountable for a company debt through an express guarantee. Understanding s. 135 as a separate liability owed by shareholders to the company conflates the distinction between the creation of a liability and how a liability is collected. In that regard, the *NSCA* does not create any debts but instead

16. Bradley, *supra* note 8 at 83.

17. *Ibid* at 84. Bradley notes also that the principal distinguishing feature of a contribution claim that makes it different from guarantor liability is that it is based in statute. While this is undoubtedly true, it does not follow logically that a contribution claim cannot relate to the same debt as a guarantee despite the latter being based in contract.

deals merely with the scope and manner in which liability for company-created debts can be collected.

Under the *NSCA*, liability for debts owed to the creditors of an NSULC extends to each member as a contributor and the ability to pursue members on that liability for the company's debts is vested in a liquidator or trustee in bankruptcy in order to prevent the unfairness and waste of judicial resources that resulted when, as was permitted under prior statutory constructions, individual creditors brought their own direct actions against individual members.¹⁸ Thus, although a claim for contribution under s. 135 is pursued by a trustee, the claim itself is for debts owed to the company's creditors and such a debt can be included in only one judgment against a particular member even when, as in *Smurfit-Stone*, the member could be held liable for that debt as a guarantor as well as a contributor. This conclusion is supported by an analysis of the history, policy and wording of s. 135. Alternatively, even if the contribution claim mechanism created by s. 135 is understood as being a separate and independent claim held by an NSULC against its members (as opposed to a collection mechanism for claims held by creditors), it is argued that such a claim would not be allowable concurrently with a guarantee claim pursuant to the common law rule against double proof because, despite the two claims then being held by different parties, they are still both for the same debt as against the same debtor.

1. *The history and policy of s. 135 of the NSCA*

First enacted in 1900, the *NSCA* is modeled on England's *The Companies Act 1862*.¹⁹ The *NSCA* has never been a complete code of corporate law and, while it has been amended over time, it has not been thoroughly modernised.²⁰ As a result, the NSULC form of business organization remains grounded in the old English memorandum and articles of

18. *The Solicitors Journal & Reporter* (10 January 1857) at 21, online: Hathi Trust Digital Library <<http://babel.hathitrust.org>>.

The costly litigation in the matter of the Royal British Bank has as yet done no service to any of the parties concerned. The shareholders have got no relief, and the depositors are in much the same position as at first, with the exception that some months have been lost and some thousands of pounds have been expended, which would otherwise have gone to swell their dividend. But the ruin and the waste that we have already seen are nothing to that which may be shortly expected. It is competent for every one of the six thousand creditors to take proceedings against each of the two hundred and eighty unhappy shareholders. Who can estimate the devastation which may ensue, or the frightful addition which the costs of innumerable actions may make to liabilities already sufficiently heavy?

19. (UK) 25 & 26 Vict, c 89 [*1862 Act*]. See FW Wegenast, *The Law of Canadian Companies* (Toronto: Carswell, 1979) at 24.

20. The *NSCA* has been amended substantially ten times since its initial enactment. See Bradley, *supra* note 8 at 1.

association model of incorporation and is meant to be interpreted through a combination of statutory interpretation and common law jurisprudence.²¹ Therefore, an understanding of the underlying policy of a contribution claim under s. 135 against members of an NSULC is informed by considering the historical development of the *1862 Act*.²²

The earliest English general incorporation statute was *Joint Stock Companies Act 1844*.²³ Prior to the *1844 Act*, the only incorporated entities were those chartered by the Crown or a special act of Parliament.²⁴ Other firms, including unincorporated joint stock companies, were indistinguishable from ordinary partnerships under English law as none of these were considered separate legal entities and their members were liable

21. K Snider, *A Primer on Nova Scotia Unlimited Liability Companies and Alberta Unlimited Liability Corporations*, 2006 Ontario Tax Conference (Toronto: Canadian Tax Foundation, 2006) 4:1-18.

22. *Interpretation Act*, RSNS 1989, c 235 [Nova Scotia *Interpretation Act*], s 9(5):
 “Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters:
 (a) the occasion and necessity for the enactment;
 (b) the circumstances existing at the time it was passed;
 (c) the mischief to be remedied;
 (d) the object to be attained;
 (e) the former law, including other enactments upon the same or similar subjects;
 (f) the consequences of a particular interpretation; and
 (g) the history of legislation on the subject.”

See also *Antigonish (Town) v Antigonish (County)*, 2006 NSCA 29 at paras 24-25, 241 NSR (2d) 332 where, in considering both the Nova Scotia *Interpretation Act* and the preferred approach to statutory interpretation, the court observed that “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”; quoting Elmer A Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87; and *Barrette v Crabtree Estate*, [1993] 1 SCR 1027 at 1035 where, in considering the interpretation of corporate legislation, the Supreme Court of Canada stated that, “[i]n the interpretation of a statutory provision it is, in my view, advisable to begin with a consideration of its background, however briefly By identifying the purpose of the remedy, this approach sets the parties’ arguments in their proper context while shedding light on the interests at stake.”

23. 1844 (UK) 7 & 8 Vict, c 110 [*1844 Act*].

24. B C Hunt, *The Development of the Business Corporation in England 1800-1867* (Cambridge, MA: Harvard University Press, 1936) at 89. See also *Baroness Wenlock v River Dee Co* (1887), 36 Ch D 674, at 685: “[a]t common law a corporation created by the King’s charter has, *prima facie*, ... the power to do with its property all such acts as an ordinary person can do, and to bind itself to such contracts as an ordinary person can bind himself to” and *Blackstone’s Commentaries on the Laws of England*, 4th ed (Oxford: Clarendon Press, 1770), vol 1, at 475:

When you come to corporations created by statute, the question seems to me entirely different, and I do not think it is quite satisfactory to say that you must take the statute as if it had created a corporation at common law, and then see whether it took away any of the incidents of a corporation at common law. It creates a statutory corporation.... What you have to do is to find out what this statutory creature is and what it is meant to do[.]

for any debts incurred by their business.²⁵ With the passage of the *1844 Act*, joint stock companies were for the first time allowed to be incorporated as entities with legal identities separate from their members. The legislature ensured also, however, that a company's separate legal status would not insulate its members from liability.²⁶ Rather, like members of an ordinary partnership, the members of a joint stock company incorporated under the *1844 Act* were liable for the debts incurred by their firm and a judgment against the company could, after diligent enforcement against the company's property, be executed against the company's members.²⁷ Thus, although businesses were allowed to incorporate as separate legal entities under the *1844 Act*, the liability of members for debts incurred by their company remained the same as "if the said Company had not been incorporated."²⁸

Although the *1844 Act* was amended in 1855 to allow for the incorporation of joint stock companies whose members would have limited liability, the change applied only to companies that, among other things, had at least 25 members and that were expressly registered, named and conspicuously operated as so-called "limited companies."²⁹ Except for

25. D Pitcairn & FL Latham, *Shelford's Law of Joint Stock Companies*, 2nd ed (London: Butterworths, 1870), at 1:

A joint stock company may be defined as an association of individuals for purposes of profit, possessing a common capital contributed by members composing it, such capital being commonly divided into shares, of which each member possesses one or more, and which are transferable by the owner. The business of the association is under the control of certain selected individuals called directors. Such an association was, in the eye of the common law, merely a large partnership, and it was not competent for the individuals composing it to constitute by their union a new persona distinct from the members of whom it was composed. Such a new persona could only be formed by a charter from the crown or by special act of parliament, and when formed was styled a corporation.

26. See the *1844 Act*, *supra* note 23, s 25 [emphasis added]:

And be it enacted, That on the complete Registration of any Company being certified by the Registrar of Joint Stock Companies such Company and the then Shareholders therein, and all the succeeding Shareholders, whilst Shareholders, shall be and are hereby incorporated as from the Date of such Certificate by the Name of the Company as set forth in the Deed of Settlement...; but so as not in anywise to restrict the Liability of any of the Shareholders of the Company, under any Judgment, Decree, or Order for the Payment of Money which shall be obtained against such Company, or any of the Members thereof, in any Action or Suit prosecuted by or against such Company in any Court of Law or Equity; but every such Shareholder shall, in respect of such Monies, subject as after mentioned, *be and continue liable as he would have been if the said Company had not been incorporated.*

27. The *1844 Act*, *supra* note 23, s 66.

28. *Ibid*, s 25.

29. See *An Act for Limiting the Liability of Members of Certain Joint Stock Companies, 1855* (UK), 18 & 19 Vict, c 133 [*1855 Act*]. The conditions included the requirement that the last word in the company's name be "Limited" and that its full name be conspicuous outside of any office or other place where the limited company did business and upon any notices, advertisements, publications, bills of exchange, promissory notes, cheques, bills, invoices, letters or other writings used by the limited company.

these limited companies, the liability of members remained unchanged. They continued to be liable for all debts incurred by their company and continued to be susceptible to direct actions brought by creditors of the company.

By 1856, however, it had become recognized that the ability of creditors to bring direct actions against members for unpaid company debts created perverse incentives and raised important policy concerns. Instead of encouraging fair and rateable treatment, it was incentivising creditors to try to “win the race” by bringing claims against individual members at the earliest opportunity and causing those members to dispose of their assets and leave the jurisdiction. At a policy level, it became necessary to explore alternative ways to preserve the liability of members of unlimited companies for company debts without the unfairness that so often resulted from direct creditor actions.³⁰

The need for an efficient and equitable process for the enforcement of contribution from members led to new statutory provisions under which creditors could be bound by compromises and were restricted in their ability to sue shareholders. Thus, the winding-up of companies, procedurally, was reduced to a single coordinated proceeding where all parties could be treated fairly and rateably instead of multiple and potentially competing proceedings involving individual creditors and shareholders. These legislative innovations paved some part of the way to the consolidation and remodelling achieved by the *1862 Act*.³¹

30. See, Hon Sir N Lindley, *A Treatise on the Law of Partnership, Including its Application to Companies*, 4th ed, vol 2 (Chicago: Callaghan & Company, 1881) at 720-721:

[W]hen [creditors] could not obtain satisfaction from companies, [they] singled out some unfortunate shareholder, and compelled him to pay the whole amount for which judgment had been recovered. This course was in the highest degree cruel; and Parliament was induced, when legislating on joint-stock companies, in 1856, to leave out all those clauses, found in preceding acts, enabling creditors to execute judgments against individual shareholders, and to provide, instead, that creditors should have the power...to cause it to be wound up. The same view prevailed when the acts related to joint-stock companies were remodeled in 1862. Consequently, a creditor of a company registered under the Companies act [sic], 1862, can only execute a judgment obtained against the company by proceeding against the corporate property, and, if necessary, by having recourse to a petition for winding-up the company.

31. See R R Formoy, *The Historical Foundations of Modern Company Law* (London: Sweet & Maxwell, 1923) at 105 and C A Cooke, *Corporation, Trust and Company—An Essay in Legal History* (Manchester: Manchester University Press, 1950) at 170.

The *1862 Act*, while allowing for the incorporation of companies with limited liability, also preserved the concept of unlimited companies.³² Under s. 38 of the *1862 Act*, a provision virtually identical to the current s. 135 of the *NSCA*, unlimited liability remained the default rule and members continued to be liable for payment of the debts and liabilities of the company, but only upon the company being wound up. In other words, the substance of a ULC member's liability for company debts did not change, but s. 38 of the *1862 Act* did change the process through which that liability could be pursued to one that would be fair to all creditors and all members.³³

This mechanism, replicated in s. 135, channels claims against members for their company's debts and liabilities so that they can be brought by a single liquidator or trustee upon the company's winding-up or bankruptcy. The important public policy objectives of these provisions, just as they were when originally adopted in England, were to retain member liability for company-created debts and to avoid the inequity, chaos and confusion of individual claims by creditors against individual shareholders. Through a contribution claim, the claims that otherwise previously would have been brought by individual creditors are statutorily entrusted to the liquidator or bankruptcy trustee alone. The policy behind the mechanism is not to create a new obligation owed by shareholders to the company but rather to unify and facilitate the collection of the shareholders' existing liability for company debts and *pari passu* distribution to creditors.³⁴

Members of a Nova Scotia company are personally liable for the debts and liabilities of their company unless such liability is qualified by

32. It is not entirely clear why the concept of unlimited companies was preserved in 1862. Reasons that have been suggested include unlimited companies have a more efficient regime for voluntary wind-up, unlimited companies might have been an attractive alternative to a general partnership as the former offered somewhat greater protection from member liability, and that there was some wariness of the then relatively novel concept of limited liability companies. See Nicholls, *Corporate Law, supra* note 3 at 83. Unlimited liability, however, as a form of organization continued to be used after 1862; in particular for banks where as a policy matter it was long thought that the interests of depositors should trump those of shareholders. Further failures later in the century brought about changes in UK banking laws; including the introduction in the UK of the colonial concept of double liability shares. See John Turner, "'The Last Acre and Sixpence': Views on Bank Liability Regimes in Nineteenth-Century Britain" (2009) 16 *Financial History Review* 111. The use of double liability shares is illustrated in *Maritime Bank v Troop*, 1889 CarswellNB 77 (WL Can) [*Maritime Bank*].

33. See *Oakes v Turquand* (1867), LR 2 HL 325 at 357 [*Oakes v Turquand*] [emphasis added]: "There is no doubt that the direct remedy of a creditor is solely against the incorporated company."

34. See *In re Whitehouse & Co* (1878), 9 Ch D 595 at 599 [*Whitehouse*] where, on the nature of a member's liability for the debts and obligations of the company, the court stated "[i]t is a mistake to call the [liability to contribute] a debt due to the company" and *In re Paraguassu Steam Tramroad Co (No1)* (1872), LR 8 Ch App 254 at 262 [*Paraguassu*]: "The different sections of the Act...all have in the view the payment, *pari passu* and equally, of the debts due to the creditors...."

an applicable subsection of s. 135 of the *NSCA* which, in terms virtually identical to those of s. 38 of the *1862 Act*, provides as follows:

135 In the event of a company being wound up, every present and past member shall, subject to this Section, be liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities and the costs, charges, and expenses of the winding up and for the adjustments of the rights of the contributories among themselves, with the qualifications following:

- (a) a past member shall not be liable to contribute if he has ceased to be a member for one year or upwards before the commencement of the winding up;
- (b) a past member shall not be liable to contribute in respect of any debt or liability of the company contracted after he ceased to be a member;
- (c) a past member shall not be liable to contribute unless it appears to the court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this Act;
- (d) in the case of a company limited by shares, no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member;
- (e) in the case of a company limited by guarantee, no contribution shall be required from any member exceeding the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up;
- (ea) in the case of an unlimited company, no contribution exceeding the amount, if any, unpaid on the shares in respect of which the member is liable as a past member, shall be required from a past member who was not a member of the company at any time on or after the time the company became unlimited;
- (f) nothing in this Act shall invalidate any provision contained in any contract whereby the liability of the individual members of the contract is restricted, or whereby the funds of the company are alone made liable in respect of the policy or contract;
- (g) a sum due to any member of a company, in his character of a member, by way of dividends, profits or otherwise, shall not be deemed to be a debt of the company, payable to that member in a case of competition between himself and any other creditor not a member of the company, but any such sum may be taken into account for the purpose of the final adjustment of the rights of the contributories among themselves.³⁵

35. *NSCA*, *supra* note 1, s 135.

Section 135 is structured so as to first describe the general nature and extent of a member's default liability; i.e. for all of the company's debts and liabilities.³⁶ Subsections (a) through (g) then list the various qualifications that may apply to limit that liability. Under these provisions, there is no limitation on the liability of a current member of an NSULC for the debts and liabilities incurred by the company unless such liability has been restricted contractually under s. 135(f). Nevertheless, consistent with the *NSCA*'s historical roots, a member's liability for debts and liabilities incurred by an unlimited company does not trigger an obligation to pay such debts unless and until the company has been wound up and its assets are determined to be insufficient to pay all of its debts.³⁷ Like s. 38 of the *1862 Act*, s. 135 of the *NSCA* creates a procedural mechanism whereby the member's liability is enforced by the appointed representative in a winding up; i.e. a liquidator appointed under provincial companies winding-up legislation³⁸ in a voluntary winding-up or a trustee in bankruptcy in a formal bankruptcy proceeding under federal bankruptcy legislation.³⁹

2. *Statutory interpretation of s. 135 of the NSCA*

In *Smurfit-Stone*, the key issue the Delaware bankruptcy court did not have to address, because of the no-recourse provision, was the relationship between a claim for contribution from an NSULC member insofar as it relates to a particular debt that the member has expressly guaranteed. Recall that the trustee in bankruptcy for the NSULC in that case argued that a contribution claim and a guarantee claim are "different claims owed to distinct entities"⁴⁰; the former being owed to the NSULC and the latter to the relevant creditors. Under s. 135, there is no express qualification to the liability of an NSULC member who has contractually guaranteed the NSULC's debt. However, the inference to be drawn from the absence of such an express qualification cannot be that concurrent claims must be allowed against the member as both a statutory contributor and a contractual guarantor. By providing a contractual guarantee for a debt a member does not seek to rely on a defence not contemplated by

36. See also *ibid.*, s 9, which sets out the various liability regimes that can be chosen for members upon incorporation.

37. PW Festeryga, *Nova Scotia Unlimited Liability Companies: What are They and How do They Work?* (Toronto: Canadian Tax Foundation, 1999) at 5.

38. *Companies Winding Up Act*, RSNS 1989, c 82.

39. *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 77 [*BIA*]. Under s 77 of the *BIA*, a trustee in bankruptcy is empowered to collect from and require that each member of a bankrupt company "[c]ontribute the amount unpaid on his shares of the capital or on his liability to the corporation, its members or creditors, as the case may be, under the Act, charter or instrument of incorporation of the company."

40. *Smurfit-Stone*, *supra* note 12 at 114 [footnote omitted].

s. 135. Instead, as a current member of an NSULC, its liability for that debt is unlimited (i.e. not qualified) for the purposes of s. 135, and the contractual guarantee is simply a privately agreed-upon mechanism for the enforcement of that debt.

The question is whether liability for that debt may be enforced through both the guarantee claim and a contribution claim concurrently. A shareholder of an NSULC, such as SSCE in *Smurfit-Stone*, who has guaranteed a particular debt and has already made a distribution under the guarantee claim is not actually disclaiming liability for the NSULC's debts. Rather, the position of SSCE in *Smurfit-Stone* was that it should not be liable for the same debt twice—once as a guarantor and again as a contributor. The relevant question is whether a member may be held liable twice for the same underlying debt merely because double liability is not expressly prohibited by the qualifications listed in s. 135. The absence of an express prohibition against double liability cannot be interpreted as allowing double liability.

In considering whether the lack of an express reference in s. 135 of the *NSCA* with respect to a member contractually guaranteeing a debt amounts to a member being subject to double liability for the guaranteed debt, the provisions need to be analyzed pursuant to the rules of statutory interpretation. As indicated above, the Nova Scotia *Interpretation Act* requires that the interpretation of statutory provisions have regard to, amongst other things, their history and purpose.⁴¹ Although it requires the consideration of a broader set of factors, statutory analysis under the *Interpretation Act* comports with the “so-called modern principle of statutory interpretation” referred to in the leading Canadian treatise on statutory interpretation⁴²; which itself requires statutory words to be read

41. See the *1844 Act*, *supra* note 23. See also *Interpretation Act*, *supra* note 22, s 9(1) [emphasis added]: “The law shall be considered as always speaking and, whenever any matter or thing is expressed in the present tense, *it shall be applied* to the circumstances as they arise, so that effect may be given to each enactment, and every part thereof, *according to its spirit, true intent, and meaning*.”; and s 9(5) which requires consideration of the following: “(a) the occasion and necessity for the enactment; (b) the circumstances existing at the time it was passed; (c) the mischief to be remedied; (d) the object to be attained; (e) the former law, including other enactments upon the same or similar subjects; (f) the consequences of a particular interpretation; and (g) the history of legislation on the subject.”

42. Driedger, *supra* note 22.

“[h]armoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.”⁴³

In describing the nature of an NSULC member’s liability, the use of the words “shall...be liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities.” in s. 135 reflects the intention of the legislature to impose liability upon members to contribute to corporate assets in the event that those assets are inadequate on winding up or bankruptcy.⁴⁴ Of course, by providing a guarantee for a company debt, a member is agreeing to be directly liable for the debt covered by the guarantee. As a consequence, the statutory purpose that a member “shall” be liable is not failed if a contribution claim is denied to the extent of a member’s guaranteed debt because, in fact, the member *is* liable.

Similarly, the use of the words “shall...be liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities” in conjunction with the phrase “subject to this Section” does not indicate that the sub-clauses of s. 135 are the only defences to liability as contributor that are available to a member. The real issue is whether a member that is liable for a company debt as a guarantor also “shall” be liable for that same company debt as a contributor. Section 135 does not explicitly address the question of whether members who have guaranteed a debt are liable to make a contribution under that section for the same debt. The eight qualifications to member liability under s. 135 contemplate only the liability of past members,⁴⁵ the liability of members of limited companies,⁴⁶ the liability of members of companies limited by guarantee,⁴⁷ the liability of members who have contractually limited their liability,⁴⁸ and the effect of sums due to members on their liability.⁴⁹ As such, interpreting s. 135 for the purposes of determining whether a guarantee claim and a contribution claim for the same debt are allowable concurrently requires that adequate weight to be given to the object of the statute and the intention of the legislature.

43. *Ibid* at 87. See also *In re Mayfair Property Co*, [1898] 2 Ch 28 at 35 [*Mayfair Property Co*] [footnote omitted]: “In order properly to interpret any statute it is as necessary now as it was when Lord Coke reported *Heydon’s Case* to consider how the law stood when the statute to be construed was passed, what the mischief was for which the old law did not provide, and the remedy provided by the statute to cure that mischief.”

44. *NSCA*, *supra* note 1, s 135.

45. *Ibid*, s 135(a), (b), (c), and (ea).

46. *Ibid*, s 135(d).

47. *Ibid*, s 135(e).

48. *Ibid*, s 135(f).

49. *Ibid*, s 135(g).

As described above, s. 135 is modeled on an analogous provision of the *1862 Act*. The object of that provision and the intention of the legislature were to create a procedural mechanism for the enforcement of creditor claims against members that protected members from the unfair results of the former rule where members were automatically liable directly to their company's creditors. It follows that where a member has contractually provided a creditor with the ability to bring an action against it directly for a debt owed by the company through a guarantee, the object of s. 135 and the intention of the legislature cannot have been to impose double liability on that member for that debt.

Furthermore, the statutory language itself does not support the conclusion that a contribution claim is a liability owed to the NSULC. Rather, the words describing the liability of a member as being “[t]o contribute to the assets of the company to an amount sufficient for payment of *its* debts and liabilities”⁵⁰ in s. 135 make clear that all contributions are held by the firm for the benefit of its creditors. As explained above, an NSULC cannot itself bring a claim under s. 135 as such a claim arises only upon the NSULC being wound up, which necessarily entails the appointment of a third party to administer the NSULC's estate. The *1862 Act*, upon which the *NSCA* is based, merely changed the mechanism by which the liability of a member for company debts owed to third party creditors is enforced. That mechanism channeled the ability to pursue such a claim to a liquidator or trustee in bankruptcy. A contribution claim for unlimited liability—as distinct from a claim for unpaid shares—is not a

50. *NSCA*, *supra* note 1, s 135 [emphasis added].

liability owed to the company but a means to provide relief to creditors.⁵¹ Claims for unpaid shares arise from obligations owed by members to the company. Contribution claims for unlimited liability arise from, amongst other things, obligations owed by the company to creditors. The fact that members are liable for obligations incurred by the company to creditors by contributing to the firm's assets does not change the fact that the underlying liability is owed to creditors and not the company itself.

Similarly, the words "liable to contribute to the assets of the company" in s. 135 do not create a separate and independent claim owned by the NSULC. The purpose of the statutory language, as explained above, is to create a centralized procedural mechanism whereby pro-rated contributions are received from shareholders and *pari passu* distributions are made to creditors. The intent of the statute is to vest the power to enforce those contributions and to make those distributions in the trustee or liquidator acting in a representative capacity on behalf of the company for the benefit of all creditors. The intent of the statutory language is not to create an independent substantive obligation owed by shareholders to the company.⁵²

51. See *Mayfair Property Co*, *supra* note 43 at 35-36 where, in discussing the liability of members of unlimited companies, the court noted:

First, they were liable to calls on their shares to their nominal amounts. This was the only liability which could be enforced by the company or by its directors whilst the company was carrying on business. This liability, but no liability beyond, was an asset of the company with which the company could deal. But, secondly, in addition to this limited liability, the members were under an unlimited liability to the creditors of the company; and this unlimited liability could be enforced by creditors, although it was not an asset of the company which the company or its directors could charge, alien, or dispose of in any way whatever to the prejudice of any creditor.

See also *Whitehouse*, *supra* note 34 at 599-600: "It is a mistake to call that a debt due to the company. It is no such thing. It is not, as has been supposed, in any shape or way a debt due to the company, but it is a liability to contribute to the assets of the company; and when we look further into the Act, it will be seen that it is a liability to contribution to be enforced by the liquidator."; *Paraguassu*, *supra* note 34 at 262: "The different sections of the Act...all have in the view the payment, *pari passu* and equally, of the debts due to the creditors; and the hand which receives the calls necessarily receives them as statutory trustee for the equal and rateable payment of all the creditors."; and *Webb v Whiffin* (1872), LR 5 HL 711 at 734 [*Webb*]: "[h]aving got into the common fund every sum which ought to be contributed to it by every person whomsoever, the Legislature takes possession of that common fund, and proceeds to distribute it amongst the creditors of the company."

52. See *Webb*, *ibid* at 735: "[A]ll...[contributions] from members [and past members] are part of the property and the assets of the company...." *Webb* involved a limited company and the pursuit of amounts unpaid on shares issued to and subsequently transferred by a past member of the company. The question was whether "old" creditors, those whose claims that existed at the time the past member transferred his shares, should receive preferential treatment by having amounts recovered from the past member applied first to their debts. The court determined that contributions recovered from a past member were not to be applied exclusively to debts incurred by the company while the past member was a member but instead became part of a common fund received by the liquidator for the benefit of *all* creditors. In other words, the objective of the statutory language is to facilitate *pari passu* distribution to creditors and not to create a separate and independent claim owned by the firm.

3. *The nature of shareholder liability under s. 135*

The key matter addressed in this paper is the relationship between a claim for contribution from an NSULC member insofar as it relates to a particular debt that the member has expressly guaranteed. In that regard, unlimited liability has been described as “a substitute for a shareholder guarantee.”⁵³ Similarly, members of an unlimited company have been described as “in effect guarantors of its obligations without any restriction....”⁵⁴ A contribution claim is, in effect, a statutorily-provided conditional guarantee for the debts of an unlimited company that is triggered only if and when the company is wound-up. The company has no independent claim or ability to seek contribution prior to being wound up and, thereafter, the amount of any contribution due from a member is, “in equity and in substance,” due to the creditors of the company and not due to the company itself.⁵⁵

Importantly, a contribution claim under s. 135 is not an asset owned by an NSULC in its own right.⁵⁶ Instead, it is a procedural mechanism for the collection of various debts and liabilities in the aggregate. These various debts and liabilities may include calls for unpaid capital which may be employed for general corporate purposes, arise from debts owed to the company by shareholders, and may be dealt with by the company prior to winding-up.⁵⁷ However, these various debts and liabilities include also those that are owed by the company to third-party creditors. The fact that the latter are collected by a liquidator or trustee in bankruptcy upon winding-up does not change the fact that the amount of a member’s contribution is with reference to debts and liabilities owed to those third-party creditors. With a contribution claim, they do not become a debt or liability owed to the NSULC. Rather, all proceeds must be held in trust for creditors by a liquidator or trustee. As a consequence, the differences between a contribution claim and the guarantee claim are procedural. A

53. KP McGuiness, *Canadian Business Corporations Law*, 2nd ed (Markham: LexisNexis Canada, 2007) at 78.

54. LCB Gower, Daniel D Prentice & BG Pettet, *Gower’s Principles of Modern Company Law*, 5th ed (London: Sweet & Maxwell, 1992) at 88. See also *Re Olympia & York Developments Ltd.*, [1994] OJ no 1335 (QL) at 13: “I accept the Claims Officer’s characterization of the ‘future liability to a call under the UK statute is analogous to a guarantee under Canadian bankruptcy law which guarantee is unsecured.’”

55. See *Maritime Bank*, *supra* note 32 at para 5 where the Supreme Court of Canada discussed the nature of a shareholder’s liability in the event that the assets of a bank are insufficient to pay its debts and liabilities under s 70 of the then applicable banking act.

56. The holding in *Smurfit-Stone*, *supra* note 12, is consistent with the argument that a contribution claim is not an asset of the NSULC. Naturally, that the court held the creditor noteholders to have waived the contribution claim under the trust indenture for the amounts due to them under the notes necessarily assumes that the claim does not belong to the NSULC.

57. For example, because calls for unpaid capital are assets of the firm, the company may borrow against them. However, firms may not borrow against a contribution claim.

creditor might choose to add a guarantee claim against a member even when contracting with an NSULC, not as a way of enforcing the debt twice, but because it provides the creditor with a direct way to collect without having to go through the Canadian bankruptcy process. In that event, the choice the creditor bargains for is one of process not substance.⁵⁸

Given that contribution claims under s. 135 replaced the historical ability of creditors to sue shareholders directly, the logical inference and necessary public policy implications to be drawn from a contractually-agreed right to sue a shareholder directly under a guarantee is that the guarantee claim replaces a contribution claim under s. 135. Thus, where a member has provided a contractual guarantee for the debt or liability, enforcement of the guarantee is instead of, and not in addition to, the ability to seek contribution for that same debt under s. 135. This does not necessarily mean that a contribution claim is entirely invalid, as there may be some portion of the claim that is not on account of the same debt owed and being pursued under a guarantee claim; e.g. a liquidator or trustee may have a valid contribution claim for the costs associated with the winding-up or other NSULC debts or liabilities not expressly guaranteed by the member of the NSULC.

This conclusion is not affected by the fact that the basis for liability under a contribution claim is statutory and the basis for liability under a guarantee claim is contractual. Although claimants often assert multiple bases for the same liability, their ability to succeed on multiple bases does

58. An unconditional contractual guarantee is superior to s 135 as it allows the enforcement of claims by creditors without resorting to winding-up and without the need to enforce the claim indirectly through a trustee in bankruptcy.

not justify recovery of multiple payments.⁵⁹ In other words, the quantum of liability does not increase simply because there are two causes of action and, where members of an NSULC have provided a contractual guarantee for the debts and liabilities of the company, a contribution claim is rendered redundant with respect to the debts and liabilities that are covered by the guarantee. Interpreting s. 135 to permit both a contribution claim and guarantee claim concurrently would contradict the equitable purpose of the section⁶⁰; not to mention the legislature's choice to describe members and their liability using equitable terms such as "contributor" and "contribution."⁶¹

Section 135 is best understood as a default rule which parties are free to contract out of, including by way of a member personally guaranteeing

59. See *BG Checo International Ltd v British Columbia Hydro and Power Authority*, [1993] 1 SCR 12. See also *Central Trust Co v Rafuse*, [1986] 2 SCR 147 at 176-177:

It is with reference to this concurrent liability of persons professing skill in a calling that it is said in *Winfield on Tort* (7th ed. 1963), p. 6, in a passage that has been cited on several occasions in the cases:

A dentist who contracts to pull out my tooth is, of course, liable to me for breach of contract if he injures me by an unskilled extraction. But he is also liable to me for the tort of negligence; for everyone who professes skill in a calling is bound by the law, agreement or no agreement, to show a reasonable amount of such skill. I cannot recover damages twice over, but I may well have alternative claims for damages under different heads of legal liability.

While these cases discuss the rule against double recovery in the context for claims against a sufficient fund, the same principles inform the rule against double proof in the context of claims against an insufficient fund. Both the rule against double recovery and the rule against double proof protect the debtor from having to pay on the same debt or liability multiple times despite the fact that there may be multiple claims. The rule against double recovery prevents creditors from collecting more than 100 cents to the dollar from multiple claims for the same debt or liability whether they are brought against the same debtor or different debtors. The rule against double proof, on the other hand, allows creditors to collect up to 100 cents to the dollar from multiple claims for the same debt or liability against different debtors but *not* multiple claims for the same debt or liability against the *same* debtor. See text accompanying note 83. In addition, a contribution claim in the context of an NSULC is analogous to a veil piercing claim in a corporation that provides limited liability to its shareholders. Where shareholders with limited liability provide a contractual guarantee for the debts and liabilities of the corporation, a veil piercing claim is rendered redundant. This is so despite the fact that a veil piercing claim is based in common law and the claim pursuant to the guarantee is based in contract.

60. As explained above, the s 135 mechanism was adopted to protect shareholders from the inefficiencies and inequities that resulted when their liability for company debts could be pursued directly by creditors. It would be anomalous for a statute drafted to prevent a member from having to shoulder more than his or her fair share of the company's debt to be interpreted to enable judgments against a member totaling twice the amount of debt owed by the company.

61. The use of "contribution" introduces equitable principles into the section, and therefore the need for interpretation against a framework of fairness and equity. See *Halsbury's Laws of England*, vol 16, 2nd ed (London: Butterworths, 1992) [footnotes omitted] at para 458 on the "Nature of contribution": Although its extent may be modified by contract, contribution is not based on contract, but on principles of natural justice. Payment by one person liable releases the others from the principal demand, and they are required to contribute as a return for this benefit; but the principle does not apply unless all the parties are liable to a common demand, and such liability, therefore, is a condition of contribution.

particular debts and liabilities owed to third-party creditors.⁶² A contribution claim under the provision arises only when the NSULC is wound up, can be brought only for the benefit of creditors by a liquidator or trustee and cannot be pursued by the NSULC itself. Section 135 is not the source of a new or independent obligation owed to the NSULC. Instead, the statute sets out a procedure for enforcing a member's obligations with respect to the NSULC's debts. The statute does *not* state that company members have an obligation that they owe "to the company"; but instead speaks of a member's liability "to contribute to the assets of the company" for payment of its debts and liabilities. The words of the statute, the history of the statute and the case law interpreting the statute all make clear that the liability of a member is for the benefit of the company's creditors and not the company itself.⁶³ Therefore, a member's issuance of a direct contractual guarantee for debts and liabilities owed by the NSULC to third-party creditors has the effect of waiving what would otherwise be the member's statutory liability to contribute on account of amounts owing to the third party creditors for the debts and liabilities covered by the guarantee.⁶⁴

4. *The rule against double proof*

In the foregoing analysis it has been argued that s. 135 does not create a separate and independent liability owed by shareholders of an NSULC to the firm. Instead, it prescribes a default procedural mechanism for the

62. The expression "default rule" of course, comes from nexus of contracts theory. In simple terms, corporate law under nexus of contracts theory is understood as a set of contractual defaults that most contracting parties in similar circumstances would have agreed upon *ex ante* assuming transaction costs were zero. See generally Frank H Easterbrook & Daniel R Fischel, *The Economic Structure of Corporate Law* (Cambridge: Harvard University Press, 1991) at 14-15; Thomas S Ulen, "The Coasean Firm in Law and Economics" (1993) 18:2 J Corp L 301 at 322; Ian Ayres & Robert Gertner, "Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules" (1989) 99:1 Yale LJ 87 at 93. Being a default rule, s 135 of the *NSCA* may be freely contracted out of by parties who have more idiosyncratic needs including by way of a guarantee. Section 135(f) of the *NSCA* explicitly sets out the enabling nature of the provision by permitting waivers of contribution claims with no prescribed form for such waivers. As such, a guarantee provided for a particular debt by a particular member arguably amounts to a waiver of a contribution claim for that particular debt against that particular member.

63. See *Oakes v Turquand*, *supra* note 33 at 347:

As I understand these Acts, they merely changed the remedy which the creditor previously possessed of issuing execution against the shareholder (which, as I have shewn, was continued to him when companies with limited liability were first established), into a right to obtain satisfaction of his debt by means of forced contributions, either by compelling a winding up of the company, or by becoming a party to a winding-up which had been already ordered. They do not appear to me to have changed the right of the creditor on the one hand, or the liability of the shareholder on the other; and therefore, I cannot adopt the argument of the counsel for the Appellant, that the cases which were decided upon the Acts prior to 1856 must be considered as inapplicable.

64. Courts have permitted members to satisfy their contribution obligations directly through agreements with creditors of unlimited companies. See *Re Blakely Ordinance Co (Brett's Case)* (1871), LR 6 Ch App 800.

collection of contributions from members for the benefit of creditors of the NSULC. In other words, a contribution claim is not an asset held by the NSULC. Under the *BIA*, however, the amount that a contributor is liable to contribute under a contribution claim is “deemed” to be an asset of the corporation.⁶⁵ The issue, of course, is whether the deeming provision in the *BIA* has an effect on the interpretation of s. 135 presented in this paper. It is argued that s. 77 of the *BIA* has no impact on the analysis of s. 135 set out above. If s. 135 had actually provided that a contribution claim belonged to the firm, there would be no need for another statute to deem it to be so.⁶⁶ Section 77 of the *BIA* treats a contribution claim as an asset of the firm for a particular and purely procedural purpose. As explained above, a claim for contribution from an NSULC member is, in equity and substance, a claim of the NSULC’s creditors that is pursued by a trustee on their behalf. The deeming provision in the *BIA* merely facilitates and enforces the rule that *only* a trustee in bankruptcy may bring a contribution claim.

Nevertheless, even if a contribution claim under s. 135 is understood as an asset owned by an NSULC in its own right, the common law rule against double proof would prevent pursuit of that claim concurrently with a guarantee claim. The rule against double proof “was developed to ensure the *pari passu* distribution of the assets of the bankrupt on a *pro rata* basis amongst the unsecured creditors—the central tenet of bankruptcy legislation.”⁶⁷ While the rule often arises in bankruptcy cases, its application is not limited to formal bankruptcy proceedings.⁶⁸

65. *BIA*, *supra* note 39, s 77(2).

66. See *The Queen v Verrette*, [1978] 2 SCR 838 at 845:

A deeming provision is a statutory fiction; as a rule it implicitly admits that a thing is not what it is deemed to be but decrees that for some particular purpose it shall be taken as if it were that thing although it is not or there is doubt as to whether it is. A deeming provision artificially imports into a word or an impression an additional meaning which they would not otherwise convey beside the normal meaning which they retain where they are used[.]

67. *Re Olympia & York Developments Ltd*, [1998] OJ no 4903 (QL) at para 25 [*Olympia & York*] [footnote omitted].

68. See, e.g., *Owners of Steamship Enterprises of Panama, Inc v Owners of ss Ousel (The Liverpool) (No 2)*, [1960] 2 WLR 54 where the English Court of Appeal applied the rule against double proof in an admiralty case. See also *Deco Electric Ltd v Republic Building Systems Alberta Ltd*, [1983] AJ no 726 (QL) at para 41: “The principle is not limited to bankruptcy.”; and *Martin v McMullen*, [1891] OJ no 35 (QL) at paras 22-24: “[t]he principle involved seems to be a general principle of equity, applicable to all cases of suretyship.”

Rather, it is an “overarching principle”⁶⁹ of general application⁷⁰ with no required statutory support.⁷¹ The rule is designed to prevent more than a single recovery from a debtor when claims for the same underlying debt are asserted in multiple ways.⁷² Under the rule, there cannot be two valid claims for the same debt against the same debtor even if the debt is owed to multiple claimants and evidenced by multiple contracts.⁷³

In *Olympia & York*,⁷⁴ while explaining how the rule against double proof applies, the Ontario Court of Justice, General Division (In Bankruptcy) stated that the “case law illustrates that the existence of separate and distinct claims or liabilities is not determinative of the double proof issue” and “[t]he crucial question is whether or not the separate

69. *Re Glen Express Ltd*, [2000] BPIR 456 (Ch D) and *In re Kaupthing Singer & Friedlander Ltd (in administration) (No 2)*, [2011] UKSC 48, 3WLR 939.

70. For a tort law example of the rule being applied, see *Jameson v Central Electric Generating Board*, [1998] HLJ No 50 at paras 32, 44 and 45. For corporate law examples, see *Foss v Harbottle* (1843), 2 Hare 461 (Ch D), 67 ER 189, where the court prevented double recovery for the same loss; once by the company and again by its shareholders; *Robak Industries Ltd v Gardner*, 2007 BCCA 61 at para 37, 28 BLR (4th) 1, and *Johnson (AP) v Gore Wood & Co (A Firm)*, [2000] HLJ no 67 at paras 44, 81, 97, 99 and 124. Again, while these cases discuss the rule against double recovery as applied to claims against a sufficient fund, the rule against double proof is essentially the same rule as applied to claims against an insufficient fund. See text accompanying note 59.

71. See David Milman, “The Challenge of Modern Bankruptcy Policy: The Judicial Response” in Sarah Worthington, ed, *Commercial Law and Commercial Practice* (Oxford: Hart, 2003) at 374: “Other common law principles survive intact notwithstanding the dominance of statute—witness the pragmatic (and distributionally just) rule against double proof....”

72. See *In re Oriental Commercial Bank* (1871), LR 7 Ch 99 at 103-104:

But the principle itself—that an insolvent estate, whether wound up in Chancery or in Bankruptcy, ought not to pay two dividends in respect of the same debt—appears to me to be a perfectly sound principle. If it were not so, a creditor could always manage, by getting his debtor to enter into several distinct contracts with different people for the same debt, to obtain higher dividends than the other creditors, and perhaps get his debt paid in full. I apprehend that is what the law does not allow; the true principle is, that there is only to be one dividend in respect of what is in substance the same debt, although there may be two separate contracts.

73. See *Re Coughlin & Co; Ex parte Guarantee Co of North America*, [1923] MJ no 56 (QL) at para 28; “There may be several claimants in respect to the debt, but there is only one debt, and double proof in respect to it is not permitted.”; and *Re Hoey* (1918), 88 LJ (KB) 273 at 274-275:

Here the debtor has entered into two covenants with two different people to pay this debt. He has entered into a contract with the mortgagee and also with his wife, but they are both covenants to pay the same debt, and if they were both allowed to prove in respect of that debt higher dividends would be paid in respect of that debt than in respect of his debts to other creditors. I think that violates the rule against double proof.

74. *Supra* note 66.

and distinct claims relate in substance to the same debt.”⁷⁵ Therefore, in considering the relationship between a contribution claim under s. 135 and a guarantee claim against a member of an NSULC, the key issue is whether they are, in substance, claims for the same debt. To the extent that they are claims seeking to recover on the same debt, they cannot both be allowed concurrently without violating the rule against double proof.

The *Olympia & York* bankruptcy case involved a parent corporation and a wholly-owned subsidiary incorporated for the sole purpose of receiving proceeds from a syndicated loan. The parent fully and unconditionally guaranteed the loan to the subsidiary, both as guarantor and as principal debtor. Immediately upon receipt, the loan proceeds were on-loaned to the parent in exchange for a promissory note and entry into a repayment agreement. After bankruptcy proceedings commenced against both the parent and the subsidiary, the syndicate of lenders filed proofs of claim against the subsidiary for amounts owing under the syndicated loan and also against the parent under the guarantee. In addition, the trustee in bankruptcy for the subsidiary filed a claim for amounts owing under the on-loan transaction between the parent and the subsidiary. The court considered whether the claim by the syndicate of lenders against the parent under the guarantee and the claim by the trustee in bankruptcy for the subsidiary against the parent under the on-loan transaction were duplicative.

To determine whether the two claims were duplicates, the Ontario court applied the following principle: “[t]he question [is] whether two payments are being sought for a liability which, if the company were solvent, could be discharged as regards both claimants by one payment.”⁷⁶ This principle may be referred to as the “single payment analysis.”⁷⁷ After examining the various financing documents, the Ontario court concluded that, had the parent remained solvent and the subsidiary become insolvent, one payment by the parent to the syndicate of lenders would satisfy its liability under the guarantee and would extinguish the debt as between the syndicate of lenders and the subsidiary.⁷⁸ The court reached the same conclusion with

75. *Ibid* at para 36. See also *Re Melton, Milk v Towers*, [1918] 1 ChD 37 [*Melton*] at 47-48: It may well be that technically there are two claims against the debtor in respect of the transaction[.]...One of these is the debtor’s liability to the bank for the money that he owed. The other, which is a separate liability arising out of the contract of guarantee, is the debtor’s liability to indemnify the sureties in respect of their liability to the principal creditor. Technically they are two separate liabilities, but in substance they are the same; and in respect of that liability there could not be a double proof against the estate.

76. *Ibid* at para 45, citing *Barclays Bank Ltd v TOSG Trust Fund Ltd*, [1984] 1 All ER 628.

77. *Ibid* at para 48.

78. *Ibid* at para 47.

respect to a payment made by the parent to the subsidiary.⁷⁹ Therefore, the court held that the two claims were double proofs and the court ordered that they ranked for payment of a single dividend out of the estate of the parent.⁸⁰

Applying the single payment analysis to the issue at hand, the conclusion that a contribution claim and a guarantee claim are double proofs is even clearer than in *Olympia & York*. Recall that the issue being considered here is the relationship between a contribution claim and a debt expressly guaranteed by a shareholder. If the member were solvent, a payment in satisfaction of a contribution claim would be received in trust by the liquidator or trustee and used to satisfy in full the claims of the NSULC's creditors. Similarly, a payment to the creditors in satisfaction of a guarantee claim would discharge a dollar for dollar amount of a contribution claim. Allowing both claims, assuming solvent estates, would enable the creditors with a guarantee to recover 200% of their claim, whereas other creditors of the NSULC would be obliged to accept recovery on the basis of only the face amount of their claims. It follows that, under the rule against double proof, amounts owed to creditors cannot be recovered from a member under both a guarantee claim and a contribution claim.

In *Smurfit-Stone*, the Delaware Court, having made its decision to disallow the contribution claim pursuant to the no-recourse provision in the trust indenture, had no reason to discuss the application of the rule against double proof as it related to the contribution claim by the trustee of the NSULC and the guarantee claim by the creditors. As explained above,

79. *Ibid* at para 48.

80. In the course of its ruling, the court in *Olympia & York* distinguished *Re Polly Peck International Plc*, [1996] 2 All ER 433 (Ch D) [*Polly Peck*], an English decision from the Chancery Division of the High Court of Justice involving similar facts, on the basis that *Polly Peck* turned on arguments relating to piercing the corporate veil that were not relevant in *Olympia & York*; *ibid* at paras 38-40. Similarly, arguments relating to piercing the corporate veil are not relevant to the question of the relationship between a contribution claim and a guarantee claim. The statutory analysis of s 135 offered in this paper involves no finding or assumption that a member of an NSULC and the NSLUC itself are not separate legal entities. In addition, the application of the rule against double proof necessarily assumes that a member of an NSULC and the NSLUC itself are separate legal entities. It should be noted also that, in *Polly Peck*, the English court observed that the single payment analysis may not be a "wholly reliable test" in the context of group insolvencies; *Polly Peck*, *ibid* at 444. This observation was not addressed by the Ontario court in *Olympia & York* and did not appear to trouble the court when it came to applying the single payment analysis in the context of a group insolvency. Similarly, the observation made by the English court about group insolvencies has no relevance to the single payment analysis as it applies to a contribution claim under s 135 and a guarantee claim. Section 135 draws no distinction whatsoever between members that are parent corporations and members that are human shareholders. It would, therefore, be absurd if the application of the single payment analysis to the relationship between a contribution claim and a guarantee claim varied depending on whether the member providing the guarantee was a corporation or human.

the trustee for the NSULC had argued that the contribution claim and the guarantee claim were not duplicative since they stemmed from two different liabilities to two different parties. Commentators have also noted that there are differences between a contribution claim and a guarantee claim such as the former being based in statute and the latter being based in contract.⁸¹ However, these differences between a contribution claim and a guarantee claim are entirely irrelevant to how the rule against double proof is applied. Even if it is accepted that s. 135 should be interpreted as creating a separate and independent obligation imposed upon a member and owed to the NSULC, thereby rendering a contribution claim and guarantee claim being owed to different parties, such an understanding of the statutory provisions would simply bring the rule against double proof into play. The rule is applied to prevent *different* creditors from proving multiple claims for the same debt against the same debtor.⁸² If the interpretation of s. 135 offered in this paper is accepted, thereby rendering a contribution claim a procedural mechanism for the collection of debts, the rule against double proof would not need to be engaged in the first place.

Finally, drawing attention to the differences between a contribution claim and a guarantee claim merely obscures the real issues. The objective of the rule against double proof is to protect the same debtor against having to make two payments on the same debt, thereby protecting the creditors of the debtor as a whole.⁸³ Also, whether two claims amount to being for the same debt has always been a question of substance over

81. See text accompanying notes 16-17.

82. See *Husky Oil Operations Ltd v Canada (Minister of National Revenue)*, [1995] 3 SCR 453 at paragraph 51 where, in construing the potential for different entities to bring claims against a contractor for the same underlying debt, the Supreme Court of Canada observed:

that while formally the contractor is potentially liable for two debts, namely the debt to the Board for the unpaid assessment and the potential debt to the principal if the principal pays the contractor's assessment, the reality is that these are one and the same *as against the contractor*. The contractor cannot be liable for both cumulatively. There is thus an inseparable nexus between the Board's claim against the contractor and the principal's potential claim against the contractor.

83. *Squires & Ors v AIG Europe (UK) Ltd & Anor.*, [2006] EWCA Civ 7, 2 WLR 1369 at para 94. It must be remembered also that creditors of a NSULC may prove in the liquidations of both the NSULC (for the underlying debt) and its member (pursuant to a guarantee claim) up to one hundred cents to the dollar and these dual claims for the same debt against *different* debtors are referred to as a permissible "double dip." Allowing both a contribution claim and a guarantee claim against a member, on the other hand, would be dual claims for the same debt against the *same* debtor and would be an impermissible double proof. See *Polly Peck*, *supra* note 80 at 442.

form.⁸⁴ In the context being analyzed in this paper, the debtor for both a contribution claim and a guarantee claim is the same; i.e., a member of an NSULC who has contractually guaranteed a debt of the NSULC. Naturally, a guarantee given by a shareholder of an NSULC for its debts will be given with reference to those debts. The statutory language in s. 135 also refers explicitly to the debts of the company. Therefore, despite any differences between a contribution claim and a guarantee claim, the only relevant considerations are that they relate to the same debt as against the same debtor. It follows that, even if s. 135 is understood as providing for a liability owed to the NSULC by members, a contribution claim would be disallowed pursuant to the rule against double proof where a member has contractually guaranteed the relevant debt and has already made a distribution to the relevant creditors on account of that guarantee.

Conclusion

Nova Scotia has enjoyed a tremendous amount of success with NSULCs under the *NSCA*. The unlimited liability feature of these entities has enabled U.S. corporate lawyers and tax specialists to mitigate tax liabilities when structuring cross-border transactions. Under s. 135, however, the liability of a shareholder of an NSULC arises only in the event that the company is wound up and the firm's assets are insufficient to pay its debts and liabilities. These procedural requirements for enforcing a member's liability for company debts give parties entering into transactions involving NSULCs an incentive to negotiate for a shareholder guarantee for company debts where relevant. A contractual guarantee allows creditors to enforce the same company debts against members directly without the need for winding-up. The *Smurfit-Stone* litigation in the U.S., with the court's ruling being based on the no recourse provision in the relevant documentation of the transaction as opposed to the relationship between a contribution claim and a guarantee claim, has now provided parties with an incentive to waive a contribution claim explicitly where a member has guaranteed a debt of the firm.

84. See *Melton*, discussing *In re Sass*, [1896] 2 QB 12, *supra* note 75 at 47-48:

[A]nd the rule against double proof has regard to the substance of the transaction and not to the form. It may well be that technically there are two claims against the debtor in respect of the transaction and two separate liabilities of the debtor arising out of the transaction. One of these is the debtor's liability to the bank for the money he owed. The other, which is a separate liability arising out of the contract of guarantee, is the debtor's liability to indemnify the sureties in respect of their liability to the principal creditor. Technically they are two separate liabilities, but in substance they are the same; and in respect of that liability there could not be double proof against the estate.

However, it is argued that, even where there is no explicit waiver of a contribution claim, such a claim would not be allowable against a shareholder with respect to a debt that the shareholder has guaranteed personally and has made a distribution on that guarantee. Section 135 does not impose a separate and independent obligation on shareholders of NSULCs owed to the firm. The historical, policy and statutory analysis undertaken here reveals that the provisions instead set out a procedural mechanism for the collection of company debts from shareholders, and this mechanism replaced the ability of creditors to sue shareholders directly for the same debts. A contractual guarantee provided by a shareholder to a creditor amounts simply to a privately agreed-upon mechanism for the enforcement of the relevant debt by the latter directly against the former as a substitute for collection under a contribution claim process. Even if s. 135 is understood as imposing a separate and independent obligation upon shareholders to the firm, the overarching common law rule against double proof would disallow both a contribution claim and a guarantee claim concurrently as both claims would be for the same debt as against the same debtor. Given that the rule against double proof would apply even if the parties explicitly contracted *for* the allowance of both a contribution claim and a guarantee claim concurrently,⁸⁵ requiring an explicit waiver of the former where a member has guaranteed a particular debt amounts merely to a pointless increase in transaction costs.⁸⁶

85. Recall that the rule against double proof applies regardless of what was agreed upon by the parties contractually. See text accompanying notes 69-73.

86. Given that, under s 135(f), contribution claims may be waived with no prescribed form for a waiver, it may be argued also that a guarantee amounts to an implied waiver of a contribution claim with respect to the debt covered by the guarantee. See text accompanying note 62.

