

Murray McDonald is a king of Canada's restructuring world.

The inner circle

RESTRUCTURING: WHO'S WHO

By Karen Mazurkewich



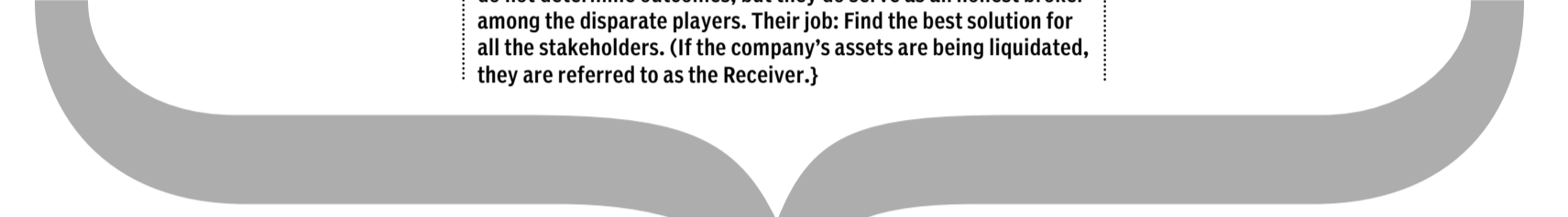
At the centre of a restructuring process is the Monitor. He is the linchpin, guiding the settlement plan, making recommendations to creditors and reporting back to the judge in CCAA court proceedings. While they are officers of the court, they are usually selected by the company's board of directors or recommended by the company's legal adviser. So, their reputation for being fair is key. They do not determine outcomes, but they do serve as an honest broker among the disparate players. Their job: Find the best solution for all the stakeholders. (If the company's assets are being liquidated, they are referred to as the Receiver.)

David Planques, PricewaterhouseCoopers Considered a smooth and polished technician. After Greg Watson left PwC Mr. Planques stepped in to rebuild the restructuring arm. He was a worthy successor, having been toiling for several years as the chief restructuring officer at Prowis Inc., a PwC spinoff. Now back in the PwC fold, he plans to build up its debtor-based business. "My strength is my ability to cut a deal with banks and move forward," Mr. Planques says.
Current dossier: Advisor to senior lenders on Quebecor World; lead advisor to Smurfit Stone.

Todd Martin, KPMG He is the new kid on the block. Mr. Martin worked on a number of forestry and pulp and paper files in Vancouver before moving to Toronto last year. He was responsible for the operations and sale of Celgar Pulp, and was a lead financial advisor to the creditor committee of Asia Pulp and Paper, including U.S. bondholders. He was also the monitor of Crown Packaging and helped on the CCAA filing of Doman Industries.
Current dossier: Nothing in the public domain.

Murray McDonald, Ernst & Young Most of the complex files — Nortel Inc. and Quebecor World — are headed by "Capital M Monitor," as he was dubbed during the Air Canada restructuring he monitored in 2004. Other big restructurings he has presided over include Algoma Steel Inc., Laidlaw Industries Inc. and Calpine Canada. Mr. McDonald started in the business in 1987. He is known for not being afraid of taking a position, not pulling punches with his advice and being flexible.
Current dossier: Quebecor World, Nortel, Masonite.

Greg Watson, FTI Consulting Mr. Watson once headed the restructuring practice of PricewaterhouseCooper, but left with three colleagues late last year to start a new practice for FTI. He has a practical approach. Unlike Mr. McDonald, who works almost exclusively as a monitor, Mr. Watson will do hands-on consulting in advance of a filing and advises companies after a restructuring.
Current dossier: Advisor for the bondholders on Nortel; financial advisor on Circuit City.



These are the dealmakers and negotiators who look for the strengths and weakness of each stakeholder and carve out a position for their client. Compromise, however, is the key to a successful settlement plan. The pivotal legal role is usual held by the lead advisor to the company, who must negotiate a settlement with lawyers on the other side of the table representing the stakeholders — bondholders, bankers, unions, unsecured creditors, non-unionized employees and pension plans.

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Robert Chadwick, Goodmans More dealmaker than litigator. He acts for debtors and frequently represents bondholders when they are attempting to take an active role in a restructuring. He's considered quiet, but tough, with a tireless work ethic. Was lead counsel to Tembec, Maax and CFM, and worked for the bondholders on Ainsworth Lumber.
Current dossier: Represents the bondholders of Abitibi-Bowater, Mecachrome International Inc. and Canwest; acting for the monitor for Smurfit Stone.

Jay Carfagnini, Goodmans Calm, big-picture guy. "In order to get a good deal, everyone has to win a bit and lose a bit, and I try to bring that balance," he says. One of the original players.
Current dossier: Representing bondholders at Quebecor; counsel to monitor for Nortel and Circuit City; counsel for Masonite.

Sean Dunphy, Stikeman Elliott Known as aggressive, possibly because he started his career in the 1980s as a litigator. Was given the moniker "Rambo" during the Air Canada restructuring when he was representing the company. He'll make deals that are rough around the edges in order to "maximize value." "I've seen people trying to get the last \$10-million of value and burn \$50-million to do it," Mr. Dunphy says.
Current dossier: Lead counsel for the company Pope and Talbot; working with several potential buyers to purchase the assets of Nortel; lead counsel for the company AbitibiBowater

Derrick Tay, Oglivy Renault Often described as the "statesman," Mr. Tay can be very creative in his approach. "If there's a big fight in court, then we haven't done our work," he says. Mr. Tay started in the business after several clients made bad lending judgments. He worked on the 2004 Air Canada deal, acting for the controversial takeover bidder Cerberus.
Current dossier: Lead Canadian advisor to Nortel; lead counsel on Quebecor World; counsel to the monitor on Masonite.

Edward Sellers, Osler Likes to prepare for a fight, but looks for a deal. Is quick to understand the underlying business imperatives.
Current dossier: Lead counsel in Canada for Circuit City; advisor to the board of directors of Nortel; and advisor to Goldman Sachs on the refinancing of AbitibiBowater.



Bankers at their best during times of crisis, these are the ones companies turn to get out of a financial mess. When necessary, investment bankers will assist firms in finding sources of capital. This may include securing loans or brokering deals with distressed-lenders, including hedge funds, private-equity players and pension plans. Restructurings used to be a straight legal process, now it's a more sophisticated financial process, says Barry Goldberg of Genuity Capital markets.

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Glenn Sauntry, BMO Capital Markets Tenacious in the extreme, aggressive and imaginative. "Most M & A types in banking can't liberate themselves from the straight path or understand that you can compromise claims," says one insider. Not Mr. Sauntry. When other banks such as Lezard Ltd. and TD Securities scaled back their restructuring practices in Canada, Mr. Sauntry built his empire.
Current dossier: Advisor to AbitibiBowater

Barry Goldberg, Genuity Capital Markets Considered more "user-friendly" than Mr. Sauntry. Has done a lot of advisory work for creditors, but says his business is now split between creditors and debtors. "In today's market, the source of fresh capital tends to be the incumbent stakeholders prepared to do exchange offerings and such," Mr. Goldberg says. He's a lawyer by trade. Past clients include working for the bondholders in the Algoma Steel, TimberWest and Tembec restructurings.
Current dossier: Acting for the bondholders in AbitibiBowater.



They raise money like private-equity firms and use that money to buy distressed debt. Typically, they monitor companies in trouble. Sometimes, they will buy bonds trading at discounts and when a company is being restructured push for a higher yield to make a profit. Other times, they will offer a loan directly to a distressed company. They profit by charging high interest. If the companies are unable to pay back the debt, they will sponsor a recapitalization plan to convert debt to ownership stakes (equity), purchasing companies at bargain-basement prices.

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Cyrus Madon, Tricap Partners (a division of Brookfield Asset Management) Quiet, low-key. Despite his hardball bargaining in the boardroom, he has a reputation as a fair and balanced manager. Made his name on the Stelco restructuring when he teamed up with the United Steelworkers.
Current dossier: Negotiating assets of AbitibiBowater; failed in his bid to refinance Quebecor World.

Newton Glassman, Catalyst Capital Group Inc. Very aggressive. Comes from the Cerberus school of restructuring, but set up his own distress fund in Canada in 2002.
Current dossier: Bought some of the bank debt for Quebecor World and has reached an agreement in principal to convert that debt to equity. Catalyst has also been exerting its rights as a creditor in Imax Corp.



Parachuted into a company to co-ordinate the actual restructuring, one veteran describes his job being "like a fireman responding to a five-alarm fire." In some cases, they are brought in to replace the chief executive or chief financial officer if they've lost the confidence of the board. Other times, the CRO will work in tandem with management, liberating them from a restructuring exercise so they can focus on operations. They are there because the senior lenders are insisting they be there. "The CRO has to make a quick assessment to determine whether the company still has a heart-beat," says Randy Benson, a key CRO expert. Initially, companies are often suspicious and hostile when a CRO is thrust upon them. "We are never sure what the reaction will be," Mr. Benson says.

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Randy Benson, Independent Able to roll up his sleeves and get his hands dirty on the operations side, although he won't linger in a company. He has restructured CFM Products, Quebecor World and Hollinger. His role evolved from circumstance. When Mr. Benson worked as general manager of a regional unit of Beatrice Food Company in 1997, he was asked by a private-equity firm to step into the chief financial officer role during a time of crisis. "I had no idea what I was getting involved in and it turned into a restructuring." Later, every job that came his way was in crisis management. "Companies go through a grieving process, you have to work with them to move past that," he says.
Current dossier: Quebecor World.

Hap Stephen, Stonecrest Capital Inc. A former monitor with Ernst & Young, Mr. Stephen attacks the job from the advisory position. He likes to do balance-sheet fixes, is noted for having good relationships with banks but is less likely to stick around and work through deeper problems. He worked as senior vice-president at Eatons while it was being restructured, and also worked with the pension funds during the Air Canada restructuring.
Current dossier: Nothing in the public domain

Bill Aziz, BlueTree Advisors Inc. Styles himself as an operations guy because he takes a hands-on role in the companies he moves into. Like Mr. Benson, he worked as a chief financial officer in a string of companies that seemed to go from one insolvency to another. "I gave up wondering why and just embraced CRO work," Mr. Aziz says. The business has changed, he says. "In the past, it used to be the banks carried great influence. That evolved into the hedge funds, who would take a blocking position in the debt of the company that would allow them to take control of the situation. Now, management and boards are being more proactive and make decisions before things get critical."
Current dossier: Hollinger Inc., Tecumseh Products Company in the United States.



CHRIS WATTIE / REUTERS FILES

Nortel Networks, led by chief executive Mike Zafirovski, is in bankruptcy protection in the United States.



CHRISTINNE MUSCHI / REUTERS FILES

Pierre-Karl Péladeau's Quebecor World has reached a pact with creditors likely to allow it to emerge from bankruptcy.



“What it does is it skews the negotiating process among the various stakeholders and more heavily favours the employees. — *Rick Orzy*, insolvency lawyer at Bennett Jones in Toronto, on ‘cramdowns’ under U.S. law

RESTRUCTURING

Car buyers likely to steer clear of fears

By HOLLIE SHAW

When Air Canada operated under bankruptcy protection for 18 months in 2003 and 2004, it didn't seem to deter people from buying \$800 return tickets to Paris. But when it comes to buying a \$20,000 car, it's another matter entirely.

Both the U.S. and Canadian governments have declared they will back warranties for **General Motors Corp.** and **Chrysler LLC** product lines in the event that the gasping automakers go into bankruptcy, thus providing reassurance to consumers that blown transmissions will be covered in the event the carmakers have to seek protection from creditors.

But experts say there are a host of other potential fears and headaches that prospective car buyers could — and likely will — avoid entirely by steering clear of the ailing automakers when making a decision about buying a new car.

How people perceive companies operating under protection from creditors is highly dependent upon the product and the sector.

“For most people, automobiles are our second-largest purchase after our home, and it is a long-term decision,” said Karl Moore, a professor in the faculty of management at McGill University in Montreal. Big-ticket, long-term purchases such as condominiums or automobiles carry a lot more baggage than that flight to Paris, he said.

“With Air Canada and United [Airlines], there was not a sense that they might just stop flying for a few days, and while some people lost their money with Jetsgo [when the air carrier suddenly halted all flights and went into bankruptcy protection in 2005], the vast majority of [customers] had paid with credit cards and were covered,” Mr. Moore said.

In addition, flights and trips are generally completed within a limited period of time and rarely have a major impact upon people's financial position, he said. He contends a commitment to back auto warranties will only partially placate consumers, given that they might envision stretching out the amount of time they hold on to a vehicle. “We can stretch out [the lifetime of] our car, but there are parts that need to be replaced. For many of us it is a five-, 10-, or 15-year purchase and the quid pro quo is that while you don't have to pay any more car payments,

you have to get [the vehicle] serviced more over time.”

In December, Rick Wagoner, the now-ousted GM chief executive, told the U.S. Congress that consumers would shy away from buying cars from a company that had filed under Chapter 11, and some of those in attendance doubted him. But recent surveys of consumer sentiment seem to bear out Mr. Wagoner's prophecy.

One survey by Rasmussen Reports said 51% of consumers would not buy a car from a manufacturer in Chapter 11, while 78% of those polled by *Consumer Reports* said they would be “unlikely” to buy a car from a bankrupt company and close to two-thirds said they would be “highly unlikely” to make a purchase under those market conditions. More than 80% of respondents looking to buy a car in the next six months told automotive researcher CNW Marketing Research they would choose to buy another brand if the company manufacturing a car they were looking to buy went bankrupt.

Philip Reed, consumer advice editor at auto research firm Edmunds.com, said the mere threat of bankruptcy has a clear chilling effect on prospective car buyers.

“People may not buy, and if they do buy they are going to want to buy at a deep discount because they feel they are taking a risk,” he said. “Part of the spectre of bankruptcy [is that] consumers don't really know what it means, but they know that it's bad.”

While the governments tried to assuage fears over warranty concerns, depreciation is still a crucial and lingering concern for consumers, he said. “If a company goes out of business, the resale value of your car is going to drop really quickly.

“We are encouraging consumers to look at the long term. If you are buying a Toyota or Honda you may pay more upfront, but the resale value may be that much higher. [With the purchase of a vehicle from a struggling domestic automaker], if you don't really feel the bite immediately, you will when you go into turn in the vehicle.”

What's more, while leasing a vehicle would theoretically seem like a good solution that would grant consumers some peace of mind, Mr. Reed said, “There are no real viable leases for the domestic cars right now.”

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PETER REDMAN / NATIONAL POST FILES

Kevin McElcheran says, “In a non-unionized workplace you have got a lot more ability to re-set the terms of employment.”

Difference in Canadian law compared with U.S.

‘Can't bust unions through bankruptcy’

By JIM MIDDLEMISS

As Barack Obama, the U.S. President, eyes a “quick and surgical” bankruptcy solution for ailing automakers, don't expect the wound in Canada to be as clean or neat should car companies here seek creditor protection under the Companies' Creditors Arrangement Act (CCAA).

That's because of a difference in Canadian labour and insolvency law. In the United States, insolvencies can be used to end high-cost union contracts if certain procedures are followed.

In Canada, however, such contracts survive insolvency and extend to successor employers who emerge from the ashes of a defunct company. A union collective bargaining agreement can also apply to an unsuspecting company that simply buys equipment, even if it's moved to a different location and possibly even if it's used for different purposes.

So, in the United States, you can impose a “cramdown” and use the threat of bankruptcy to force unions to accept a deal. Here in Canada, that's a tactic that doesn't fly and the presence of a collective bargaining agreement (CBA) makes it more complex when restructuring a company.

“What it does is it skews the negotiating process among the various stakeholders and more heavily favours the employees,” said Rick Orzy, an insolvency lawyer at Bennett Jones in Toronto. “It makes it harder to get a deal. The odds of a complete breakdown and liquidation get stronger.”

Ken Rosenberg, a lawyer at Paliare Roland in Toronto, who has represented unions in restructurings, said, “The position of unions — and certainly no court has ever said otherwise — is that union bargaining rights and the right to apply their contract to a successor employer [are] not affected by a bankruptcy or insolvency.”

“You can't bust unions by going through a bankruptcy,” he said.

While judges have broad powers under insolvency law in Canada, even they can't set aside union contracts to facilitate a restructuring.

That's because in Canada, the federal and provincial governments have constitutional powers over certain areas. The federal government is responsible for bankruptcy law, but the provinces are responsible for property and civil rights, which include employment.

Provincial labour boards are responsible for ruling on labour-law issues, such as whether a union contract applies to a successor employer. An insolvency court judge overseeing a restructuring has no jurisdiction to determine that matter. A Labour Board must hear it.

Mr. Rosenberg said that “courts, whether in an insolvency context or otherwise, have no right to terminate, amend, abrogate or selectively apply collective agreements.”

Boards, he said, “are very

crisis in the business and that jobs could be eliminated.” Even then, there's no guarantee the union will negotiate.

Mr. McElcheran cited the restructuring of the steelmaker Stelco, in which the “union wouldn't come to the table. That turned out to be a brilliant strategy.” Steel prices rebounded and the company became viable again without the union making major concessions.

Mr. Orzy, however, said that without the steel-price rally there was “a really good chance it would have shut down.” Stelco was later sold to U.S. Steel and now sits idle following a temporary closure. But its pension obligations, the original reason that Stelco filed for CCAA protection and which were never dealt with, are being met by the U.S. company.

He said the successor-rights issue affects the dynamic of negotiations in restructurings and has the greatest impact on the smaller union plants, those with 100 to 300 jobs. “Nobody will buy them,” he said. “Everybody is going to have to take the same pain if it's going to work.”

Those plants will be mothballed and the equipment shipped outside the reach of the union's CBA, such as overseas or to a lower-cost jurisdiction. (Labour laws apply only to the province they cover.)

Mr. Orzy, who often advises lenders in insolvencies, said the successor rights also affect valuations and financing. He tells lenders that if they lend to a company with a union and the company defaults and they have to collect on the loan by selling the company or its assets, the buyer is then subject to the CBA and the liabilities that go with it. “The price you are going to get as a result of the law is less.”

Mr. Rosenberg, however, said unions are prepared to negotiate when jobs are on the line. “The position of organized labour is that they're in the business of saving and maintaining jobs and creating new employment. They're not in the business of closing factories. They are a willing participant in the restructuring of business and usually have the

“Some unions will be more concerned about preserving jobs”

factual about these things. Sometimes unions lose and sometimes they win.”

About three of every 10 workers in Canada belong to a union, according to 2007 federal government figures. As the economy slows and more companies seek insolvency protection, expect successor rights to play a bigger role in the success or failure of restructurings.

Kevin McElcheran, an insolvency lawyer at McCarthy Tétrault, said it already “comes up a lot.”

“In a non-unionized workplace you have got a lot more ability to re-set the terms of employment.” He said the only way to bring the union to the table is to “demonstrate a

greatest stake in the survival of that business.”

Alison Narod, an employment lawyer at Farris, Vaughan, Wills & Murphy in Vancouver, said a CBA “is always an issue because of the effect it has on costs or running the business and any restrictions there may be on running the business. Typically, parties have to address that in cutting their deal.

“Some unions are practical and will be more concerned about preserving jobs if they are convinced that the employer is in a tight financial spot,” she added.

Jean-Yves Fortin, a restructuring lawyer at the Montreal law firm BCF, said given the economic climate, “people compromise more out of necessity. These are very trying times and everybody has to compromise. There will be more of a will than there was before.”

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