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• EXPANDING THE INVESTIGATIVE POWERS OF A CCAA MONITOR •

By Gabriel Faure and Janie L.-Roy, McCarthy Tétrault LLP

In the matter of the *Companies' Creditors Arrangement Act* (the "**CCAA**") of *Bloom Lake*,[1] the Superior Court of Québec rendered a judgment regarding the expansion of the powers of the monitor in a context where a creditor refused to produce documentation requested by the debtors. Based on its exclusive jurisdiction to determine the scope of the monitor's powers in pursuit of the objectives of the CCAA, the Court authorized the monitor to compel any person to be examined and provide documents on a corporation in which the debtors held shares, including information beyond what would normally be available to a shareholder.

Background: Bloom Lake Mine's interest in the Twinco joint venture

The debtors owned and operated the Bloom Lake Mine in Québec, near the border with Newfoundland and Labrador. They hold 17% of the shares of Twinco, an incorporated joint venture formed under the Canada Business Corporations Act in 1960, among CFLCo, the debtors and Iron Ore Company of Canada, to develop a hydroelectric generating plant on the Unknown River in Labrador to deliver power to mining operations in nearby Labrador City and Wabush.

In the early 1960s, Twinco was granted the rights to develop a hydroelectric power plant by CFLCo, and then proceeded to build the plant. In 1974, CFLCo took over the plant, as well as extensive maintenance obligations with respect to the plant. CLFCo indemnified Twinco in respect of these obligations and the environmental liabilities associated with the plant. However, since that date, according to various assessments, environmental liabilities may have arisen in connection with the latter.

The debtors debtors are of the view that these environmental liabilities are the responsibility of CLFCo and not of Twinco, but do not know whether, and to what extent, Twinco may have funded any environmental maintenance or remediation work that was the responsibility of CLFCo, and for which Twinco may have a claim against CLFCo for reimbursement. However, in the event of a reimbursement to Twinco by CLFCo, the debtors would be allocated their pro rata share of the amount remitted.

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The debtors debtors and the Monitor therefore sought the information to determine the amount of maintenance and other compensable expenses that could be reimbursed by CFLCo, but were denied access to any said information. They therefore applied to the Court for orders granting the monitor the investigative powers necessary to obtain this information.

The Court's authority to define the powers of the monitor

The Court began by recalling the evolution of the role of the monitor over time. Originally a creation of case law, the role of the monitor was given legislative recognition with the 1997 amendments to the CCAA, in addition to making its appointment mandatory. Subsequently, in 2007, the description of its role and its responsibilities were expanded. Since that time, the minimum powers of the monitor are set out in the CCAA and the court is given the discretion to increase them by paragraph 23(1)(k) of the CCAA, which states that "[t]he monitor shall […] carry out any other functions in relation to the company that the court may direct", as we've explained in a previous blog post.[2]

On this basis, the Court rejected Twinco and CLFCo's argument that the judicial discretion of the courts under s. 11 of the CCAA is limited in such a way that it does not have the necessary jurisdiction to rule on the application. Indeed, Twinco and CLFCo argued that the CCAA, which is aimed at restructuring companies rather than liquidating them, would not be the appropriate vehicle to investigate third parties to the CCAA proceedings. The Court noted, based on the judgment of the Supreme Court of Canada in *9354-9186 Québec inc. v Callidus Capital Corp*,[3] that the assignment of a unique supervisory role to judges is one of the principal means by which the CCAA achieves its objectives. Thus, the Court held that the determination of the scope of the monitor's powers in pursuit of the objectives of the CCAA is within its exclusive jurisdiction, particularly where those powers relate directly to an asset or property of the debtors

that forms part of a sanctioned plan of compromise or arrangement. It therefore granted the expanded powers of the monitor requested by the debtors.

Monitor's duty of neutrality

Finally, Twinco and CLFCo argued that the monitor's neutrality would be compromised if it were granted the expanded powers requested, given the existence of ongoing litigation in Québec and Newfoundland and Labrador. In response to this argument, Justice Pinsonnault cited the Quebec Court of Appeal in the matter of *Aquadis*,[4] according to which the principle of the monitor's neutrality was attenuated when the amendments to s. 23 of the CCAA were adopted, making the latter an active participant in the proceedings. As long as the monitor is objective and not biased and his decisions are based on reasoned criteria that promote the legitimate objectives of the CCAA, the requirement of neutrality is satisfied. In this case, the Court found that the expanded supervisory powers sought were limited to providing information to the monitor, without compromising the rights and remedies of the parties.

The limits of the investigative powers of the monitor

Case law prior to the present case, including the recent decision in *Square Candiac*[5] of Justice Kalichman of the Québec Superior Court, expanded the powers of the Monitor to include the ability to compel any person reasonably believed to have knowledge of any of the debtors, their business or property, to be examined under oath, as well as to disclose and produce to the monitor all documents in his or her possession pursuant to paragraph 23(1)(c) of the CCAA.

Twinco and CLFCo however argued that the powers of the monitor to determine the state of the commercial and financial affairs of the debtor companies should be limited to the corporate documents available to a shareholder. In rejecting this argument, the Court endorsed the reasoning of the Ontario Court of Appeal in *Osztrovics*,[6] which was decided in a bankruptcy context, but whose principles remain applicable to the CCAA. In that case, Justice Brown held that this narrow interpretation of the investigative powers of the bankruptcy trustee would preclude the enforcement of the duty to creditors to value and realize the most significant asset of the estate. It is on this basis that the Court concluded that the powers of investigation vested in the Monitor go beyond the information that would normally be available to a shareholder.

Jurisdiction to issue orders against third parties, domiciled elsewhere in Canada

The Court finally agreed with the argument of the debtors that orders made under sections 11 or 23 of the CCAA do not necessarily have to be limited to CCAA debtors. Such orders may therefore provide for relief against third parties, including powers of investigation granted to monitors to investigate third parties with respect to the debtor's assets. In the present case, the Court finds that the requested expanded supervisory powers, being related to the property of the debtors, relate to the debtor company and that this weighs in favor of granting them. Moreover, orders granting expanded powers to the monitor, being granted under the CCAA, are enforceable throughout Canada.

Conclusion

In the last thirty years, the role of the CCAA Monitor has evolved considerably. Recent developments have allowed the Monitor to take an increasingly active role in the proceedings, to the point where practice and case law have accepted the expanded vision of the monitor's role, or even the baptism of the "super monitor", to use the words of Justice Pinsonnault. It can therefore be expected that this decision will, under the appropriate factual conditions, constitute a new tool in the hands of the insolvency practitioner to investigate the assets of insolvent companies.

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litigation and banking litigation. Gabriel was called to the Québec bar in 2014, and holds a Master's degree in business law (LLM), a Juris Doctor in North American Common Law (JD) and a Bachelor's degree in civil law (LLB), which he obtained from Université de Montréal in 2015, 2012 and 2010 respectively. His master's thesis on the oppression remedy has been rated "excellent". He teaches the bankruptcy and insolvency law course at Université du Québec à Montréal, and regularly publishes legal articles, in particular about insolvency and corporate law.

***Janie L.-Roy**, an articling student with McCarthy Tétrault, completed her law degree at Université de Montréal and graduated in May 2020. During her studies, she received awards for excellence in administrative law and public international law, and her academic achievements earned her a place on the Dean's list. She successfully passed the Québec Bar exam last fall. Prior to her legal studies, Janie completed her DEC in Social Sciences - International Profile and won the program's award of excellence.*]

• NO "STRANGER" TO THE PROCEEDING: CCAA COURT REAFFIRMS SINGLE PROCEEDING MODEL •

By Rachel Bengino and Adrienne Ho, Thornton Grout Finnigan LLP

The single proceeding model, which is a core tenet in insolvency proceedings, was recently reaffirmed in the *Companies' Creditors Arrangement Act* ("**CCAA**") proceedings of Bloom Lake in *Re Bloom Lake,* 2021 QCCS 3402.

The CCAA proceedings for multiple insolvent debtors (the "**CCAA Parties**") were commenced in 2015 in Quebec. Twin Falls Power Corporation ("**TwinCo**") was a joint venture formed by the Churchill Falls (Labrador) Corporation Limited ("**CFLCo**"), two of the insolvent debtors (Wabush Iron Co. Limited, Wabush Resources Inc., collectively, "**Wabush**"), as well as some other parties.

Twinco filed a proof of claim in the CCAA proceedings. A plan of compromise and arrangement was approved in 2018. Further to this plan, much of the CCAA Parties' estates had been sold, with the exception of certain equity interests held in Twinco by Wabush. Until these remaining assets are sold, the estate distribution cannot be completed.

Outstanding issues remained in dispute, including over environmental liabilities and an accounting of monies spent, between the CCAA Parties, TwinCo, and its majority shareholder CFLCo. Unable to reach a resolution, in November 2020, the CCAA Parties filed a motion before the CCAA Court (defined below) seeking, among other things, an order to wind-up and dissolve TwinCo under the *Canada Business Corporations Act*[7] (referred to as the "**CBCA Motion**").

In January 2021, CFLCo filed an application for a court-supervised liquidation regarding Twinco, also under the *Canada Business Corporations Act* in the Supreme Court of Newfoundland and Labrador.

The Monitor also obtained an order for expanded powers to demand information from Twinco and CFLCo.

The narrow issue before the Quebec Superior Court (Commercial Division) (the "**CCAA Court**") was whether it had the jurisdiction to hear the CBCA Motion, or whether the motion was properly heard in Newfoundland and Labrador. The argument was that Newfoundland and Labrador was the governing law of the underlying material contracts and the jurisdiction where both TwinCo and CFLCo are headquartered.

In concluding that the CCAA Court, as a "national court", had the jurisdiction to hear the CBCA Motion, the CCAA Court considered the following:

(i) the single proceeding model, which applies to insolvency proceedings (including CCAA proceedings), and favours litigation concerning an insolvent company to be dealt within a single jurisdiction rather than fragmented in separate proceedings;
(ii) the court overseeing the insolvency proceedings sits as a national court pursuing the objectives of a federal statute that establishes a centralized "command centre" for all proceedings related to a debtor; and
(iii) a creditor who cannot claim to be "a stranger to the bankruptcy" but desires to fragment the proceedings, in spite of the single-control model, has the burden of demonstrating sufficient cause to send the "trustee scurrying to multiple jurisdictions".

On the final point, the CCAA Court concluded that neither TwinCo nor CFLCo were "strangers" to the CCAA proceedings, given that among other reasons, they filed a proof of claim and received a partial distribution in the proceedings. The CCAA Court noted that filing a proof of claim amounts to an attornment and consent by TwinCo to the jurisdiction of the CCAA Court. The CCAA Court also noted that the CCAA Parties are bringing the CBCA Motion in an effort to monetize the equity interests in TwinCo such that those proceeds would be distributed to creditors, which in turn includes TwinCo itself. Given the objective of the CBCA Motion is to recover assets to the CCAA Parties' estates, the CCAA Court has jurisdiction (particularly since it had been managing the proceedings since 2015).

The CCAA Court also considered whether it should decline to exercise its jurisdiction based on the doctrine of *forum non conveniens*. The CCAA Court determined that it was not appropriate to transfer the motion to Newfoundland and Labrador since, *inter alia*: (i) the CBCA Motion relates to an asset of the CCAA Parties, the administration of the CCAA parties' estate as well as the implementation of a court-sanctioned plan; (ii) that the parties would incur additional expense and transferring the CBCA Motion would result in a multiplicity of proceedings, (iii) the CCAA Court is already familiar with the details of the CCAA proceedings and the parties, (iv) given COVID, all evidence is being adduced electronically, and (v) with the exception of some contractual provisions that are governed by Newfoundland law, the actual issues in the CBCA Motion are in respect of federal corporate jurisdiction.

This follows a long line of cases dictating that the single control model in insolvency proceedings should be followed, which is the most efficient and convenient way for all disputes to be dealt with in one forum on an all-encompassing basis.[8] This includes the decision of the Honourable Justice Newbould, as he then was,[9] in the Nortel proceedings,[10] where Newbould J. unequivocally determined that all disputes involving an insolvent company should be decided in the forum presiding over the insolvency proceedings, including claims arising out of extraterritorial governing law contracts.

Absent sufficient cause to disrupt the model and displace the CCAA court's jurisdiction to keep all claims within a single proceeding, the insolvency courts remain reluctant to fragment disputes involving the debtor company.

At the time of writing this piece, CFLCo has sought leave to appeal this decision. We will continue to monitor the developments in this case.

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enforcement of creditors' rights and security, receiverships, BIA and CCAA restructuring proceedings, shareholder disputes and creditor/debtor disputes. She has experience representing banks, lenders, debtors, receivers, trustees, court-appointed monitors and purchasers. She currently acts as the Chair of the Turnaround Management Association Toronto Chapter's Next Gen Committee, and previously served in various roles as a Director with the International Women's Insolvency and Restructuring Confederation (IWIRC) - Ontario Network. She also was the recipient of IWIRC's Semi-Finalist Rising Star Award (2018). She regularly speaks on panels on a broad range of insolvency topics. Rachel is a co-editor of the TGF Topline, a quarterly publication that keeps readers up to date on restructuring and litigation cases.

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1 *Bloom Lake General Partner Ltd. (Arrangement relatif à)*, 2021 QCCS 2946, leave to appeal to the CA requested

2 See https://www.mccarthy.ca/en/insights/blogs/restructuring-roundup/can-plan-arrangement-authorize-monitor-appointed-supervise-insolvency-proceedings-exercise-rights-behalf-debtors-creditors.

3 2020 SCC 10.

4 *Arrangement relatif à 9323-7055 Québec inc. (Aquadis International Inc.)*, 2020 QCCA 659.

5 *Arrangement relatif à 9227-1584 Québec inc.*, 2021 QCCS 1342.

6 *Osztrovics Estate v. Osztrovics Farms Ltd.*, 2015 ONCA 463.

7 R.S.C., 1985, c. C-44.

8 See for example, *Sam Lévy & Associés Inc. v. Azco Mining Inc.,* 2001 SCC 92, *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67, and *Montréal, Maine & Atlantic Canada Co., Re.,* 2013 QCCS 5194, and *Essar Steel Algoma Inc. et al*, 2016 ONSC 595.

9 Frank Newbould is now retired from the bench and acts as Counsel with Thornton Grout Finnigan LLP.

10 *Nortel Networks Corp., Re*, 2015 ONSC 1354.