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The Role of the Monitor in CCAA Restructurings

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Merci, Monsieur le président.

J'ai le plaisir d'être parmi vous aujourd'hui dans la magnifique ville de Québec pour vous faire part de mes réflexions quant au rôle du contrôleur dans des dossiers de restructuration en vertu de la Loi sur les arrangements avec les créanciers des compagnies.

Mr. Chairman, thank you for this very kind, indeed too kind, introduction.

To borrow from one remark of the Irish writer Oscar Wilde, *"…after such an introduction, I can hardly wait to hear what I have to say …"* !!!

To be honest about it, I suspect that some of my colleagues worry that my comments to this audience today may come back to haunt them when they have to decide issues in the future involving the role of monitors appointed under the CCAA.

They can rest assured. My purpose here is not to express the Court's opinion, or for that matter my own opinion, on any potential litigious issue pertaining to that subject.

Those of you who expected advanced rulings of any kind will be disappointed.

My goal is rather to simply share with you some thoughts on what we, as judges, have perceived that role to be, and how it can, sometimes, be useful for us in rendering judgment in CCAA proceedings.

Mon but est simplement de partager avec vous mes réflexions quant au rôle du contrôleur et de son utilité à nous faciliter parfois la tâche dans la prise de décisions en vertu de la Loi sur les arrangements avec les créanciers des compagnies.

To that end, I intend to address the subject from three different angles.

First, by looking at the governing provisions of the CCAA pertaining to the monitor.

Second, by discussing some of his powers, using as starting point the provisions dealing with his role included in what we refer to in Quebec as the "Standard Order" under the CCAA.

Third, by reviewing the liability and the protection of the monitor in the context of CCAA proceedings.

The Governing Provisions of the CCAA

Since 1997, Section 11.7(1) of the CCAA provides that the Court shall appoint a monitor when it issues an order pursuant to Section 11, namely an initial order.

The functions of the monitor are set out in Subsection 3. In essence, they call for the monitor:

(a) to have access to and examine the debtor company's books and records;

(b) to file a report with the Court on the state of that company's business and financial affairs;

(c) to advise its creditors of such report; and

(d) to carry out those functions that the Court may direct him to do.

As it has been the case with many (…if not all …) aspects of the CCAA, Courts have somehow "expanded" on this wording of the Act and have been "a little more precise" in their orders as to what exactly is entailed by those functions.

Judicial creativity notwithstanding, from the description of the functions of the monitor found in the CCAA, one understands his loyalty to be essentially threefold.

First, as a Court-appointed officer, the monitor has a responsibility towards the Court.

Second, when monitoring business and financial affairs and facilitating the restructuring of a debtor, the monitor has a responsibility towards the debtor company.

Third, as the person in charge of advising them on the situation, the monitor has a responsibility towards the creditors.

This threefold mission of the monitor warrants two comments from the judges' perspective.

First comment. As Court-appointed officer, the monitor is, as some have rightly depicted before, the "eyes and ears" of the judge in dealing with the debtor company's business and financial affairs. For any judge, this is important and, I must confess, essential in allowing us to properly carry out our role as decision makers.

As judges, we take great comfort in knowing that the monitor is our "eyes and ears", and we normally give strong consideration to the monitor's assessment of a given situation.

Obviously, this is true as long as he brings us his financial expertise as opposed to his legal expertise… Sometimes, we have to remind some monitors, or their counsels, of the distinction…

Thus, any report of the monitor submitted to the Court is normally a key element in any decision making in CCAA proceedings.

Today, it is a rather standard practice to file written reports of the monitor each time a specific motion is submitted for adjudication, be it on the state of the debtor company's business and financial affairs or on the specific issue in front of us.

We expect that, and I would go as far as saying that after the reading of a given motion, the first document that will be looked at and perused by the judge will often be the monitor's report.

Make no mistake about it. Most of the time, if not always, we read these reports thoroughly.

That said, and because of their importance, some remarks on these monitors' reports may be of assistance to some of you. For judges, who do not know the debtor's business inside out, a good monitor's report is one that is well structured, ideally with a table of contents and easily identifiable captions. While it should be clear, it should also be concise. While it should provide the facts, it should also not hesitate to explain what they are and what they entail. While the decision in the end remains ours, monitors should not be afraid of providing us with their recommendations, in a simple but clear manner.

I am glad to see that most of the monitors' reports that are filed in CCAA proceedings meet these criteria. It is desirable that they continue to do so because of their obvious impact in our decision-making process.

This brings me to my second comment on the threefold mission of the monitor that one can derive from the CCAA.

Being the "eyes and ears" of the judge, it is as important for the monitor to realize that he must remain at all times impartial and independent. With responsibilities towards the Court, the debtor company, and its creditors, there is simply no other way about it. It is indeed because of his impartial and independent role that we, judges, give a lot of importance to his report and take some comfort in the monitor's assessment of a given situation.

From that standpoint, the renewed importance that we are witnessing in the expanding role of the chief restructuring officer (CRO) in the context of CCAA proceedings can only be beneficial to the impartiality and independence of the monitor. It takes him further away from any active role in the operations of the debtor company's business and allows him to focus more on his role as advisor or facilitator in the context of the restructuring.

The CCAA itself raises an interesting issue on the monitor's independence, which I will be cautious in commenting since one can expect that, one day, my Court may have to rule on it.

Contrary to the situation that exists under the BIA, Subsection 11.7(2) of the CCAA allows the auditor of the debtor company to be appointed as monitor in proceedings under the Act. I must confess that it is rarely seen in practice. In most of the restructurings that we have supervised in Quebec, seldom were the auditors appointed as the monitor of the debtor company.

But, it has been seen in other jurisdictions in Canada and there are definite positive justifications to do so, the least of which being the extended knowledge of the affairs of the company that the auditors often have. However, not surprisingly, in the aftermath of the Enron and other similar affairs, some are pointing to the potential danger of a lack of independence of auditors acting as monitors of a debtor

company, for instance in carrying on his responsibility to assess what went wrong and how, if anything, it should be remedied.

I will leave it at that for now, as this is a good place to move to the second angle from which I want to discuss the role of the monitor, namely his powers.

The Powers of the Monitor

What the CCAA summarizes in four paragraphs at Subsection 11.7(3) is often translated in three or four pages, sometimes more, in the orders that we, as judges, are asked to issue.

In this Province, thanks to a great cooperation between the "Commercial Bar" and the Commercial Division of the Superior Court (which corresponds to the Commercial List in other Canadian jurisdictions), we have been able to work and agree on what is now referred to as a "Standard Initial Order". In doing so, we have tried to cut as much as possible on the excess and useless wording that is too often found in orders

submitted and issued under the CCAA. This Standard Order is now referred to specifically in section 5.5 of the General Rules of the Commercial Division of the Superior Court.

Our Court invites counsels to use the Standard Order as much as possible, not because it will be automatically granted, but because, thanks to that cooperation, it is a document that all judges of the Commercial Division know, are familiar with, and have already reflected upon. It thus facilitates the reading, helps to render the process more efficient, and allows everyone to focus more easily upon the real issues that may arise in a given case.

Obviously, this Standard Order includes sections on the powers of the monitor. It is not my intention to repeat them all to you, but I would like to share with you some of their main features which, in my view, emphasize key aspects of the role of the monitor.

To begin, I bring your attention to the closing words of the main paragraph (#23) dealing with the powers of the monitor. Interestingly, after an enumeration of powers that covers thirteen items, these closing words reiterate that the monitor is not to interfere with the business and financial affairs of the debtor company and that he is not empowered to either take possession of its property or manage its business.

In my view, this is representative of the key element of his independence. In fact, many of the terms used in the listing of the powers of the monitor focus upon his role as "assistant" to the debtor company. The monitor is not taking it over. He needs to be pragmatic, practical and helpful to the debtor company, but he should remain impartial because of his duties to others, i.e. the Court and the creditors.

I fully realize that this may be more and more difficult with the evolving role of the monitor faced with complex restructurings where, sometimes, he must, in essence, even replace a defunct board. Nevertheless, he should remain careful to maintain a

proper balance as well as fairness and impartiality in dealing with the interests of all involved.

A good example of this is the role that is entrusted in him in some matters when the sale of major assets or business segments of a debtor company is rendered necessary for a successful restructuring. In these situations, his views on the valuation of assets and on the opportunity of the sale are seriously considered, as his role of ensuring that a reliable and trustworthy process has been followed. They are key to obtaining the best price possible, for the ultimate benefit of the creditors.

In the same vein, another paragraph of the Standard Order confirms that the monitor is not an employer or a successor employer, as our Court of Appeal decided in *Mines Jeffrey* in 2002. The property of the debtor company does not become that of the monitor and the continued operations remain those of the company, not his.

The provisions of the Standard Order dealing with the powers of the monitor also emphasize the need for him to access the books and records of the debtor company, as well as the necessity to report to the Court whenever needed.

I have already explained the usefulness of these reports for us at almost every phase of the restructuring. To cite a few examples, I can mention: to be reassured on the level of cash-flow, to hear the monitor's view on the need for a DIP financing and, if so, for how much, to have his opinion on the opportunity of selling some of the assets, to obtain his assessment and recommendations on the plan of arrangement.

Lastly, on the powers of the monitor, the Standard Order includes provisions requiring him to notify and inform the creditors. From the standpoint of the creditors, what we have seen in practice so far is interesting. The initial order is but one step that will normally involve later on a much more thorough and detailed order. Such order may deal, for

example, with specific powers and obligations for the monitor in handling the claims identification and valuation process, as well as in the calling, handling and presiding over of the meetings of the creditors on the plan of arrangement.

No provisions of the CCAA call for the monitor to perform those tasks, but experience shows that it is now becoming more and more frequent to see these responsibilities being given to the monitor, with obvious reference to a right of appeal to the Court in case of disagreement. For example, we have been called upon to review rejection notices of given claims issued by monitors.

On a different note, another interesting feature of the Standard Order is the recognition, at paragraph 27, that as officer of the Court, the monitor shall not incur liability as a result of the fulfilment of his duties, save for situations arising from gross negligence or wilful misconduct. And even there, the Standard Order indicates that no action can be

commenced against the monitor without prior leave of the Court, after notice to him and counsels.

This brings me to the final angle from which I want to look at the role of the monitor, namely that of his liability and protection.

Ce qui m'amène au dernier angle sous lequel j'exprime le rôle du contrôleur, à savoir sa responsabilité et sa protection.

The Liability and Protection of the Monitor

This protection from liability granted to the monitor in the Standard Order that our Court issues is in line with what the CCAA provides for. At Subsection 11.7(4), it enacts that the monitor is not to be liable when he acts in good faith and takes reasonable care in preparing the reports filed. In Section 11.8, it goes even farther in terms of non-liability of the monitor in respect of certain matters like claims arising before the monitor's appointment or environmental matters.

As of now, these provisions have not given rise to many disputes, if any.

But the protection of the monitor does not stop there. In initial orders issued under the CCAA, Courts in this province and in other jurisdictions in Canada have approved the inclusion of a priority charge to protect the monitor's fees and disbursements, as well as those of his counsels and advisors. It is normally referred to as the "administration charge".

Courts in this country have felt rather unanimously that it is necessary to protect the monitor in this fashion because his role is beneficial to all involved, including creditors.

This, however, calls for some remarks.

Even though one can safely venture to say that Canadian courts have regularly affirmed their ability to create and order priority charges for the monitor's fees and disbursements through the use of their inherent jurisdiction as a source of

judicial power, there still remains an important exercise of discretion that a Court must make in this respect, namely to decide for how much and in which circumstances it should be granted. This, unfortunately, seems to be somewhat forgotten.

The "administration charge" for the monitor is not a blank cheque. Too often, the amounts sought are not thought through and counsels regularly experience difficulties in justifying their extent. While the principle of an "administration charge" for the monitor's fees and disbursements appear to be accepted by most, the issue of what is reasonable under a given set of circumstances is still and often open to much discussion.

It is the role of the monitor, and that of counsels, to come prepared in front of the Court in order to explain why they need that much protection, bearing in mind the financial situation of the debtor company and that this should be assessed considering the specific situation at hand and the

obvious impact the issuance of an initial order will have upon the creditors.

Surely, for some, being the "eyes and ears" of a judge may be priceless, or of an incalculable value... However, it by no means entails that you can charge anything for the mere privilege of being so … Reasonableness has its limits!!!

On that note of advice, I thank you for allowing me to share these thoughts with you on the role of a very important ally which helps us render well-reasoned and properly founded judgments in the context of CCAA restructurings.

Thank you.

François Rolland,
Chief Justice