THE NEW STANDARD FORM TEMPLATE RECEIVERSHIP ORDER

Explanatory Notes for Version No. 1, September 14, 2004

These notes are to be read in conjunction with the new standard form template receivership order developed for the Commercial List Users' Committee of the Ontario Superior Court of Justice (the "Committee").

Introduction

Receivership orders have grown in length and complexity over the past several years. This is partly due to the evolution of the role of court appointed receivers but also due to the simple expediency of counsel utilizing precedents from one case to the next. Rather than considering the ongoing applicability of specific provisions of orders that were made to deal with the circumstances of a particular case (and might therefore be unnecessary in the next case) it has been the tendency of the bar to simply continue to engraft customizations onto the last available precedent. The result has been orders that are very long, often barely understandable, contain redundant or inconsistent terms, and may even be ill suited to the particular case before the Court. In addition, there has been an evolution in the practice concerning the appointment of receivers whereby the initial appointment order used in Toronto is somewhat more substantive and involves broader incursions into the sphere of third party rights than some say is appropriate at least upon an *ex parte* first hearing.

In May, 2002, the Canadian Bar Association Ontario, Insolvency Section sponsored a programme seeking to develop a standard form order appointing a Receiver and Manager or Interim Receiver. The result of the CBAO conference was to produce a better order that has served as a paradigm for orders made in many actual cases since that time. However, the creation of a new paradigm did more than improve the language of prior orders. The CBAO draft order included several substantive provisions that may not have been appropriate for all occasions. In addition, the creation of a new paradigm did nothing to deal with the problem of the incremental growth of these types of orders from that day forward.

In 2003, the Committee decided to embark upon a project to create a standard order to assist the Court and users of the Commercial List to streamline the process of dealing with cumbersome receivership orders. It is important to stress that the goal of the Committee was not to determine any substantive issues of law or to approve or disapprove of any particular strategy. Rather, recognizing that the CBAO project had met with only limited success and that there was an ongoing need to deal with the complexity of receivership orders, the Committee sought to embark upon a project to create a new standard form of order to serve as a common starting point or template for counsel seeking receivership relief on behalf of clients. Counsel and clients are free to alter or depart from the standard form template order as they see fit. However, amendments to the standard form template order should be blacklined (including using "strikethrough" notations for deletions). Proposed changes to the standard form template order should be specifically drawn to the attention of the Court in order to focus the argument and to deal with the particular issues that may require specific attention in each case. By requiring counsel to return to the same template for each new case, the Committee hopes to avoid the creeping, incremental growth that has affected prior orders.

It is the Committee's view that it is now an appropriate time to embark upon a project of this sort. There has been over a decade of experience since the re-birth of the *Companies Creditors' Arrangement Ac*t (the "CCAA") and since the creation of the expanded form of interim receiver under subsection 47(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "BIA"). It is now clear that in Ontario at least, resort can be had to the provisions of the CCAA in appropriate cases to allow debtors to liquidate. The profession seems to have emerged from the struggle to understand the integration of the various forms of relief that are available to assist in dealing with the problems caused by insolvent debtors. Indeed, the state of the art has evolved to the extent that a consensus has developed among many, and perhaps most insolvency professionals, at least as to certain fundamental principles. It seems to be generally accepted in 2004, for example, that it is in the interests of the majority of stakeholders in most cases for the debtor to remain in possession of its assets and in control of its business for as long as possible to seek a going concern restructuring or realization. If the debtor can no longer remain in possession and control of its business, for any number of reasons, then in all but the simplest cases, the realization process should be carried out by an officer of the Court functioning as a fiduciary to all stakeholders under the supervision of the Court. To the extent possible, the procedural mechanism chosen to appoint the Court's officer should be a neutral factor and should neither determine nor skew substantive rights where this can be avoided. There should be transparency and accountability built into the process (favouring the reporting requirements under the BIA). The process, such as it may be, should be an orderly process with positions being taken and disputes resolved through communication and resort to the Court where necessary. There should be no advantage to a party who races to advance its self-interest where that party's interests can be protected without serious prejudice by the adoption of another method that may also protect or advance the interests of others. And, finally, the parties should recognize that the Court's officer is not a legitimate target for tactical maneuvers. The parties recognize that an independent fiduciary is needed at the outset due to the potential for conflicts among them. Provided that the officer functions in the manner required by the Court and without personal wrongdoing, the simple fact of its appointment should not involve the officer in the disputes *inter-partes* nor expose the officer to personal jeopardy.

There is certainly room to debate the applicability of one or more of these concepts in any given case. Furthermore, there are other and even competing concepts that can be equally applicable. However, there is a sufficient consensus among legal and accounting professionals who frequently find themselves before the Commercial List so as to allow for the development of a template receivership order to provide a common starting point to assist the bar, receivers, and the Court.

The standard form template order developed by the Committee is to serve only as a starting point and is drafted to adopt, rather than alter, the substantive provisions of orders made in recent years by judges of the Commercial List. The Sub-committee charged with the task of recommending a form of order to the Committee was cognizant of decisions of some Courts that have raised questions as to the propriety of the broad scope of relief frequently sought in Ontario. The standard form template order that has been adopted is very wide in the sense of providing for a complete replacement of management and ousting of the board of directors of the debtor in favour of complete control of the debtor's business by the Receiver. This is in every sense a creditor-centred process with the owners of the business having little ongoing role unless they can establish that they have some economic stake in the outcome. However, the Committee has also tightened up on loose language found in some precedents to respect the fact that there is, at

minimum, an issue as to the propriety of affecting third party rights, especially in orders made at hearings that are brought in haste and typically involve little or no notice to anyone other than the most senior creditors. It may be that in many cases even the powers contained in the standard form template order will not be required. There will continue to be cases where it will be sufficient to appoint a more traditional interim receiver with powers limited to preserving and protecting the debtor's assets or to supervising management's use of cash and realization of receivables. Conversely, it may be that in any given case, a party may claim that the evidence justifies more sweeping orders affecting third party rights or interests. As noted previously, the standard form template order adopted by the Committee does not seek to resolve these issues or to prevent counsel from seeking to include in their draft orders any provisions that appear advisable in any given case. However, where counsel choose to adopt provisions that depart from the standard form template, it will be incumbent upon counsel to bring any changes sought to the attention of the Court in order to justify the substantive basis for the relief sought in addition to the usual burden to obtain any receivership order at all.

The Committee also notes that it intends the process of developing a standard form template receivership order itself to be a dynamic one. The standard form template order should be reviewed on a periodic basis in order to ensure that it keeps pace with the state of the art and thereby provides a useful tool that promotes convenience.

In an effort to assist the profession, the members of the Sub-committee involved in preparing the standard form template order felt it would be useful to identify some of the issues that were discussed during the process of creating the standard form template order that has now been developed. What follows therefore is a discussion of substantive and tactical legal issues but in no way reflects any determination or outcome at the Committee on any of these issues. In fact, in keeping with the determination that the standard form template order would not resolve substantive issues, the Committee expressly refrained from seeking to resolve issues that ought properly be heard in Court.

Receiver or Interim Receiver

The standard form template order adopts the format of styling the Court officer as both an Interim Receiver under subsection 47(1) of the BIA and a Receiver and Manager appointed pursuant to section 101 of the *Courts of Justice Act*, R.S.O. 1990, c.C-43, as amended (the "CJA"). The participants in the CBAO programme first recommended this approach for several reasons:

1. An order appointing an Interim Receiver under the BIA has national scope and is readily enforceable nationally (subject always to local concerns as often may arise in Quebec and elsewhere);

2. An Interim Receiver bases its jurisdiction federally and may be better protected against certain provincial liabilities and certain inequities that may flow from the application of different provincial regimes to the same debtor's property as may be located in different provinces;

3. A Receiver and Manager under the CJA can be provided with a priming charge in respect of its disbursements and thereby avoid issues concerning the limits on the authority of the Court to grant a priming charge in respect of business losses suffered by an Interim Receiver.

There have also been concerns expressed by the Office of the Superintendent in Bankruptcy noting that because an Interim Receiver is not a "receiver" for the purposes of Part XIV of the BIA, there is no mandatory notice to creditors, reporting to the Superintendent or other statistics gathering function for interim receiverships in Canada. There is also a concern that the use of an Interim Receiver may frustrate the statutory rights of suppliers under section 81.1 of the BIA in respect of 30-day goods. Accordingly, a neutral and inclusive approach mandates that a Receiver and Manager appointment under the CJA should supplement an interim receivership under subsection 47(1) of the BIA in order to invoke the BIA's required notice to creditors and reporting to the Superintendent in the interests of all stakeholders. As in all cases, this determination is subject to the opportunity of counsel to seek an alternative form of order.

It has been argued previously, and particularly during the CBAO programme, that the historic anachronisms associated with the different types of Court officers (be they liquidators, trustees, receivers, managers, receiver-managers, or interim receivers) cause increased costs and uncertainty whereas, in most cases, the differences in the various forms of Court officer have little relevance to modern-day practice. This too supports the use of a joint Receiver and Manager and Interim Receiver as the default position in order to minimize the chances for substantively different outcomes merely from the choice of one model over the other.

Throughout the provisions of the standard form template order, readers will note that an effort has been made to limit repetitive phrases that have crept into prior precedents. There are few lengthy recitations of all manner of specific examples stated to be "without limiting the generality of the foregoing". Statutory citations are omitted where obvious. The Receiver's broad discretion is typically expressed only once per paragraph rather than noting *ad nauseam* that, "the receiver is authorized, but not obligated, in its sole, absolute and unfettered discretion, where it considers it to be necessary or desirable, or otherwise in the interest of the estate".

Clause by Clause Review of the Standard Form Template Receivership Order

Parties, Recitals and Service

The standard form template receivership order is assumed to be sought on motion in an action. Formally, the parties will be the moving creditor who has or is about to deliver a notice under section 244 of the BIA, as plaintiff, and the debtor as defendant. There may be a Statement of Claim for debt delivered or there may only be a Notice of Action at the time of the motion. At some stage, the plaintiff will seek judgment typically prior to or at the time of the distribution of proceeds by the Receiver. The fact that there are only two formal parties raises procedural issues. Rule 37 requires that all persons who are likely to be affected by an order be served with the notice of motion. In the absence of proper service, Rule 37.14 allows persons who are affected by an order made without notice to return to Court as soon as reasonably possible after notice of the order comes to the person's attention. To promote certainty and to limit such returns, it is in the interest of the moving party to seek to serve its motion record on as many interested persons as possible prior to the return of the motion. Whether the burden is on the moving party or a challenger at a comeback motion either under the terms of the receivership order or under Rule

37.14 will turn on the circumstances of each case. However, these issues highlight the importance of listing in the order itself the identities and the appearance or non-appearance of parties served with notice of the motion as required by the Rules. The practice of some counsel to recite only "on hearing the submissions of counsel present" without listing the persons for whom such counsel appeared and without listing those who were served and did not appear is generally insufficient. Many rights are affected by service and appearance at a motion. Appeal rights, effective vesting and even the effectiveness of the receivership order itself may depend upon proof of service and appearance. Recitation of these jurisdictional facts in the order itself should not be ignored.

Paragraph 3 – The Receiver's Powers

The Committee spent a great deal of time considering the Receiver's powers contained in section 3 of the standard form template order. Substantial efforts have been made to modernize and simplify the language used in the recitation of the Receiver's powers. Although it is tempting to give the Receiver a broadly worded, simple power to take all reasonable steps to conduct the receivership, receivers recommend forcefully that it is very helpful, and often essential, for the receiver to be able to point to a specifically enumerated power in its appointment order to enforce compliance or to prove to third parties the receiver's entitlement to act. Therefore, efforts have been made to identify the most essential and the least controversial powers associated with the preservation and realization upon the debtor's assets and to phrase those powers with clarity. It bears repeating, that it is open to counsel to seek to either reduce or enlarge upon the powers contained in the standard order by simply highlighting the change and bringing it to the attention of the Court.

Among the powers that are specifically enumerated are the standard powers to take possession of and to preserve and protect the debtor's property - especially its liquid assets. The standard form template order assumes the Receiver will manage the business, hire consultants as required, enter into transactions, and compromise claims owing to the debtor. The normal powers to litigate are included. It is also assumed that the Receiver will market and sell assets. No specific approval of a marketing process is required in the standard form template order. However, a Receiver is still well advised in a significant case to seek prior approval of the process by which the assets will be marketed, in order to avoid later questioning of the effectiveness of the process itself. The standard form template order anticipates that there will be a materiality level established for sales of assets, beyond which prior approval of the Court should be sought.

Specific reference is made to subparagraph 3(n) of the standard form template order that empowers the receiver,

> 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;

It is expected that as an officer of the Court the Receiver will engage in meaningful communications with stakeholders. While the process can cause extra costs to be incurred and must therefore involve the exercise of reasonable discretion by the Receiver and all interested parties, the case law is clear that the use of a court appointed Receiver is not the private preserve

of the senior creditors and must, of necessity, involve some degree of transparency and accountability to all stakeholders. Expensive appearances and last-minute challenges to activities may well be avoided by timely communication among the parties who are "in the money" and particularly those who may find themselves "out of the money" as a result of the anticipated activity.

The concluding words of paragraph 3 of the standard form template order are designed to clarify that the Receiver is exclusively in control of the debtor's activities. Absent specific authority therefore, the board of directors of the debtor may not engage in litigation in the debtor's name nor take any other steps on behalf of the debtor once the receiver is appointed.

The standard order does not contain a specific provision allowing the Receiver to file an assignment in bankruptcy or to consent to the making of a Receiving Order under the BIA against the debtor. There is some case law that has allowed receivers to take these steps. However, even where appointment orders have contained a general power allowing the receivers to bankrupt the debtors, many receivers have chosen to seek specific approval of the Court prior to exercising that power in any event. Receivers' reluctance to bankrupt debtors emanates from several concerns including, among other things, that bankruptcy can reverse priorities among creditors and receivers do not want to take steps to prejudice one creditor or to favour another in the absence of due consideration and authority of the Court. Bankruptcy is a sufficiently material, substantive and final act that if a Receiver is to be empowered to bankrupt the debtor, the matter should be brought to the attention of the Court expressly.

Paragraphs 4 to 6 – Injunctions, Possession and Access to Property

Receivership orders typically contain sweeping injunctions against non-parties that are designed to ensure compliance and co-operation with the Receiver. In considering, for example, the Receiver's ability to obtain documentation and to require co-operation from third parties, the standard form template order draws a line to distinguish the obligations of the debtor and its board of directors, management and shareholders from those of third parties. In addition, the standard form template order contains specific definitions that are designed to restrict the Receiver's rights to take possession only of the property of the debtor. Paragraphs 4 of the standard form template order requires the debtor, those affiliated with the debtor and everyone with notice of the order, to advise the Receiver of the existence of any of the debtor's property in their possession or control and to deliver to the Receiver such of the debtor's property that the Receiver requires. Limiting the obligation to deliver up the debtor's property to only those cases where the Receiver requires the property saves costs for the third parties and protects the estate from being forced to incur costs to move or store property that might be more efficiently left in the possession of the third party temporarily or permanently.

Unlike some broadly drafted orders, the standard form template order does not require third parties to deliver up their own property that may just be relevant to the business or affairs of the debtor. Rather, paragraph 5 of the standard form template order requires third parties to advise the Receiver of the existence of any records or information related to the business or affairs of the debtor in that person's possession or control and to provide the Receiver with access and the right to make copies of such information at its request. The Receiver is not entitled to require access to privileged information nor to information that is protected by a statutory prohibition against disclosure. There is no power provided to the Receiver to compel

persons to be examined under oath akin to the power provided to a trustee in bankruptcy under section 163 of the BIA. If there are grounds and funding for a broader investigation during a receivership, the appointing creditor or the Receiver can seek the appropriate relief in the initial order or at a later time.

Paragraphs 7 to 11 - The Stay

Previous efforts have been made to simplify the cumbersome provisions of early CCAA orders that had developed concerning stays of proceedings. Despite the development after the *Royal Oak* case of four specific paragraphs that define a comprehensive stay, some recent precedents have reverted to utilizing the old, multi-page, cumbersome stay provisions and then also recite the abbreviated four-paragraph model. No one has claimed nor demonstrated to the Committee that the concise four-paragraph stay lacks the effectiveness or comprehensiveness of the older, longer version. Therefore, the four-paragraph model has been adopted with some refinement for the receivership process. The four paragraphs plus the traditional leave requirement for commencing legal proceedings against the receiver are carried into the standard form template order under the headings, "No Proceedings Against the Receiver", "No Proceedings Against the Debtor or the Property", "No Exercise of Rights or Remedies", No Interference with the Receiver" and "Continuation of Services".

It should be noted that there is no specific stay of any person's right to set off pre-receivership claims against the debtor in response to post-receivership claims by the Receiver. The standard form template order permits the filing of notice of security interests and the registration of claims for liens under the provisions of provincial personal property regimes. This seems to accord with the statutes and the most recent case law on these topics. None of these forms of enforcement interferes inappropriately with the Receiver's administration nor requires the Receiver to take any action or to spend money of the estate. However, lien claimants continue to require the consent of the Receiver or leave of the Court in order to commence actions to enforce lien rights. It remains open to anyone seeking to prohibit setoff or the registration of security or claims for lien, to ask the Court to do so by blacklining the standard form template order and bringing the matter to the attention of the presiding judge.

In some CCAA orders, there has been a specific clause utilized to seek to suspend the time from running under s. 81.1 of the BIA and thereby to preserve the ability of suppliers of goods to seek to enforce their rights to re-possess their goods at the end of the CCAA process. Some question the usefulness of this provision because, in most cases, the suppliers' rights are compromised in the proceeding or else the goods are sold or consumed before the proceeding ends. In other cases, elaborate clauses have been developed to seek to extend limitation periods that might expire during a Court-ordered stay. It certainly seems fair to ensure that a party facing the expiry of a limitation, contractual or statutory, who is prevented by a stay from taking the steps required to perfect its rights, should be given an opportunity to take these steps once the stay is lifted. However, this rationale does not fit well with every time period that may be affected by a stay. For example, there is no case law suggesting that a lease of realty ought to be automatically extended if it were otherwise to expire during the course of a stay. However, anyone seeking to enforce a remedy consequent on the lapse of time will continue to require

leave of the Court as is the case with all other stakeholders. Accordingly, paragraph 9 of the standard form template order simply continues to enjoin the exercise of rights and "suspends" all rights and remedies. The specific effect of any suspension will remain to be dealt with in individual cases either by amendments to the standard form template order or by subsequent proceedings.

There has been some controversy in the development of stay orders concerning the appropriateness and the jurisdiction of the Court to order counter-parties to renew contracts with the debtor. For the purpose of the standard form template order, the "No Interference with the Receiver" stay provision prohibits third parties from failing to "honour renewal rights". To the extent to which anyone wishes to seek to force a renewal in the absence of a contractual renewal right, the matter will have to be brought to the attention of the Court.

There have also been many attempts to deal with circumstances where suppliers to the debtor seek to secure or obtain preferential payment of pre-insolvency claims by using post-proceeding pricing practices. Suppliers have been known to seek security deposits or to enforce price increases to seek to disguise their efforts to re-coup pre-proceeding claims. As a pure drafting exercise, the Sub-committee was of the view that simple words entitling the Receiver to continue to pay "normal prices and charges… in accordance with normal payment practices of the Debtor" are sufficient to prevent the bulk of the conduct which consumed multiple lines of text in prior orders. This wording is not intended to require any further advance of money or credit. The Sub-committee recognized that the current drafting leaves open the possibility that if the Receiver wishes to open new accounts with suppliers in the Receiver's own name, as is often the case in practice, suppliers may wish to try to engage in preferential practices. The Committee is confident that this is a matter that can be left to the Receiver's business judgment with resort to the Court remaining available to all stakeholders if the exercise of the three C's (communication, courtesy and common sense) does not resolve any particular problem. While all counsel remain free to seek to amend the standard form template order in appropriate circumstances, the Committee does not believe it appropriate to adopt as a base case an *ex parte* provision binding third parties beyond the degree to which they were already bound to deal with the Debtor.

Paragraphs 13 and 15 – Employment and Environmental Regulation Issues

Among the most controversial aspects of recent restructuring orders is the paragraph dealing with employment of employees by the Receiver. Some insolvency professionals are of the view that in order to protect the Receiver from personal liability from termination and severance pay obligations, the Receivership order ought to terminate the employment of all of the debtor's employees and thereby crystallize termination obligations as claims against the estate. The Receiver is then free to re-hire employees as it wishes, free of pre-existing obligations under subsection 14.06(1.2) of the BIA. They rely on the limited mandate of the Receiver and the fact that there has been no "sale" of the debtor's assets to argue that the Receiver will not be a successor employer in these circumstances. Other counsel believe that if the Receiver actually hires employees in its own name, the Receiver stands a greater risk of being bound by pre-existing obligations. These counsel prefer to adopt the characterization of the historic Interim Receiver as a third party monitoring the affairs of the debtor's business and therefore not interfering at all in the debtor's employment of its own employees. These counsel are of the view that the Receiver will have less risk of being held to be successor employers

because, notionally at least, the debtor's corporate personality survives during the receivership with its employment contracts intact. This is a very live topic in the profession with several recent cases having been brought on issues of relevance. While reasonable counsel can differ on the degree of protection available under differing structures of a receivership, the standard order was drafted to minimize the disruption to the existing legal relationship leaving it open to counsel to advise the Court if she wishes to depart from the *status quo* in any particular case.

In light of the recent decision of the Court of Appeal in *TCT Logistics Inc.*, there is no current consensus on the best practices for achieving the goals set out by the Court of Appeal. The standard form template order therefore adopts a minimalist approach of authorizing the hiring of employees and reiterating the protections in subsection 14.06(1.2) but otherwise awaits the development of a new practice as is expected over time.

The Sub-committee received extensive input into the process from the representatives of the Government of Ontario. Their goal was to ensure, in particular, that the damage caused by business failure was not compounded so as to cause any further detriment to employees, the public or the public interest. They argued that the stay of proceedings should not operate to prevent regular enforcement of day-to-day regulatory requirements affecting the debtor's business, such as, for example, the duty to allow a fire marshall to inspect a plant. The Committee was of the view that it is consistent with the overall supervision by the Court of the process being carried on under the auspices of the Court's officer, that governments too ought to be part of the process and should be involved in the proceeding, whether to seek leave or otherwise to have input as an important stakeholder. For clarity however, an exception was built into paragraph 9 to exempt from the stay, the Receiver's obligation to comply with statutory and regulatory provisions relating to health, safety or the environment. Similarly, paragraph 15 provides that nothing in the standard form template order exempts the Receiver from any duty to report or to make disclosure that is imposed by any environmental law.

In several recent cases, especially under the CCAA, government ministries have brought motions to clarify that the stay of proceedings should not prevent regulators from pressing charges or from dealing with other urgent life, health and safety matters. Often such orders are made on consent. However, unlike the United States, Canadian bankruptcy law has no statutory exemption from stay orders in favour of government regulators. Prior to the enactment of section 14.06 of the BIA, it used to be the practice of the bar to contact the Ministry of the Environment in every case in order to negotiate a specific agreement as to the manner of dealing with environmental issues in each upcoming receivership proceeding. The process was cumbersome and unfair to the government in that it repeatedly forced decision-makers to enter into environmental protocol agreements on an urgent basis. Since the enactment of section 14.06 it has been the practice to refrain from specific agreements in each case as the statute provides the outlines of the rights and obligations of the Receiver in environmental and employment matters. The Committee is of the view that the current practice of relying on section 14.06 of the BIA is the most efficient practice and applies to the broadest number of cases and therefore is appropriate for the standard form template order.

With respect to environmental liabilities, the standard form template order similarly provides that the act of becoming a receiver does not, in itself, oblige the Receiver to expose itself to the risk of liability. However, to the extent that the Receiver takes actual steps to take control of or occupy contaminated property, the standard order assumes that the receiver will have to deal with its liabilities under provincial law subject always to section 14.06 of the BIA.

Paragraph 14 – PIPEDA

The *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 ("PIPEDA") by its terms seems to impact on the ability of creditors to realize upon a business. Personal information concerning employees, customers and possibly suppliers could well be very important components of either a receiver's ability to run the business or to sell it. The statute contains a reasonableness standard that is one of the over-riding principles guiding the use and dissemination of personal information. A Receiver has little time nor ability to seek the consent of every employee or every customer before disclosing information needed to keep a plant open or to allow an expeditious realization. The reasonableness of limiting the need to obtain express consent in urgent circumstances in order to keep a business from failing is self-evident. It maintains the jobs and the business to which individuals have provided their information presumably because they either want their jobs or they want to do business with the debtor. PIPEDA also allows for court orders limiting the need to obtain express consent in appropriate circumstances. The standard form template order contains such a limitation drawn from the *PSINet Limited* CCAA proceeding. In effect, the Receiver will be entitled to disclose personal information to prospective purchasers under the terms of appropriate confidentiality orders and provided that the purchaser, by agreement and court order, can make no further use of the debtor's data than was available to the debtor itself.

Paragraph 16 – Receiver's Liability

The standard form template order adopts the prevailing model of limited liability of the Receiver. As noted previously, the Receiver is not a legitimate target for the competing creditors. It is therefore appropriate for the Receiver to be protected from litigation by a stay provision and to ensure that the Receiver can only be made liable for clear acts of misconduct. Therefore, a gross negligence floor has been continued as the standard of culpability in order to limit the ability of creditors or the debtor from seeking to mount a challenge to the reasonableness of every exercise of the Receiver's discretion. Some receivership orders have limited damage awards against the Receiver to the value of the assets of the estate or to the amount of the Receiver's fees even in the event of gross neglect or willful misconduct by the Receiver. The Committee is unaware of any case law guidance on the question of why a Receiver who has been found to have committed deliberate misconduct or to have been grossly negligent ought to be protected from an award of the damages that reasonably flow from its misconduct. Therefore the standard form template order proceeds from the assumption that if the circumstances call for exceptional levels of immunity beyond the protection of a gross negligence standard, then this should be brought to the attention of the Court.

Paragraphs 17 to 23 – The Funding of the Receivership

The standard form template order creates two Court ordered charges that will take priority ahead of all existing security interests. The first is a charge for the Receiver's fees and those of its counsel. A second charge is created in respect of any Receiver's borrowings. There are still many cases in which creditors wish to limit generally the availability of charges or to carve out certain assets or certain liabilities from charges. Of course, it remains open to the parties to alter the scope, priority, or to otherwise limit the quantum of charges by making appropriate changes to the standard order and drawing the changes to the attention of the Court.

The standard form template order requires that the Receiver's accounts and those of its counsel be taxed. The taxation is referred to a Judge on the Commercial List in order to maintain consistency in this specialized area. The Committee is aware of certain receivership and CCAA orders in which the requirement for an assessment of counsel's fees has been omitted. In view of the recent treatment of this issue by the Court of Appeal, the Committee is of the view that assessment ought to be the standard. Any counsel wishing to avoid the requirement of assessment may bring the matter to the Court by blacklining or striking through the standard provision.

Finally, paragraph 28 of the standard form template order provides for the moving creditor to recover its costs in accordance with the terms of its security documents. However, where the moving creditor does not have a proven right to receive its costs in priority to other creditors, then the issue of the timing and priority of the costs related to the motion to appoint the Receiver is deferred until a later order of the Court. This prevents subordinate creditors or other interested parties from seeking to bring proceedings on a cost-free basis where the proceedings may be adverse in interest to creditors with superior interests who may later prove that they are entitled to the limited funds of the estate.

Concluding Notes

Although the body of standard form template order is still more than 10 pages long, it is hoped that the use of a template will simplify cases by providing a well-understood starting point and by focusing counsel and the Court upon the rationales for customizations required in the particular circumstances of each case before the Court. This area is not a simple one and many of the clauses which are now seen as "standard" have long histories involving valid arguments pro and con. Unfortunately, many of the original rationales and the arguments which were once the "state of the art" are now long forgotten. This may result in a blind adoption of provisions that may have been originally created to serve very different purposes. By simplifying the order and requiring specific identification of customized provisions, it is hoped that parties will address the real issues in their cases and utilize scarce judicial resources more efficiently.

It is hoped that this process will prove to be a benefit to the profession and the public. It is anticipated that by focusing counsel and the Court on specific clauses, there may be case law developed to deal expressly with issues which, to date, have been subsumed in convoluted drafting. This too will assist the dynamic process and allow for the development of the template over time.

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