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THAT...CAN THEY?
Insolvency Trumps Certain
Contractual Rights**

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For time immemorial, it has been the quest of commercial lawyers to draft the perfect contract; a contract that covers all twists and turns, preserving clients' rights in all circumstances. However, and putting it mildly, even the most perfect of contracts is put to the test where one of the parties to the contract becomes insolvent and voluntarily or involuntarily, becomes subject to the Bankruptcy and Insolvency Act (the "BIA"), the Companies' Creditors Arrangement Act (the "CCAA"), or a receivership order. Exacerbating matters is that historically, the degree to which contractual rights were affected depended in part on which of the insolvency processes was invoked and the judge shepherding the process. Indeed, any insolvency practitioner will tell you that the need to jettison or re-work existing contractual relations is at times at the core of a restructuring or bankruptcy.

In September, 2009, many long-awaited amendments to the BIA and the CCAA came into force. Some of these amendments deal specifically with the treatment of agreements between an insolvent or bankrupt debtor and third parties. Some created new law, some codified the common law that had developed since the proliferation of debtor-initiated restructuring, and many served to enhance the similarities between restructurings under the BIA and the CCAA.

This paper touches on how insolvency proceedings affect certain contractual rights parties may have granted each other, particularly relating to termination and assignments of agreements. There are special rules dealing with both issues some of which are long-standing and well understood and some of which are brand new and yet to receive significant judicial treatment.

In addition to this paper, we recommend to the reader interested in an overview of this topic and the amendments generally a paper by Douglas Palmateer entitled "*Bankruptcy and Insolvency Law Reform (2005 – 2009) – Major Commercial Issues (September 2009)*," from which we have drawn for this presentation.

Termination of Agreements

Termination by the Debtor in a Proposal under the *Bankruptcy and Insolvency Act* and in a *CCAA Application*

Prior to the 2009 amendments, a debtor making a proposal under the BIA had the right to disclaim a commercial lease of real property under which the debtor was a lessee. Section 65.2 of the BIA prescribes the notice to be given, provides a mechanism for the lessor to challenge the disclaimer, and describes how the lessor's claim is to be calculated. However, the BIA did not provide for the disclaimer of *other* kinds of agreements in the context of a proposal by the debtor to its creditors. In contrast, under the CCAA, the ability of a debtor to disclaim a commercial lease of real property, and any other type of agreement to which the debtor was a party, had been a matter left entirely to the discretion of the court.

Under new section 65.11(1) of the BIA, a statutory right is created for an insolvent debtor to disclaim or resiliate any agreement (subject to certain exceptions) to which the debtor is a party as a part of, and on the day that, the debtor files a Proposal or a Notice of Intention to file a Proposal under the BIA. At the same time, the CCAA was amended by the addition of s. 32 to provide the same regime for disclaimer and resiliation of agreements in CCAA proceedings. Section 65.11(1) only applies to agreements in relation to a business and not to non-business

agreements entered into by insolvent individuals¹ and there are several other types of agreements which are excluded²:

- Eligible financial contracts;
- Commercial Leases (disclaimer of Commercial Leases in a Proposal is addressed under s. 65.2 of the *BIA*);
- Collective agreements;
- Financing agreements if the debtor is the borrower; and
- Leases of real property or of an immovable if the debtor is the lessor.

Where the counterparty to the agreement objects, they have a right to apply to court within 15 days of the date they receive the notice of disclaimer for an order that the agreement is not to be disclaimed or resiliated and the court is required to consider not only whether the disclaimer or resiliation would enhance the prospect that the debtor's proposal will be viable, but also the extent of financial hardship to the counterparty (it must be "significant"). The court must also consider whether the trustee is in favour³.

By contrast, pursuant to section 65.1(1), the counterparty to an agreement with an insolvent debtor who has filed a Proposal or Notice of Intention to file a Proposal is precluded from terminating or amending their agreement with the debtor or from claiming an accelerated payment or forfeiture, regardless of whether the contract so provides, by reason only that the debtor is insolvent or has filed the Proposal or Notice of Proposal. In other words, the rights flow one way.

¹ See section 65.11(2).

² See section 62.11(10)

³ See section 65.11(3) and (5).

Prior to these amendments, courts had permitted executory contracts (contracts in which there were outstanding obligations between the parties) to be disclaimed by insolvent debtors despite the absence of any express statutory authority where circumstances warranted⁴. Likewise, in the case of CCAA applications, courts had found the power under the CCAA to terminate various kinds of agreements as part of the restructuring based on a consideration of whether termination of the agreement would be fair, reasonable and equitable⁵.

This created particular concern for counterparties to licensing agreements who could find themselves in a situation of having their license cancelled and no longer having access to, for example, the intellectual property rights upon which their business depended. In some cases, this would be in the best interests of the insolvent debtor. For example, the license may be worth more at the time of filing the Proposal than it was when the agreement was initially entered into.

However, recognizing the potentially severe consequences to a licensee, Parliament enacted a special protection for licensees of intellectual property (IP) in s-s 65.11(7)⁶ which provides that the disclaimer or resiliation of an agreement does not affect the rights conveyed under the agreement to the counterparty to use the IP or to enforce a right of exclusive use of the IP during the term of the agreement and any further period for which the party extends the

⁴ Ullmann, David and Mellissa McCready, “*Licensed to Steal: The Rights of IP Licensors and Licensees in an Insolvency*”, **Annual Review of Insolvency Law (2010)**, Carswell, p. 203. And see ***New Skeena Forest Products Inc. v. Kitwanga Lumber Co.***, 2005 BCCA 154, holding that both Receivers and trustees in bankruptcy have common law authority to disclaim executory contracts. And see Duggan, Anthony, “*Disclaimer of Contracts in CCAA Proceedings: Some Aspects of the 2005-2007 Amendments*”, **Annual Review of Insolvency Law (2010)**, Carswell, p. 243.

⁵ See for example, ***Re Skeena Cellulose Inc.***, (2002), 43 C.B.R. (4th) 178 (BCSC), aff’d, (2003), 43 C.B.R. (4th) 187 (BCCA), where termination of supplier and service agreements was permitted; ***Re Doman Industries Ltd.***, (2004), 1 C.B.R. (5th) 7 (BCSC), where termination of replaceable logging contracts was not permitted.

⁶ The corresponding section of the CCAA is 32(6)

agreement as of right. This protection is contingent upon the licensee continuing to perform its obligations under the agreement in relation to the use of the IP.

Note that section 65.11(7) does not say that agreements granting rights to use IP cannot be disclaimed or resiliated. Agreements containing licenses of IP are not altogether excepted from 65.11 as are, for example, eligible financial contracts. What is preserved is the right to “use” the IP (note that what is meant by “use” is not defined in the Act) and enforce exclusive use but not the other rights and obligations which may exist between the parties, even in the same agreement. Commentators have noted⁷ that this may result in illusory protection in certain situations. In the case of licensed software, for example, the agreement may contain an obligation for the licensor to provide updates and technical support. Those obligations may be essential for the licensee to continue to use the IP. However, section 65.11(7) may not prevent the licensor from disclaiming those types of obligations. The further question this raises is whether the licensee would be entitled to reduce the license fee payments it was otherwise obliged to make to account for any such reduced services or whether that would constitute a failure to perform its obligations under the agreement. These questions have not yet been resolved.

Termination or Amendment of Agreements in a Proposal by the Counterparty

As noted, s.65.1(1) of the BIA provides that when a debtor files a notice of intention to make a proposal or a proposal, a counterparty to an agreement with the debtor⁸, including a security agreement, is prohibited from terminating or amending the agreement or claiming an

⁷ “*Licensed to Steal*”, supra at p. 204

⁸ Other than an eligible financial contract

accelerated payment or forfeiting the term under the agreement, by reason only that the insolvent person is insolvent or made the filing. Where the agreement in question is a lease, the counterparty is prohibited from terminating or amending the lease agreement by reason only that were rental arrears in the period preceding the filing of the notice of intention or proposal even if there is a contractual right to do so in the lease. A similar provision did not appear in the CCAA until the 2009 amendments, adding s.34 to the CCAA which section is substantially similar to s.65.1 of the BIA.

Section 65.1 of the BIA also prohibits the termination or amendment of licensing agreements and prohibits the claiming of an accelerated payment or forfeiture by reason only that the debtor is insolvent, has filed a notice of intention to make a proposal, has filed a proposal, or has not paid royalties for any period before the filing. Interestingly, s.34 of the CCAA does not mention licensing agreements.

The counterparty is, however, entitled under either Act to require the debtor company to make immediate payment for goods, services, use of leased property or other valuable consideration provided after a filing of a notice of intention, a proposal or an application under the CCAA.⁹

Section 65.1 of the BIA and s.34 of CCAA also provide that nothing in those sections compels the counterparty to make any further advance of money or credit (see also CCAA s. 11.01 which provides that no *order* has the effect of requiring the further advance of money or credit), and both sections contain special exemptions to protect the rights of lessors of aircraft objects in certain circumstances.¹⁰

⁹ See s. 11.01 of the CCAA.

¹⁰ See BIA s 65.1(4)(c) and CCAA s. 34(4)(c)

Both Acts permit the counterparty to apply to court for a declaration that the restrictions on termination or amending the agreement or claiming an accelerated payment or a forfeiture do not apply, or apply only to the extent declared by the court, where it can be established that the operation of the subsections would cause “significant financial hardship.” However, absent court order, any contractual entitlement to such remedies is of no force or effect.

Termination of Agreements by Trustee in Bankruptcy

The recent amendments to the insolvency legislation in Canada have not affected the law as it previously existed.

The BIA does not contain any provision expressly authorizing a trustee in bankruptcy to disclaim a contract to which the bankrupt is a party. However, as noted previously, the courts have generally recognized that a trustee may do so.

Section 46 of *The Landlord and Tenant Act* of Manitoba authorizes a trustee in bankruptcy to disclaim a lease of real property in which the bankrupt is a lessee.

Termination or Amendment of Agreements in Bankruptcy by the Counterparty

Under s.84.2 of the BIA, the counterparty to an agreement with an *individual* bankrupt, including a security agreement, is prohibited from terminating or amending the agreement, claiming an accelerated payment under it or forfeiting the term of the agreement, by reason only of the bankruptcy. The balance of s.84.2 is virtually identical to s.65.1 (discussed above) and provides that:

- a lessor may not terminate or amend a lease by reason only of the bankruptcy or insolvency or that the bankrupt has not paid rent in respect of a period of time before bankruptcy;
- nothing prevents the counterparty from requiring payments to be made in cash for goods, services, use of lease property or other good and valuable consideration provided after the bankruptcy;
- nothing requires the counterparty to advance money or credit; and
- it is open to the non-bankrupt party to apply to court for a declaration that the restrictions of rights will cause the applicant significant financial hardship.

In the case of bankrupts who are not individuals, the law has not changed. The counterparty is not prohibited from enforcing clauses in the agreement that allow for termination, amendment, acceleration of payment or forfeiture of the term upon the occurrence of bankruptcy. Where there is no clause permitting the counterparty to terminate the agreement on the debtor's bankruptcy, the trustee has a right to keep the contract in force, but must notify the other party within a reasonable time of the trustee's election to do so. Otherwise, the other party will be entitled to assume that the contract is at an end. The trustee's rights have been established by case law, as courts have interpreted the trustee's general power in the BIA to "carry on the business of the bankrupt, in so far as may be necessary for the beneficial administration of the estate of the bankrupt."

Termination of Agreements by Receiver

The model receivership orders that are now being used and approved by the court typically empower receivers to “cease to carry on all or any part of the business and specifically to cease to perform any contracts of the debtor.”

Accompanying this paper is a copy of the standard form receivership order currently in use in Ontario. It is used as a starting point by many insolvency practitioners in Manitoba where, at the moment, no standard form order is in place as of yet.

Termination of Agreements in Receiverships by Counterparty

Typically, before a receiver is appointed by the court, protection against termination of agreements by other parties is set out in the court order. Private receivers have no protection against termination or amendments of agreements by the other party. They cannot compel performance by the other party.

Assignment of Agreements

The right of a counterparty to approve or reject the Assignment of the agreement to a third party is typically expressly provided for, in detail, in the agreement and is often considered an important right. The recent amendments to the BIA have added s. 84.1 which significantly

affects these rights. Section 84.1 applies to straight bankruptcies and Division I Proposals¹¹. Similar provisions are also now in effect for CCAA matters in section 11.3(1)¹².

The amendments permit a trustee or monitor to apply for a court order assigning the rights and obligations of a bankrupt under an “agreement” to “any person specified by the court” who agrees to the assignment. Section 84.1 only applies to agreements in relation to a business and certain types of agreements are excluded, namely, agreements entered on or after the date of bankruptcy, eligible financial contracts and collective agreements.

Section 84.1 also does not apply to contracts which “by reason of their nature” are not assignable. This wording has created some concern as the meaning of this is not clear. Finally, section 84.1 contains a non-exhaustive set of factors to be considered in determining whether the order sought should be granted, namely, whether the proposed assignee is able to perform the obligations under the agreement and whether it is “appropriate” to assign the rights and obligations of the agreement to that person. In the case of Division I Proposals, there is the additional requirement that the proposal trustee under the proposal approves the proposed assignment.

Of critical importance, the consent of the counterparty to the agreement is not required under this section and the earliest case law interpreting s. 84.1 has found that even agreements containing strict approval of assignment clauses will not protect the counterparty if the court is of the view that the test under s. 84.1 is otherwise met. The net effect is that the rights of the counterparty to accept or reject an assignment are effectively subordinated in circumstances where the assignment would likely benefit the other stakeholders in the insolvency proceeding.

¹¹ As to the application of s. 84.1 to Division I Proposals, see ss. 66(1) and 66(1.1) of the *BIA*

¹² For ease of language, we will primarily discuss the amendments in the bankruptcy context.

Some protection is given to the counterparty by s-s 84.1(5), which provides that the court may not order the assignment unless satisfied that all monetary defaults will be remedied. However, this protection may be illusory as the section excludes those defaults arising “by reason only of the person’s bankruptcy [or] insolvency...” In most cases, a debtor will be insolvent in the sense of unable to meet obligations as they come due for a period of time prior to bankruptcy or the taking of any formal steps and in many cases, this will be the source of most if not all, monetary defaults.

The full text of s. 84.1 is as follows:

84.1 (1) On application by a trustee and on notice to every party to an agreement, a court may make an order assigning the rights and obligations of a bankrupt under the agreement to any person who is specified by the court and agrees to the assignment.

Individuals

(2) In the case of an individual,

(a) they may not make an application under subsection (1) unless they are carrying on a business; and

(b) only rights and obligations in relation to the business may be assigned.

Exceptions

(3) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under

(a) an agreement entered into on or after the date of the bankruptcy;

(b) an eligible financial contract; or

(c) a collective agreement.

Factors to be considered

(4) In deciding whether to make the order, the court is to consider, among other things,

(a) whether the person to whom the rights and obligations are to be assigned is able to perform the obligations; and

(b) whether it is appropriate to assign the rights and obligations to that person.

Restriction

(5) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the person's bankruptcy, insolvency or failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

Copy of order

(6) The applicant is to send a copy of the order to every party to the agreement.

Section 84.1 provides trustees with an entirely new power as regards agreements other than commercial real property leases. By virtue of s. 146 of the *BIA*, commercial real property leases have long been capable of assignment by a trustee in bankruptcy on court application as a matter of provincial law. Until the recent amendments, section 146 provided as follows:

146 Subject to priority of ranking as provided by section 136 and subject to subsection 73(4), the rights of lessors shall be determined according to the laws of the province in which the leased premises are situated.

In Manitoba, landlords and tenants looked to section 46 and 47 of *The Landlord and Tenant Act*, which, among other things, grants trustees three months from the date of bankruptcy to elect to retain leased premises, to surrender and disclaim the lease, or to seek to *assign* the lease to an appropriate person as determined by the Act regardless of any term of the lease to the contrary. With regard the assignment, section 46(2) of the *LTA* provides the following test:

46...and [the assignee, liquidator, or trustee] may upon payment to the landlord of all arrears of rent, assign the lease with rights of renewal, if any, to any person,

(a) who covenants to observe and perform its terms and agrees to conduct upon the demised premises a trade or business that is not reasonably of a more objectionable or hazardous nature than that which was thereon conducted by the debtor; and

(b) who on application of the assignee, liquidator or trustees, is approved by a judge of the Court of Queen's Bench as a person fit and proper to be put in possession of the leased premises.

The critical question under this legislation (and its various provincial counterparts) has been whether the proposed assignee was “fit and proper”, and there is a well developed body of caselaw on that issue. For example, in *Re Sommerset Management Services and Yolles Furniture Co. (Ontario) Ltd. et al.*, (1978) 26 C.B.R. 205 (ON C.A.), at 221, Wilson J.A. articulated the following test:

... I think the judge must be satisfied that the proposed tenant is one who will be both motivated to and able to honour the covenants in the lease and the covenants he is required to give under the section, and that he will make a fit and proper use of the premises. In order to satisfy himself of this the judge will require evidence of the proposed tenant's reputation in the community, both as a tenant and as a businessman, and he will also require evidence of the proposed tenant's credit-worthiness. But in addition to these factors the judge will consider the status of the bankrupt estate, the availability of assets to meet the claims of creditors and the sum, in this case \$151,000, subject to adjustments, which will be realized for their benefit if the assignment is effected. Weighing all these things, he will grant or withhold his approval.

Given the existing provincial legislation in this area, some of the immediate commentary on s. 84.1 has questioned whether it even applies to commercial leases. In our view, it is intended to apply. Apart from its terms (the word “agreement” is clearly broad enough to include a commercial lease), section 146 of the *BIA* has been amended to be expressly subject to s. 84.1:

146. Subject to priority of ranking as provided by section 136 and subject to subsection 73(4) and section 84.1, the rights of lessors are to be determined according to the law of the province in which the leased premises are situated.

Historically, the application for approval of the assignment was always brought in the jurisdiction where the affected landlord was located as the legislation of that province governed. This was beneficial to an opposing landlord especially in a bankruptcy where the proceedings were in another province; the landlord did not have to travel to oppose (saved travel and legal costs) and the battle was waged on the home front before a judge not otherwise invested in the bankruptcy proceedings. The cost savings and opportunity for a “fresh look” are at risk in a national proposal or bankruptcy given that the BIA appears to permit an application to assign a commercial real property lease to be brought in jurisdiction where the bankruptcy or proposal is filed. These factors might be disincentives to landlords who would otherwise challenge the assignment.

Recent Decision-Ford Credit Canada Ltd. v. Welcome Ford Sales Ltd.

Section 84.1 has recently received its first appellate treatment in *Ford Credit Canada Ltd. v. Welcome Ford Sales Ltd.*, 2011 ABCA 158, released May 27, 2011. The decision is an appeal from a decision granting permission to a trustee in bankruptcy to assign an automobile dealership agreement to a third party over the objections of the counterparty, Ford Motor Company of Canada, Limited (“Ford Motor”).

Welcome Ford Sales Ltd. (“Welcome Ford”) was placed into receivership on January 14, 2010, the day after the discovery of a significant defalcation by a senior employee during a routine inventory audit carried out by Ford Credit Canada Ltd. (“Ford Credit”). On January 29, 2010, Ford Motor informed the receiver (MNP) that it would not consent to any assignment or sale of the dealership agreement to any party. On May 19, 2010, the Bank of Montreal (who was also owed a substantial sum) obtained an order placing Welcome Ford into bankruptcy with MNP as trustee. MNP proceeded to market the dealership to various existing Ford dealerships,

notwithstanding that Ford Motors maintained the position that it would not consent to any sale or assignment.

MNP found a willing buyer, in another local Ford dealership and sought court approval to assign Welcome Ford's Dealership Agreement under s. 84.1. The chambers judge approved the assignment and concurrently dismissed Ford Motor's application for a declaration that the dealership agreement could not be assigned without its consent¹³. Both orders were appealed to the Alberta Court of Appeal.

The issue squarely before the Court of Appeal was the correct interpretation of s. 84.1 but Ford Motor raised other arguments as well. It argued that Welcome Ford had fundamentally breached the dealership agreement because of the defalcations by senior management and the fact that Welcome Ford had ceased to operate. It argued that there was therefore no existing agreement for the Trustee to assign.

This argument was rejected. The court found that Ford Motor had refused to cooperate with the Receiver's attempts to reopen and operate the business thereby preventing the breach from being remedied. As such that it was Ford Motor – not Welcome Ford – who was responsible for the continuing breach. Further, other any breaches of the Dealership Agreement would be cured by the proposed assignment. Ford Motor also relied heavily on the terms of the Dealership Agreement which gave it broad discretion to reject any assignment. This argument also failed based on the court's interpretation of s. 84.1 as overriding the common law and contractual rights Ford Motor otherwise had. The Court of Appeal described the effect and intent of s. 84.1 in the following passages:

¹³ ***Ford Credit Canada Limited v. Welcome Ford Sales Ltd.***, 2010 ABQB 798

(B) How is s. 84.1 of the BIA to be interpreted?

29 The position at common law was always that if one party breached a condition (and not a mere warranty) in a contract, the other party to that contract had an election, either to treat the contract as continuing and insist on future performance, or to accept the repudiation and bring the contract to an end. In the latter case certain obligations survived the termination depending upon the construction of the contract.

30 The effect of s. 84.1 of the BIA is to override the common law unilateral right of the innocent party to the contract to accept the repudiation and end the contract. It has been designed to preserve the value of the estate as a whole, even if the contractual rights of some creditors, such as Ford in this case, are compromised. Therefore, even if Ford otherwise had the right to terminate the dealership agreement for breach of condition, and its assignment clause was not one which survived the termination, s. 84.1 nonetheless allows the trustee to apply to the Court for permission to assign the contract so long as the provisions of the statute are met.

...

37 Prior to the coming into force of s. 84.1 in 2009, a trustee in bankruptcy could not assign (sell) a contract to a third party where the counter-party to that contract opposed the assignment. As a result, a bankrupt estate was vulnerable to losing the benefit of a valuable contract to the detriment of the estate and often to the detriment of third parties.

38 The estate of a bankrupt may include various forms of property. Sometimes the most valuable property in an estate will be the contractual rights possessed by the bankrupt as of the date of bankruptcy. Those rights may be embodied in, for example, a franchise agreement, a purchase agreement, a license agreement, a lease, a supply agreement or an auto dealership agreement.

39 The clear intent of Parliament in enacting s. 84.1 of the BIA was to address this vulnerability; it made a policy decision that a court ought to have the discretion to authorize a trustee to assign (sell) the rights and obligations of a bankrupt under such an agreement notwithstanding the objections of the counter-party.¹⁴

(emphasis added)

From the foregoing, it is clear that a primary concern was the clear benefit to be reaped by the Estate from permitting the assignment.

¹⁴ **Ford Credit Canada Limited v. Welcome Ford Sales Ltd.**, 2011 ABCA 158 at para 30

However, this interpretation is in some ways surprising. Enacted concurrently with s. 84.1 was section 84.2 which provides that no person may terminate or amend any agreement with a bankrupt individual by reason only of the individual's bankruptcy. That s. 84.2 does not, by its terms, apply to all bankrupts generally, has led some commentators to the understandable view that s. 84.1 may have limited practical use in bankruptcies of corporations because, "there is nothing in new section 84.2 of the BIA to prevent the other party to an agreement with a non-individual bankrupt, from exercising a bankruptcy termination provision and terminating the agreement."¹⁵ There is no indication in the **Ford** case that such an argument was raised, but the decision of the Alberta Court of Appeal suggests that a "termination on bankruptcy" clause in an agreement with a corporate bankrupt may avail the counterparty naught.

Another interesting aspect of the decision is the way the Court of Appeal analyzed sections 84.1(3) and 84.1(4). In our view, these sections invite a two-stage analysis in which the court is required to first analyze the type of agreement, including whether it is of a "nature" so as not to be assignable (under s-s (3)) and then, if the agreement has an assignable nature, to analyze whether the particular assignee is appropriate having regard to the considerations raised in s-s (4).

Indeed, that is the way the section was analyzed by the lower court who first considered whether the agreement was a "personal contract" pursuant to the test enunciated by the Manitoba Court of Appeal in **Blackhawk Mining Inc. v. Manitoba (Provincial Assessor)**, 2002 MBCA 51 where, at para 82, the court said:

¹⁵Palmateer, Douglas, "Bankruptcy and Insolvency Law Reform (2005-2009) Major Commercial Issues, September 2009", p.18, para. 110

In *Campbell v. Morrison* (1987), 28 S.C.R. 228 (S.C.C.) [a.k.a. *Maloney v. Campbell*], a case dealing with the assignment of a mortgage debt, King J. succinctly summarized the principle (at p. 233):

Agreements are said to be personal in this sense when they are based on confidences, or considerations applicable to special personal characteristics, and so cannot be usefully performed to or by another.

In the result, Thomas J. concluded that the Dealership Agreement was not a personal contract, holding it to be a standard franchise agreement:

[73] When all of the legal and evidentiary considerations present here are taken into account I conclude that the DSSA is not a 'personal contract', which by its 'nature' cannot usefully be performed by another. Instead, it is a rather standard commercial franchise which could be performed by virtually any business person and entity with some capital and experience in automotive retailing. I find that the DSSA is capable of assignment and therefore the exclusion in s. 84.1(3) of the *BIA* does not apply. However, that still leaves the question of whether the DSSA should be assigned to the assignee proposed by the Trustee and whether the consent of Ford Motor is required or has unreasonably been withheld.

...

[89] I have determined that the DSSA is capable of being assigned and that the exemption found in s. 84.1(3) is not applicable to this contract in these circumstances. The outstanding questions are whether the proposed assignee, particularly the preferred assignee, is "able to perform the obligations" contained in the DSSA [s. 84.1(4)(a)] and whether it is appropriate to assign the rights and obligations **to that person** (Emphasis added.) [s.84.1(4)(b)].

[emphasis in original]

However, the Court of Appeal rejected the independent consideration of s-s 84.1(3) and (4) finding that the suitability of the proposed assignee was a relevant factor to consider in determining whether or not the agreement was assignable by reason of its "nature" under s-s (3). In the words of the court:

35 Ford argued that whether the rights and obligations of an agreement are assignable "by reason of their nature" pursuant to s. 84.1(3) must be decided before, and independently of, any consideration under s. 84.1(4) as to whether the proposed assignee is capable of performing the obligations and it is appropriate to assign the rights and obligations. If so, it is irrelevant that the ultimate purchaser is an otherwise approved dealer and a proven performer. The issue of whether the nature of the agreement precludes its assignment would thus have to be resolved independently of

any consideration of whether the agreement's commercial purpose would be achieved in the hands of the proposed assignee.

36 This interpretation is not supported by the literal words found in s. 84.1 which do not make a determination under s. 84.1(3) an independent precondition to a determination under s. 84.1(4). Legislative intent may be taken into account as an aide to interpretation only in the case of ambiguity in the words of the statute. Even if such an ambiguity existed here, and one is not apparent, Parliament's intent does not support Ford's interpretation. ...

...

44 Ford has suggested no business reason to support its interpretation of s. 84.1(3) and (4). There is no apparent reason as to why appropriateness of the assignment or the capability of the proposed assignee would not be relevant to determining whether the rights and obligations are assignable by their nature. Rather, the opposite would appear to be true.

45 Therefore, I conclude that s. 84.1(3) is to be interpreted upon considering, among other things, the capacity of the proposed assignee and whether it is appropriate to assign the rights and obligations as set out in s. 84.1(4).

We question the correctness of this approach. In our reading, subsection (3) expressly excludes several types of agreements outright without engaging the merits of the proposed assignee. However, for the time being, the **Ford** case is the most authoritative interpretation of s. 84.1 in Canada.

Finally, as regards the criterion in s. 84.1(4), the Court of Appeal found that the lower court's assessment of the proposed assignee as appropriate, based on evidence of its excellent track record in operating a profitable Ford dealership and on the fact that the quality of its existing business obviously met Ford's standards, was reasonable.

Without a doubt the legal interpretation of s. 84.1 (and s. 11.3 of the CCAA) will be refined in the years to come. For the time being, and for our purposes, it suffices to note that these provisions represent a significant new way in which insolvency proceedings can interfere with express contractual rights and obligations.

MODEL RECEIVERSHIP ORDER (ONTARIO)

ON READING the affidavit of [NAME] sworn [DATE] and the Exhibits thereto and on hearing the submissions of counsel for [NAMES], no one appearing for [NAME] although duly served as appears from the affidavit of service of [NAME] sworn [DATE] and on reading the consent of [RECEIVER'S NAME] to act as the Receiver,

SERVICE

1. THIS COURT ORDERS that the time for service of the Notice of Motion and the Motion is hereby abridged and validated¹⁸ so that this motion is properly returnable today and hereby dispenses with further service thereof.

APPOINTMENT

2. THIS COURT ORDERS that pursuant to section 243(1) of the BIA and section 101 of the CJA, [RECEIVER'S NAME] is hereby appointed Receiver, without security, of all of the assets, undertakings and properties of the Debtor acquired for, or used in relation to a business carried on by the Debtor, including all proceeds thereof (the "Property").

RECEIVER'S POWERS

3. THIS COURT ORDERS that the Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:

- (a) to take possession of and exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;
- (b) to receive, preserve, and protect of the Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of Property to safeguard it, the engaging of

¹⁸ If service is effected in a manner other than as authorized by the Ontario *Rules of Civil Procedure*, an order validating irregular service is required pursuant to Rule 16.08 of the *Rules of Civil Procedure* and may be granted in appropriate circumstances.

independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;

- (c) to manage, operate, and carry on the business of the Debtor, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, or cease to perform any contracts of the Debtor;
- (d) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver's powers and duties, including without limitation those conferred by this Order;
- (e) to purchase or lease such machinery, equipment, inventories, supplies, premises or other assets to continue the business of the Debtor or any part or parts thereof;
- (f) to receive and collect all monies and accounts now owed or hereafter owing to the Debtor and to exercise all remedies of the Debtor in collecting such monies, including, without limitation, to enforce any security held by the Debtor;
- (g) to settle, extend or compromise any indebtedness owing to the Debtor;
- (h) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of the Debtor, for any purpose pursuant to this Order;
- (i) to undertake environmental or workers' health and safety assessments of the Property and operations of the Debtor;
- (j) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Debtor, the Property or the Receiver, and to

settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding;

- (k) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;
- (l) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business,
 - (i) without the approval of this Court in respect of any transaction not exceeding \$_____, provided that the aggregate consideration for all such transactions does not exceed \$_____; and
 - (ii) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause;

and in each such case notice under subsection 63(4) of the Ontario *Personal Property Security Act*, [or section 31 of the Ontario *Mortgages Act*, as the case may be,] shall not be required, and in each case the Ontario *Bulk Sales Act* shall not apply.

- (m) to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property;
- (n) to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver deems appropriate on all matters relating to the Property and the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;

- (o) to register a copy of this Order and any other Orders in respect of the Property against title to any of the Property;
- (p) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the Receiver, in the name of the Debtor;
- (q) to enter into agreements with any trustee in bankruptcy appointed in respect of the Debtor, including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any property owned or leased by the Debtor;
- (r) to exercise any shareholder, partnership, joint venture or other rights which the Debtor may have; and
- (s) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations.

and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Debtor, and without interference from any other Person.

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER

4. THIS COURT ORDERS that (i) the Debtor, (ii) all of its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "Persons" and each being a "Person") shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property to the Receiver upon the Receiver's request.

5. THIS COURT ORDERS that all Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Debtor, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "Records") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 5 or in paragraph 6 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

6. THIS COURT ORDERS that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.

NO PROCEEDINGS AGAINST THE RECEIVER

7. THIS COURT ORDERS that no proceeding or enforcement process in any court or tribunal (each, a "Proceeding"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

NO PROCEEDINGS AGAINST THE DEBTOR OR THE PROPERTY

8. THIS COURT ORDERS that no Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

9. THIS COURT ORDERS that all rights and remedies against the Debtor, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that this stay and suspension does not apply in respect of any "eligible financial contract" as defined in the BIA, and further provided that nothing in this paragraph shall (i) empower the Receiver or the Debtor to carry on any business which the Debtor is not lawfully entitled to carry on, (ii) exempt the Receiver or the Debtor from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH THE RECEIVER

10. THIS COURT ORDERS that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtor, without written consent of the Receiver or leave of this Court.

CONTINUATION OF SERVICES

11. THIS COURT ORDERS that all Persons having oral or written agreements with the Debtor or statutory or regulatory mandates for the supply of goods and/or services, including

without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Debtor are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Receiver, and that the Receiver shall be entitled to the continued use of the Debtor's current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Receiver in accordance with normal payment practices of the Debtor or such other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court.

RECEIVER TO HOLD FUNDS

12. THIS COURT ORDERS that all funds, monies, cheques, instruments, and other forms of payments received or collected by the Receiver from and after the making of this Order from any source whatsoever, including without limitation the sale of all or any of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, shall be deposited into one or more new accounts to be opened by the Receiver (the "Post Receivership Accounts") and the monies standing to the credit of such Post Receivership Accounts from time to time, net of any disbursements provided for herein, shall be held by the Receiver to be paid in accordance with the terms of this Order or any further Order of this Court.

EMPLOYEES

13. THIS COURT ORDERS that all employees of the Debtor shall remain the employees of the Debtor until such time as the Receiver, on the Debtor's behalf, may terminate the employment of such employees. The Receiver shall not be liable for any employee-related liabilities, including any successor employer liabilities as provided for in section 14.06(1.2) of the BIA, other than such amounts as the Receiver may specifically agree in writing to pay, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*.

PIPEDA

14. THIS COURT ORDERS that, pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act*, the Receiver shall disclose personal information of identifiable individuals to prospective purchasers or bidders for the Property and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sales of the Property (each, a "Sale"). Each prospective purchaser or bidder to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Receiver, or in the alternative destroy all such information. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Debtor, and shall return all other personal information to the Receiver, or ensure that all other personal information is destroyed.

LIMITATION ON ENVIRONMENTAL LIABILITIES

15. THIS COURT ORDERS that nothing herein contained shall require the Receiver to occupy or to take control, care, charge, possession or management (separately and/or collectively, "Possession") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the *Ontario Environmental Protection Act*, the *Ontario Water Resources Act*, or the *Ontario Occupational Health and Safety Act* and regulations thereunder (the "Environmental Legislation"), provided however that nothing herein shall exempt the Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Receiver shall not, as a result of this Order or anything done in pursuance of the Receiver's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

LIMITATION ON THE RECEIVER'S LIABILITY

16. THIS COURT ORDERS that the Receiver shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*. Nothing in this Order shall derogate from the protections afforded the Receiver by section 14.06 of the BIA or by any other applicable legislation.

RECEIVER'S ACCOUNTS

17. THIS COURT ORDERS that the Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, and that the Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge (the "Receiver's Charge") on the Property, as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings, and that the Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subject to sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.¹⁹

18. THIS COURT ORDERS that the Receiver and its legal counsel shall pass its accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

19. THIS COURT ORDERS that prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including legal fees and disbursements, incurred at the normal rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

¹⁹ Note that subsection 243(6) of the BIA provides that the Court may not make such an order "unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations".

FUNDING OF THE RECEIVERSHIP

20. THIS COURT ORDERS that the Receiver be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed \$_____ (or such greater amount as this Court may by further Order authorize) at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order, including interim expenditures. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "Receiver's Borrowings Charge") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Receiver's Charge and the charges as set out in sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

21. THIS COURT ORDERS that neither the Receiver's Borrowings Charge nor any other security granted by the Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court.

22. THIS COURT ORDERS that the Receiver is at liberty and authorized to issue certificates substantially in the form annexed as Schedule "A" hereto (the "Receiver's Certificates") for any amount borrowed by it pursuant to this Order.

23. THIS COURT ORDERS that the monies from time to time borrowed by the Receiver pursuant to this Order or any further order of this Court and any and all Receiver's Certificates evidencing the same or any part thereof shall rank on a *pari passu* basis, unless otherwise agreed to by the holders of any prior issued Receiver's Certificates.

GENERAL

24. THIS COURT ORDERS that the Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

25. THIS COURT ORDERS that nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of the Debtor.

26. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

27. THIS COURT ORDERS that the Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Receiver is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

28. THIS COURT ORDERS that the Plaintiff shall have its costs of this motion, up to and including entry and service of this Order, provided for by the terms of the Plaintiff's security or, if not so provided by the Plaintiff's security, then on a substantial indemnity basis to be paid by the Receiver from the Debtor's estate with such priority and at such time as this Court may determine.

29. THIS COURT ORDERS that any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to the Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

SCHEDULE "A"

RECEIVER CERTIFICATE

CERTIFICATE NO. _____

AMOUNT \$ _____

1. THIS IS TO CERTIFY that [RECEIVER'S NAME], the receiver (the "Receiver") of the assets, undertakings and properties [DEBTOR'S NAME] acquired for, or used in relation to a business carried on by the Debtor, including all proceeds thereof (collectively, the "Property") appointed by Order of the Ontario Superior Court of Justice (Commercial List) (the "Court") dated the ___ day of _____, 20__ (the "Order") made in an action having Court file number ___-CL-_____, has received as such Receiver from the holder of this certificate (the "Lender") the principal sum of \$_____, being part of the total principal sum of \$_____ which the Receiver is authorized to borrow under and pursuant to the Order.

2. The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded [daily][monthly not in advance on the _____ day of each month] after the date hereof at a notional rate per annum equal to the rate of _____ per cent above the prime commercial lending rate of Bank of _____ from time to time.

3. Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property, in priority to the security interests of any other person, but subject to the priority of the charges set out in the Order and in the *Bankruptcy and Insolvency Act*, and the right of the Receiver to indemnify itself out of such Property in respect of its remuneration and expenses.

4. All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at Toronto, Ontario.

5. Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Receiver to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.

6. The charge securing this certificate shall operate so as to permit the Receiver to deal with the Property as authorized by the Order and as authorized by any further or other order of the Court.

7. The Receiver does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

DATED the ____ day of _____, 20__.

[RECEIVER'S NAME], solely in its capacity
as Receiver of the Property, and not in its
personal capacity

Per: _____

Name:

Title: