



CBA INSOLVENCY GROUP

A B-2 Spirit stealth bomber is shown in flight, viewed from a high angle. The aircraft is dark and sleek, with its wings spread. Below it, a long, vertical line of bombs is being dropped, creating a trail of falling ordnance. The background consists of a clear blue sky above a layer of white, fluffy clouds.

CBA Insolvency Discussion Group

The Role of the Monitor Under CCAA

With Emphasis on Conflict Issues

The Role of the Monitor

- Independence
- Conflicts
- Recent Cases
- Reports
- Material Adverse Change
- Cash Flow Projections

The Role of the Monitor

- **Cost Reductions/Sale Approvals**
- **Refinancing/Restructuring**
- **Post Filing Payments**
- **Liaison with Stakeholders**
- **Super Monitor**
- **Statutory Duties**

Writers involvement 2 key lessons

- Skeena I 1. Stakeholders views 2 Courts eyes/ears
- Skeena II 1. Evergreen contracts 2. Monitor bankrupts Co
- Skeena III 1. Twin Track 2. Whose DIP
- Houwelings 1. Strategic Direction 2. Monitor arranging sales
- Jackpine 1. Conflict 2. Replacement of Monitor
- Hester Creek 1. Stay of the Stay 2. Monitors Report
- Redekop 1. Business Review 2. Cross Examination

Recent Court Decisions

- **United Used Auto – keep the secured at bay**
- **Hester Creek – less than full disclosure in Petition**
- **Hickman Equipment - affirmed Auditor may act as Monitor**
- **Skeena – Plan can terminate contracts**
- **St Eugene Mission – Sale of assets by CRO in 60 days**
- **Broad and liberal interpretation a recurring theme**
- **Inherent jurisdiction of the Court vs. the Act**

Independence of the Monitor

- Who can be the Monitor?
- Who should be the Monitor?
 - Only required since 1997
 - Auditors have client knowledge with potential conflicts
 - Monitor does not have to be a trustee
- Impartiality and Independence
 - as the Court may direct
 - Not an advocate for Company
 - Sometimes act as “financial advisor”

Independence of the Monitor

- Eyes and ears of the Court
- Reliance on information provided by Monitor
- Ensuring Company compliance with Order
- Reporting to secured creditors
- Sometimes sell assets with secured creditor approval
- Meetings with stakeholders
- Creditors often have little confidence and trust in management
- Who pays? Skeena admin charge \$1.2M, United admin charge \$1M

Conflict Issues

- **Can Auditor be Monitor**
- **Is a Public Company any different**
- **My view**
- **Skinny Monitor**
- **Professionals are judged by the Company they keep**
- **By agreeing to act in a CCAA filing, you and legal counsel are lending your name to that Company and giving it credibility (see Hester Creek)**

Conflict Issues: My View

- Appointment driven by the debtor
- Can't be monitor if you're the auditor
- Monitors are very cautious and afraid of biting the hand that feeds them
- Too often a CCAA filing is inappropriate
- Too often the stay is extended for too long a period of time, and huge costs incurred (admin charge) that bear no relation to the value of the reorganization effort or outcome (Hester Creek, United Auto)

Conflict Issues: My View

- Courts have let the process be abused, and relied too much on legal maneuvering
- Courts need to read the Monitors reports before hand, and if they need clarification, ask the Monitor
- Monitor should be available to be cross examined on their reports
- Monitor should be prepared to express their opinion and not be afraid to tell the truth

Conflict Issues: My View

- Monitor should not be afraid that by expressing their opinion they may lose work
- Very difficult role if the job is done properly, you can't please everyone, and sometimes the truth is ugly

Conflict Issues

- Say what you think not what you think people want to hear
- “.....the prospects of obtaining funding can best be described as speculative” Monitors first report New Skeena dated December 8, 2003
- “I agree with Mr. Bowra’s assessment....that this proposal can best be described as a wing and a prayer” Justice Sigurdson Redekop Properties Inc CCAA filing March 2, 2001
- Monitor role a difficult one, saying what you think can be costly

Monitor Reports to Court

- Purpose
- Prescribed Information
- Frequency
- Audience

Monitor Reports to Court

- **Structure / Schedules**
- **Asset values**
- **Confidentiality issues**
- **Web Sites**
- **Typical Report layout**
- **Independent Assessment**

Material Adverse Change

- In projected cash flow
- In financial circumstances
- In operations
- In restructuring process
- In economic factors / outlook
- How material?
- How adverse?
- How common?

1. - Royal Oak and Canada 3000 but reports are rare

Cash Flow Projections

- **Format** - what good is it without an income statement and a balance sheet?
- **Period covered** – their choice: weekly or monthly
- **Detail** - as much or as little as they feel like
- **Certification**– you don't really think we've audited this do you?
- **Assumptions** – are they too easily achieved?
- **Whose Projections** are they anyway?
- **Is anyone holding Management's feet to the fire?**

Cost Reductions / Sale Approvals

- Terms of Order / Mandate
- Who decides - not usually the party paying
- Burn rate – burn, baby, burn
- Claims arising post filing (severance, pensions, etc.)
- Sale of redundant assets – who needs DIP?
- Sale of divisions – cash, cash, cash at fire sale prices
- Cash realised will finance extensions
- Virtually impossible to obtain Court approval for a major transaction without prior approval from Monitor

Management Assessment

- **Mandate - no-one wants to go there**
- **Can the team that got us here really lead us to the Promised Land?**
- **Chief Restructuring Officer or do we mean CLO**
- **Find a Report with one, if you can**

Refinancing / Restructuring

- Terms of Order
- Forms of assistance by Monitor
- Reporting
- How long does it take to put a Plan together?
- Doomed to Failure concept

Post Filing Payments

- Terms of Order
- Exposure for suppliers – but many give credit anyway
- Deposits / Trust Fund – a rare animal
- Letter to suppliers - YOYO

Liaison with Stakeholders

- **Petitioner**
- **Secured Creditors**
- **Trade Creditors**
- **Post-Filing Suppliers**
- **Employees/Unions**
- **Lessors**
- **Municipalities**
- **Government Departments/Agencies**
- **First Nations**
- **Media**

Super Monitor

Monitor is now playing far broader role than the original role of watchdog. Examples of expanded role include

1. Implementation of initial order
2. Financial advisor
3. Facilitator-mediator
4. Manager
5. Receiver

Super Monitor

- The potential broad nature of the role confuses the conflict analysis.
- Courts have concluded Monitor must act independently and consider the interests of the petitioners and the creditors.
- The Monitor must be an agent of the Court, assist the Court and be independent of any parties.
- The more expanded the role the more active the Monitor becomes in the proceedings.

Summary of CCAA

- Beware
- Be Concerned
- Be Involved
- Time consuming and expensive process

Summary of CCAA

- Courts generally on side of Debtor
- Often difficult to overturn, especially where jobs at stake, even if shutdown (Skeena)
- Good counsel from Day 1 a must
- Judge shopping

Summary of CCAA

- **Monitors' Reports critical**
- **Abuses can outweigh benefits**
- **\$5 million limit too low**
- **Evolving Role of Monitor**

Statutory Duties

- Section 11.7 (3) of the Act
 - File Reports
 - (i) Per Order
 - (ii) Material Adverse Change
 - (iii) Prior to meetings

- Court Order Requirements
 - Initial Order
 - Comeback Order
 - Administration Order

- Typical CCAA Order – duties of Monitor

- Flexibility of the statute – “inherent jurisdiction of the Court” lends to potentially broad nature of role of Monitor

The Writer's Involvement in Filings since 1998

<u>Company</u>	<u>Monitor</u>	<u>Trustee/ Receiver</u>	<u>Business Review</u>
■ Skeena Cellulose I	x		X
■ Skeena Cellulose II		X	
■ New Skeena Forest Products	X		
■ Jackpine Forest Products	X		X
■ Houweling Nurseries	X		X
■ Garibaldi Alpen Resorts	X		
■ Points North Group	X		X
■ Canadian Imperial Ventures	x		
■ Hester Creek Winery		X	X
■ Redekop Properties		X	
■ United Used Auto & Truck		X	
■ 360 Networks (audit client)	X		
■ St. Eugene Mission			