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Highlights

INSOLVENCY

franchise agreements and bankruptcy

Alfonso Nocilla examines the Alberta Court of Appeal's decision in *Ford Credit Canada Ltd. v. Welcome Ford Sales Ltd.* This decision is significant for three reasons: (i) it is the first to apply the new section 84.1 of the *Bankruptcy and Insolvency Act* ("BIA"), and the first to do so in the franchising context; (ii) the Court of Appeal held that franchise agreements may be assigned in bankruptcy to third parties over the objections of franchisors; and (iii) franchise agreements may be considered standard commercial agreements for the purposes of the BIA, not "personal contracts." The Court of Appeal's analysis underscores the purpose of section 84.1, which is to protect and enhance the value of the bankruptcy estate for the benefit of creditors generally. 1426

QUEBEC – LANGUAGE CHARTER

the mandatory duties of a company

The *Office québécois de la Langue Française*, the government body responsible for monitoring the application of the *Charter of the French Language* (the "Charter") in the province of Quebec, recently launched an awareness campaign regarding the use of trade-marks in languages other than French in company names and public signs, which put the topic of this legislation back into the spotlight. Pascale Cloutier provides a summary of the key sections of the Charter and this recent awareness campaign. The Charter was introduced in 1977 by the Quebec government. The objective of the Charter is to protect the quality and influence of the French language in the province while making French the official language of government and the law, and the everyday language of work, instruction, communication, commerce and business. 1431

CORPORATE LAW

franchisors and partnerships

Where the franchisor is a limited partnership, is it really the Limited Partnership which is the franchisor taking actions, holding the assets, and risking liability, or is the franchisor really, in effect, the General Partner of the Limited Partnership? As Leonard Polsky explains, the courts have considered the status of a limited partnership on a number of occasions, and have concluded, generally, that within the limited partnership structure, it is the General Partner in fact which makes the decisions and executes the documents, and that it is the General Partner in fact which takes any actions on behalf of the limited partnership. 1434

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INSOLVENCY

The Assignment of Franchise Agreements in Bankruptcy: Concerns for Franchisors

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Introduction

In 2009, amendments to the *Bankruptcy and Insolvency Act*[1] created section 84.1. This provision permits a trustee in bankruptcy to apply for a court order unilaterally assigning all of the rights and obligations of a bankrupt under an agreement to any third party who accepts the assignment. Until recently, there was no case law on section 84.1, and it was not clear how the provision would apply in the franchising context. However, in *Ford Credit Canada Ltd. v. Welcome Ford Sales Ltd.*,[2] the Alberta Court of Appeal clarified the law in this area by holding that:

(i) franchise agreements may be considered standard commercial agreements for the purposes of the BIA, not "personal contracts", and are therefore subject to section 84.1;

(ii) a court can assign the rights and obligations of a bankrupt franchisee to a third party over the objections of the franchisor; and

(iii) section 84.1 overrides a franchisor's common law and contractual rights to terminate a franchise agreement upon the franchisee's breach of the agreement.

This article examines the Alberta Court of Appeal's decision in *Welcome Ford* and considers some of its major implications for franchisors. Specifically, this article examines the factors that a court will consider when asked to assign an agreement under section 84.1 of the BIA, and what steps franchisors should take in order to avoid a similar result if any of their franchisees become bankrupt or insolvent.

Legislative Background

Provision

Section 84.1 of the BIA permits the court to assign any agreement entered into by a bankrupt to a third party upon application by the trustee of the bankrupt's estate. The agreement must be assignable, i.e., it must not be (a) entered into on or after the date of bankruptcy, (b) an eligible financial contract, (c) a collective agreement, or (d) unassignable by its nature (i.e., a contract for personal services). In addition, subsection 84.1(4) provides that:

> 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.

Purpose

Section 84.1 overrides the common law unilateral right of an innocent party in a breach of contract to accept repudiation and terminate the contract. Its purpose is to protect and enhance the assets of a bankrupt's estate by permitting the assignment (sale) of agreements entered into by the bankrupt to third parties. This purpose recognizes that commercial agreements may hold considerable value for the bankruptcy estate as a whole. Accordingly, the assignment of agreements may be an important means of maximizing recovery for the creditors of the bankrupt.

Alberta Court of Appeal Decision

Facts

Welcome Ford Sales Ltd. ("Franchisee") operated a franchise vehicle dealership through a dealership agreement with Ford Motor Company of Canada Ltd. ("Franchisor"). In

[1] R.S.C. 1985, c. B-3 ("BIA").
[2] 2011 ABCA 158.

early 2010, the Franchisor's auditors discovered that a senior employee at the franchisee's dealership had misappropriated funds. The day after the misappropriation was discovered, the Franchisor's financing arm, Ford Credit Canada Limited ("Ford Credit"), which had a secured interest in the franchisee's inventory of vehicles and parts, obtained a court order appointing a receiver for the franchisee. The receivership order stayed all rights and remedies against the franchisee except with the consent of the receiver and the Court. In particular, the receivership order prohibited any party from terminating any agreement with the franchisee.

The franchisor applied for a court order lifting the stay of proceedings so that it could terminate the dealership agreement with the franchisee. At the same time, Ford Credit asked the Court to lift the stay as against it so that it could remove its collateral in the vehicle inventory. The Alberta Court of Queen's Bench denied these applications.

Following the franchisor's unsuccessful motions, the Bank of Montreal obtained a court order placing the franchisee into bankruptcy. The trustee then began marketing the franchisee's dealership for an *en bloc* sale of all its assets, including the dealership agreement. The franchisor opposed the assignment of the dealership agreement to any third party and argued that the dealership agreement could not be assigned without its consent. The lower Court dismissed this argument and allowed the trustee to proceed with the sale pursuant to section 84.1 of the BIA. The franchisor appealed.

Ruling

On appeal, the franchisor argued that the dealership agreement could not be assigned under section 84.1 of the BIA because:

(i) the agreement had terminated prior to the appointment of the receiver as a result of the franchisee's "fundamental breach" in failing to supervise its managers or prevent the misappropriation of funds; and

(ii) the proposed assignment did not meet the prerequisites for court approval under section 84.1, namely that (1) the dealership agreement was not assignable by its nature because it was a "personal contract," and (2) the assignment was inappropriate and the proposed assignee lacked the capacity to perform the franchisee's obligations under the agreement.

The Court of Appeal rejected the franchisor's arguments on both grounds and dismissed the appeal.

Analysis

With respect to the franchisor's argument that the franchisee had "fundamentally breached" the dealership agreement, the Court of Appeal applied the test from *Shelanu Inc. v. Print Three Franchising Corp.*, asking whether the franchisee had deprived the franchisor of "substantially the whole benefit of the contract." In applying this test, the Court of Appeal accepted the lower Court's finding that there was no evidence that the franchisee knew that its employees were misappropriating funds, or that the franchisor's reputation had suffered as a result of the misappropriation. In addition, the Court of Appeal stated that if the agreement were assigned to the proposed purchaser, which was itself a Ford franchisee, the franchisor would "receive the benefit the parties intended it to receive when that agreement was created." Accordingly, the Court of Appeal held that the *Shelanu* test was not met and that no fundamental breach had occurred.

With respect to section 84.1 of the BIA, the Court of Appeal rejected the franchisor's argument that the dealership agreement was by its nature unassignable because it was a "personal contract," despite the express wording of the dealership agreement to this effect. Simply saying that an agreement is "personal in nature," and therefore unassignable, would defeat the purpose of subsection 84.1(4) of the BIA, which sets out the factors that a court must consider when determining whether to assign an agreement. The Court of Appeal also accepted the lower Court's conclusion that the dealership agreement was "a rather standard commercial franchise which could be performed by virtually any business person and entity with some capital and experience in automotive retailing." Lastly, the Court of Appeal noted that the franchisor had shown little concern over who should operate the franchisee's dealership both when it prepared the original dealership agreement and upon renewal in 2007:

> [T]here was no evidence Ford had made any inquiry in respect of Smith, the owner of Welcome Ford, before signing the original dealership agreement or its most recent renewal in 2007, even to the extent of a credit check or confirmation as to his or the dealership's financial status from their bankers. Indeed, Ford did not know that Smith had relocated to the Dominican Republic well before the receivership order was granted; there was no evidence that it monitored him or stayed in regular contact with him throughout the period he controlled Welcome Ford.

The Court of Appeal concluded that the dealership agreement was assignable under section 84.1, and upheld the lower Court's decision.

Some Lessons From Welcome Ford

Section 84.1 of the BIA Applies to Franchise Agreements

Since Canada's bankruptcy and insolvency system is a federal regime, the Alberta Court of Appeal's decision is, at least in theory, binding on the lower courts of other provinces. In the absence of any conflicting decision from other provincial courts of appeal, *Welcome Ford* stands for the proposition that section 84.1 applies to franchise agreements across Canada. In addition, while the Court of Appeal left open the possibility that a franchise agreement could be a "personal contract," and therefore unassignable by its nature, the Court's analysis suggests that this would be unlikely in most cases. In particular, the Court of Appeal relied on the lower Court's finding that the relationship between the franchisor and the franchisee was commercial in nature, and that there was nothing that the franchisee "alone could or did provide" so as to make the dealership agreement personal. In doing so, the Court of Appeal dismissed the franchisor's argument that the dealership agreement required the franchisee to have "special personal characteristics, including specific requirements of knowledge, capital and experience."

The franchisor also argued that since the dealership agreement imposed certain good faith and fair dealing obligations on the parties, there was a risk that assigning the agreement to any third party would increase the risk that the assignee would not honour its good faith obligations under the agreement. The Court of Appeal agreed that this risk was possible in theory, but noted that in this case, where certain employees of the dealership had misappropriated funds, the risk would be reduced by the assignment to an existing Ford dealer in good standing.

The Court of Appeal seemed to agree that a proposed assignee's ability to perform its good faith obligations under a franchise agreement falls under the subsection 84.1(4) factors that a court must consider, and is therefore a prerequisite to the assignment. In this case, however, the proposed assignee met the requirement.

In effect, the Court of Appeal substituted its business judgment of who should operate the franchisee's dealership over the franchisor's judgment. In particular, the Court of Appeal accepted the lower Court's findings that:

(i) the dealership agreement was "a rather standard commercial franchise which could be performed by virtually any business person and entity with some capital and experience in automotive retailing;" and

(ii) the proposed assignee had "both the capital and relevant experience in automotive retailing to enable him to operate the franchisee's dealership."

Evidently, the above factors were not the only ones that concerned the franchisor in determining who, if anyone, should operate the franchisee's dealership. The franchisor presented evidence to the lower Court that the territory of the dealership might not be commercially viable any longer, and that the dealership's facilities had become inadequate. However, the lower Court gave little weight to this evidence and suggested that if the franchisor had serious concerns regarding the viability of the dealership, it would have raised these concerns earlier in the proceedings, and before it sought the receivership order.

The Purposes of Section 84.1 Have Priority Over the Franchisor's Contractual and Common Law Rights

The Court of Appeal's analysis underscores the purpose of section 84.1, which is to protect and enhance the value of the bankruptcy estate for the benefit of creditors generally. This aim recognizes that different forms of commercial agreements may hold considerable value for the estate, and that the bankruptcy court may unilaterally assign them "even if the contractual rights of some creditors … are compromised" as a result. Franchisors should keep this purpose in mind in insolvency scenarios, especially where an insolvent franchisee has creditors who may not share the same interests as the franchisor. For example, once the bankruptcy process has been initiated, banks – including the bank in this case – are primarily motivated to maximize their recovery from the sale of the business.

Given the above, simply providing that a franchise agreement is not assignable by reason of its nature, will not prevent its assignment under section 84.1. At the same time, the proposed assignee in *Welcome Ford* was an existing Ford franchisee. Therefore, in light of the fact-specific inquiry required to approve an assignment under section 84.1, it is an open question whether the Court of Appeal or the lower Court would have approved the assignment to any third party that seemed "up to the job," or whether it permitted the assignment in this case solely because the assignee was an existing franchisee of the same system. Accordingly, rather than stipulating that a franchise agreement is unassignable by its nature, franchisors seeking to avoid a similar result as in *Welcome Ford* might wish to prohibit their existing franchisees from purchasing additional franchises without the franchisor's consent, whether through an assignment in bankruptcy or otherwise. However, this approach carries the risk that the ultimate assignee will turn out to be a third party who is less qualified to operate the franchise than an existing franchisee.

Franchisors should also be aware that where they withhold their consent to an assignment of a franchise agreement by a trustee in bankruptcy, the bankruptcy court may ask whether it is reasonable to withhold consent in the circumstances. In *Welcome Ford*, for example, the lower Court found that "Ford would never consent to the assignment of the dealership agreement because it would not consent to the assignment of any dealership agreement where a dealership had ceased operation." The lower Court concluded that this was unreasonable because "Ford had not taken into account the merits of the proposed assignee," and the Court of Appeal agreed. Therefore, rather than providing a blanket refusal, a franchisor should clearly and carefully set out its reasons for withholding its consent to a proposed assignment when it does so in the insolvency context, and these reasons should specifically address the ability of the proposed assignee to perform the obligations imposed by the franchise agreement.

Franchise Agreements May Also Be Assignable Under Section 11.3 of the Companies' Creditors Arrangement Act

Franchisors should be aware that franchise agreements may also be assignable under section 11.3 of the *Companies' Creditors Arrangement Act*,[3] which provision substantively mirrors section 84.1 of the BIA. While the CCAA provision has yet to be tested in the franchising context, a franchisor with an insolvent franchisee should consider whether the franchisee is likely to pursue CCAA proceedings. Notwithstanding the typically higher costs of CCAA proceedings as compared to BIA proceedings, CCAA proceedings are an option for a distressed franchisee whose debt exceeds $5,000,000.

Conclusion

Ideally, franchisors should take every possible step to ensure that their franchisees avoid bankruptcy and insolvency proceedings. However, where such proceedings are unavoidable, franchisors should be aware that neither a trustee, a bankrupt nor the bankruptcy court is likely to pass on the opportunity to sell valuable franchise agreements where doing so will maximize returns for the estate.

Franchisors' counsel should take careful note of the factors that will inform the fact-specific judicial analysis of whether an agreement is assignable under section 84.1 of the

[3] R.S.C. 1985, c. C-36 ("CCAA").

BIA, and should be aware of the possibility that similar proceedings to those discussed herein could occur under section 11.3 of the CCAA. As both of these sections are new provisions, it remains to be seen how courts in provinces other than Alberta will interpret them. However, *Welcome Ford* will undoubtedly inform future decisions involving the assignment of franchise agreements in the insolvency context.

QUEBEC – LANGUAGE CHARTER

The Charter of the French Language: What to Know When Doing Business in Quebec

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Background

The majority of the population of the province of Quebec is French-speaking, while other provinces of Canada such as New Brunswick, Ontario and Manitoba have significant French-speaking populations. Quebec, with a population of eight million people, is the second largest province in Canada after Ontario.

The *Charter of the French Language*[1] (the "Charter") was introduced in 1977 by the Quebec government. The objective of the Charter is to protect the quality and influence of the French language in the province while making French the official language of government and the law, and the everyday language of work, instruction, communication, commerce and business.[2]

Over the years, some sections of the Charter have been declared unconstitutional by the Supreme Court of Canada, which makes its application much narrower than it was when adopted in 1977.

The Charter provides that its provisions are monitored by a governmental body, the *Office québécois de la Langue Française*[3] (the "Office").

Among other things, the Office has the power to make inspections and inquiries.[4] Every person who contravenes a provision of the Charter commits an offence and is liable to a fine of between $600 and $6,000 for a person and between $1,500 and $20,000 for a company. Fines are doubled for subsequent offences.[5]

The following is a brief overview of the mandatory duties of a company doing business in Quebec in terms of the Charter.

French as the Language of Work

Section 4 of the Charter provides that "workers have a right to carry on their activities in French."

The right to work in French includes:

- all communications from the employer to the employees, including offers of employment and promotions, must be drafted in French;[6]
- collective agreements must be drafted in French;[7]
- an employer is prohibited from dismissing, laying off, demoting or transferring an employee for the sole reason: (a) he or she is exclusively French-speaking; (b) he or she has insufficient knowledge of a particular language other than French; or (c) he or she has demanded that a particular provision of the Charter be respected;[8] and
- an employer is prohibited from requiring the knowledge of a language other than French for the purpose of obtaining employment, unless the nature of the duties requires such knowledge.[9]

French as the Language of Commerce and Business

Companies doing business in Quebec must follow these mandatory sections of the Charter:

- Every inscription on a product (including its container or wrapping), a document or object supplied with it, the directions for use and the warranty certificates must be drafted in French. The French inscription may be accompanied by inscriptions in

[1] R.S.Q., chapter C-11.
[2] Preamble of the Charter of the French Language.
[3] Section 160, Charter of the French Language.
[4] Section 166, Charter of the French Language.
[5] Section 205, Charter of the French Language.
[6] Section 41, Charter of the French Language.
[7] Section 43, Charter of the French Language.
[8] Section 45, Charter of the French Language.
[9] Section 46, Charter of the French Language.

another language but no inscription in another language must be given greater prominence.[10] Some exceptions apply to this general rule; they are more fully explained in the Regulation respecting the language of commerce and business.[11] Federal laws may also apply to these matters.

- Catalogues, brochures, folders, commercial directories and any similar publications must be drafted in French.[12] Again, some exceptions apply to this general rule.[13]
- All computer software, including game software and operating systems, whether installed or uninstalled, must be available in French unless no French version exists. Software may also be available in another language, provided that the French version can be obtained on terms that are no less favourable and that its technical characteristics are at least equivalent. In terms of price, it can be non-equivalent if it reflects higher production or distribution costs.[14]
- Toys and games, except those referred to in section 52.1, which require the use of a non-French vocabulary for their operation, are prohibited for sale in the Quebec market, unless a French version of the toy or game is available on the French market on no less favorable terms.[15]
- Contracts of adhesion, contracts containing printed standard clauses, and other related documents must be drafted in French. They can be drafted in another language if it is the express wish of the parties.[16]
- Application forms for employment, order forms, invoices, receipts and releases have to be written in French.[17]
- Public signs, posters and commercial advertising must be in French. They may also be in French and another language if French is markedly predominant.[18] The term "markedly predominant" is defined by Regulation.[19] Some exceptions and specifications apply to the general rule.[20]

Company Names and Public Signs

The name of a company doing business in Quebec must be in French or must have a French version.[21] The name of a business may be accompanied with a version in another language provided that, when the name is used, the French version appears prominently.[22]

Section 25 of the Regulation respecting the language of commerce and business[23] provides:

> 25. In public signs and posters and in commercial advertising, the following may appear exclusively in a language other than French:
>
> (1) the firm name of a firm established exclusively outside Quebec;
>
> (2) a name of origin, the denomination of an exotic product or foreign specialty, a heraldic motto or any other non-commercial motto;
>
> (3) a place name designating a place situated outside Quebec or a place name on such other language as officialized by the Commission de toponymie du Québec, a family name, a given name or the name of a personality or character or a distinctive name of a cultural nature; and
>
> (4) a recognized trade-mark within the meaning of the *Trade-marks Act* (R.S.C. 1985, c. T-13), unless a French version has been registered.

Family names (e.g., *Smith*), place names (e.g., *Trafalgar Square*), expressions formed by the artificial combination of letters (e.g.,

[10] Section 51, Charter of the French Language.
[11] R.R.Q., c. C-11, r. 9.
[12] Section 52, Charter of the French Language.
[13] Regulation respecting the language of commerce and business R.R.Q., c. C-11, r. 9.
[14] Section 52.1, Charter of the French Language.
[15] Section 54, Charter of the French Language.
[16] Section 55, Charter of the French Language.
[17] Section 57, Charter of the French Language.
[18] Section 58, Charter of the French Language.
[19] Regulation defining the scope of the expression "markedly predominant" for the purposes of the Charter of the French Language, R.R.Q., c. C-11, r. 11.
[20] Section 59, Charter of the French Language and Regulation respecting the language of commerce and business, R.R.Q., c. C-11, r. 9.
[21] Sections 63 and 64, Charter of the French Language and section 17 of *An act respecting the legal publicity of enterprises*, L.R.Q., P-44.1.
[22] Section 68, Charter of the French Language.
[23] RRQ, c. C-11, r. 9.

AIG), syllables (e.g., *RecyFor*), figures (e.g., *221*), and expressions taken from other languages (e.g., *Daily Living*) may appear in the names of enterprises.[24] This part is described in the Charter of the French Language as the "specific" of the company name. When a "specific" is used in another language than French, it has to be accompanied by a generic term in French.[25]

The Office launched a campaign in November 2011 for the awareness of the respect of public signs and use of trade-marks as a company name. Companies have been visited by inspectors and ordered to comply with the Charter. The Office advertised having as a goal to work with the businesses in order to have them comply with the law. A financial support program has been put in place for smaller businesses.[26]

The Office has published a guideline to help businesses comply with the Charter.[27] The guideline gives the following examples of what is acceptable as a public sign for a company using a trade-mark as a company name. The examples are with the trade-mark *Daily Living* operating a furniture store:

- Add a French generic descriptive term to the trade-mark: *ameublement Daily Living*. In this example, the word *ameublement* (furniture store in French) describes the type of business operated by the company.
- Use a French version of the trade-mark: *Les beaux jours*.[28] It can be a literal translation or not.
- Add a French descriptive expression or slogan to the trade-mark: *Daily Living meubles, literie et decoration* (in English: *Daily Living furniture, linens and decoration*) or *Daily Living Pour un decor au gout du jour* (in English: Daily Living for a makeover of your decor).
- Have a public sign in both languages with a clear predominance to French.

Conclusion

Further to the imperative sections of the Charter of the French Language, it is a good business practice to do business in French in Quebec. Many businesses have successfully conquered the Quebec market by, among other things, translating their trade-mark and commercial material in French. It should not be seen as an obstacle to develop business in Quebec. Like other aspects of developing a new market, it is wise to seek advice in order to comply with the Charter of the French language. It is important to note that many exceptions and specifications have been not been discussed in this article.

[24] Section 67, Charter of the French Language.

[25] Section 27, Regulation respecting the language of commerce and business, R.R.Q., c. C-11, r. 9.

[26] Press Release of the *Office québécois de la Langue Française*, November 13, 2011.

[27] www.respectdelaloi.gouv.qc.ca.

[28] *Les beaux jours* is not a literal translation.

CORPORATE LAW

Who Is the Ultimate Franchisor in a Limited Partnership Structure?

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There are no limitations placed upon the type of legal entity chosen to be a franchisor. The majority of franchisors appear to be corporations, however, among other structures, a number of franchisors are in fact limited partnerships.

This type of business structure is a valid choice. However, when it comes to certain types of legal analysis, usually involving issues such as title or liability, the question can arise as to which party is ultimately the holder of title to property, or which party is ultimately liable when a successful claim is made.

The courts have considered the status of a limited partnership on a number of occasions, and have concluded, generally, that within the limited partnership structure, it is the General Partner in fact which makes the decisions and executes the documents, and that it is the general partner in fact which takes any actions on behalf of the limited partnership.

Two such cases are illustrative here. They are *Kucor Construction & Developments & Associates v. Canada Life Assurance Co.*[1] and *Belzberg Technologies Inc. v. ITG Canada Corp.*[2]

In the first of these cases, it was accepted that a Partnership was constituted only as a relationship between the legal entities, and that at common law, the Partnership does not have a legal existence of its own. Further, it was stated that a Limited Partnership is just one type of Partnership.

The *Kucor* case examined the Limited Partnership's legal existence in the context of real property. However, the principles enunciated are not limited to real property, and should be considered also in the contexts of tangible and intangible personal property, such as the assets which form the principal assets of a franchise system.

In the excellent annotation from the Carswell report of the Ontario Court of Appeal decision in the *Kucor* case, some examples are given of common or "conventional" corporate approaches taken when documents are executed on behalf of a limited partnership. For example, for corporate purposes, a conventional means of execution would be:

> ABC Limited Partnership by its General Partner, XYZ Ltd.

For real estate purposes, a conventional means of execution would be:

> XYZ Ltd., as General Partner for the Partners of ABC Limited Partnership.

In the *Belzberg* case, which followed the *Kucor* case, the finding on this issue was that a Limited Partnership is not a legal entity distinct from its General Partner, and that there was no distinction between actions taken in the name of the Limited Partnership, and actions of the General Partner.

In the *Kucor* case, the Ontario Court of Appeal found that the Limited Partnership involved was not a legal entity, at least for the purposes of holding and mortgaging real estate. The Limited Partnership was held to acquire and convey title to real estate through its General Partner. The Limited Partnership was found to be "incapable" of holding title to land, namely of receiving its title, and conveying such title.

Interestingly enough, the Court found that the Limited Partnership was properly named as a party in the action, but that it was clear in law that the mortgage in question in that case had been given by the General Partner corporation, as a corporation, and notwithstanding that it had done so as the General Partner for or on behalf of the Limited Partnership.

In that particular case, this legal distinction was material, as a statute precluded a corporation from making the prepayment of

[1] (1998) 41 O.R. (3d) 577 (Ont. C.A.) ("*Kucor*").
[2] 2005 CanLII 35788 (Ont. S.C.J.) ("*Belzberg*").

the mortgage that was in question in the case.

The annotation to the Carswell *Kucor* case report succinctly described the situation in that case as follows:

> Both courts accepted the general proposition that a limited partnership was not a legal entity and therefore could not hold or mortgage property (there is virtually no academic or jurisprudential authority that suggests anything to the contrary ...).

A further comment from the same annotation is also illustrative, in broader terms, of the issue of the status of a Limited Partnership, as follows:

> Of course, the law is full of a number of deeming statutes which allow a limited partnership for certain purposes to take on the guise of a separate legal entity .... So, for instance, a limited partnership can: sue and be sued; file its own income tax returns; be petitioned into bankruptcy; have financing statements registered against it, etc., all in its own name. Nonetheless, these incidences of legal existence remain statutorily granted conveniences, and it remains a non-sequiter to then conclude that a limited partnership is, therefore, a separate legal entity for all purposes.

In considering all of this, perhaps a useful suggested approach to document execution in a Limited Partnership franchise situation would be to have the franchisor's documents executed as follows:

> XYZ Ltd. in its capacity as General Partner of and for the Partners of ABC Limited Partnership.

This would represent a good combination for most or all purposes, of the examples quoted earlier from the annotation to the Carswell report of the *Kucor* case.

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