C A N A D A

PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL

Nº 500-11-048114-157

S U P E R I O R C O U R T
(Commercial Division)

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

BLOOM LAKE GENERAL PARTNER LIMITED
QUINTO MINING CORPORATION
CLIFFS QUÉBEC IRON MINING ULC
WABUSH IRON CO. LIMITED
WABUSH RESOURCES INC.

Petitioners

-and-

THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP
BLOOM LAKE RAILWAY COMPANY LIMITED
WABUSH MINES
ARNAUD RAILWAY COMPANY
WABUSH LAKE RAILWAY COMPANY LIMITED

Mises-en-cause

-and-

FTI CONSULTING CANADA INC.

Monitor

-and-

TWIN FALLS POWER CORPORATION
CHURCHILL FALLS (LABRADOR) CORPORATION LIMITED

Mises-en-cause

imk
avocats • advocates

TWIN FALLS POWER CORPORATION'S ARGUMENT PLAN IN SUPPORT OF ITS MOTION TO DISMISS THE APPLICATION FOR LACK OF JURISDICTION AND FOR FORUM NON-CONVENIENS

I. THE WABUSH MOTION

1. On 16 November 2020, the Petitioners and the Mises-en-cause (collectively the "**CCAA Parties**") brought a motion (the "**Wabush Motion**") seeking a series of orders with regard to the Mise-en-cause Twin Falls Power Corporation ("**Twinco**").

2. The Wabush Motion is said to be brought pursuant to section 11 of the *Companies' Creditors Arrangement Act* (the "**CCAA**") and sections 214 and 241 of the *Canada Business Corporation Act* (the "**CBCA**"), in the context of a CCAA proceeding commenced on January 27, 2015, the whole as appears from the Court record and as set out in paragraphs 1 to 7 of the Wabush Motion as defined below (the "**CCAA Proceedings**").

3. The Wabush Motion seeks the following orders, the whole as set out at paragraph 13 of the Wabush Motion (collectively the "**Orders**" and each, an "**Order**"):

   - confirming Churchill Falls (Labrador) Corporation Limited's ("**CFLCo**") liability for Twinco's maintenance obligations and environmental liabilities from and after July 1, 1974 related to a power generating plant operated by Twinco in Newfoundland and Labrador until July 1, 1974 (the "**Twinco Plant**");

   - compelling an accounting from Twinco of all monies expended by Twinco in respect of maintenance and environmental costs that have not been reimbursed by CFLCo pursuant to the CFLCo Indemnity (as defined in paragraph 46 of the Wabush Motion) and CFLCo Maintenance Obligations (as defined in paragraph 48 of the Wabush Motion) (collectively, the "**Reimbursable Environmental/Maintenance Costs**");

   - directing CFLCo to reimburse all Reimbursable Environmental/Maintenance Costs (such amount to be reimbursed by CFLCo, being the "**CFLCo Reimbursement**") to Twinco for distribution to the shareholders as part of the winding up and dissolution of Twinco pursuant to the relief requested in paragraph (d) below;

   - directing the winding up and dissolution of Twinco pursuant to section 214 and/or section 241(3)(l) of the CBCA and a distribution of: (i) the Twinco Cash (as defined in paragraph 23 of the Wabush Motion) net of all reasonable fees and expenses incurred by Twinco to implement and complete the wind up and dissolution being sought in this Motion (the "**Remaining Twinco Cash**"), and (ii) the CFLCo Reimbursement to Twinco's shareholders, including Wabush Iron Co. Limited and Wabush Resources Inc. (collectively the "**Wabush Parties**"), on a pro rata basis;

- in the alternative to (d), directing Twinco and/or CFLCo to purchase the shares of Twinco held by the Wabush Parties pursuant to section 214(2) and/or section 241(3)(f) of the CBCA for a purchase price equal to the amount of the Wabush Parties' respective pro rata share of: (i) the Twinco Cash, and (ii) the CFLCo Reimbursement; and

- such further and other relief as this Honourable Court deems just.

4. The central issues to the Wabush Motion raised by the CCAA Parties are as follows (the "**Issues**"):

(i) a determination and calculation of any outstanding contractual liabilities as between Twinco and CFLCo (the "**Contractual Claims**");

(ii) whether it is just and equitable to order the liquidation and dissolution of Twinco (the "**Wind-Up Claim**"); and

(iii) whether: (i) in respect of Twinco: (a) there is any act or omission of Twinco that effects a result; (b) the business or affairs of Twinco are or have been carried on or conducted in a manner; or (c) the powers of the directors of Twinco are or have been exercised in a manner, that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of the Wabush Parties and, if so, what is the appropriate remedy (the "**Oppression Claims**").

II. TWINCO'S MOTION TO DISMISS

5. In the context of the present motion to dismiss, the question to be answered by this Honourable Court is whether the Québec Superior Court has jurisdiction to determine the Contractual Claims as between Twinco and CFLCo, as well as to order oppression remedies and/or the wind up in respect of Twinco under the Wind-Up Claim and Oppression Claims.

6. Twinco submits that Québec courts do not have jurisdiction to hear any of the Issues raised in the Wabush Motion.

7. In the alternative Twinco submits that, if it is determined Québec courts do have jurisdiction to hear the Issues, that this Honourable Court should decline jurisdiction on the basis that the Supreme Court of Newfoundland and Labrador is in a better position to decide the Issues, pursuant to article 3135 of the *Civil Code of Québec* ("**CCQ**") or, at the very least, this Honourable court should seek aid from the Supreme Court of Newfoundland and Labrador pursuant to Section 17 of the CCAA.

a. <u>This Honourable Court Does Not Have Jurisdiction *Rationae Loci* Under Article 3148 CCQ</u>

8. In personal actions of a patrimonial nature, such as the dispute between the parties, Québec authorities are competent pursuant to article 3148 CCQ which reads as follows:

> **3148**. In personal actions of a patrimonial nature, Québec authorities have jurisdiction in the following cases:
>
> (1) the defendant has his domicile or his residence in Québec;
>
> (2) the defendant is a legal person, is not domiciled in Québec but has an establishment in Québec, and the dispute relates to its activities in Québec;
>
> (3) a fault was committed in Québec, injury was suffered in Québec, an injurious act or omission occurred in Québec or one of the obligations arising from a contract was to be performed in Québec;
>
> (4) the parties have by agreement submitted to them the present or future disputes between themselves arising out of a specific legal relationship;
>
> (5) the defendant has submitted to their jurisdiction.
>
> However, Québec authorities have no jurisdiction where the parties have chosen by agreement to submit the present or future disputes between themselves relating to a specific legal relationship to a foreign authority or to an arbitrator, unless the defendant submits to the jurisdiction of the Québec authorities.

9. In the case at bar, none of these five criteria grounding jurisdiction of Québec authorities is met.

10. Conversely, the following facts demonstrate the lack of a connection to the jurisdiction of Québec:

(i) Twinco has its registered office and chief place of business in Newfoundland and Labrador;

(ii) Twinco has no operations in the province of Québec, has no place of business in Québec, nor any assets in the province of Québec;

(iii) there is no allegation in the Wabush Motion that any contractual obligation for any of the parties would have to be performed in Québec, or that any prejudice would have been suffered in Québec;

(iv) no fault is alleged to have been committed in Québec;

(v) the Material Agreements are not governed by the laws of Québec; and

(vi) Twinco has not attorned to the jurisdiction of Québec.

11. The burden of alleging and proving the relevant facts which could confer jurisdiction *rationae loci* upon the Québec authorities rests with the CCAA Parties.

- *Licaplast Industries Emballages inc.* c. *Ice River Springs Water Co*., 2013 QCCS 572, para. 9 [**TAB 1**]. See also *MNC Multinational Consultants inc.* c. *Natraceutical Group*, 2014 QCCS 5400, para. 33 [**TAB 2**].

12. In its Wabush Motion, the CCAA Parties failed to meet their burden to allege and prove specific and precise facts that would give this Court jurisdiction over this matter.

13. For these foregoing reasons, the Québec Courts do not have jurisdiction to hear the Issues arising out of the Wabush Motion.

b. <u>This Honourable Court Does Not Have Jurisdiction Under Any Specific Provisions of the CCAA and CBCA</u>

i. Contractual Claims

14. Orders (a), (b) and (c) sought by the Wabush Motion relate to the determination of contractual rights and liabilities between Twinco and CFLCo:

- Order (a) would require a determination as to the contractual liabilities for maintenance and environmental liabilities as between Twinco and CFLCo, on the basis of the interpretation of a series of Material Agreements (as defined at paragraph 26 of the Wabush Motion and attached thereto as Exhibits R-5, R-6 and R-7) between Twinco and CFLCo (and other parties) dating since 1961.

- Order (b) requires an accounting of all monies spent by Twinco assuming the determination in Order (a).

- Order (c) requires the identification of an amount owing by CFLCo to Twinco as a result of the determination in Orders (a) and (b), and an order against CFLCo for the payment of this amount.

15. Orders (a), (b) and (c) therefore require the determination of both the legal rights between Twinco and CFLCo under the Material Agreements, and an accounting of a history of transactions and activities by Twinco since potentially 1961 (the date of the oldest of the Material Agreements).

16. However, neither Twinco nor CFLCo is asking for their contractual rights to be determined by this Honourable Court.

17. Further, neither Twinco nor CFLCo is a party to the CCAA Proceedings, nor is either corporation a party governed by the original or any subsequent order issued in the CCAA Proceedings.

18. Rather, both Twinco and CFLCo are strangers to the CCAA Proceedings in which the Wabush Motion has been brought.

1. The Statutory Discretion under Section 11 of the CCAA Does Not Extend to the Orders Sought by the CCAA Parties

19. While pursuant to section 42 of the CCAA, a CCAA Court may apply provisions of the CBCA as part of a CCAA process, Twinco submits it may only do so where (i) the matter is under the jurisdiction of the CCAA court and (ii) where the requested relief is consistent with the purposes of the CCAA.

20. The Wabush Motion is supposedly anchored in section 11 of the CCAA, which, notably, relates to the general power of a CCAA court only "in respect of a debtor company":

> **11** Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.
>
> [Our emphasis.]

21. Section 11 of the CCAA is unambiguous that the application must be made in respect of a debtor company.

22. While it is not disputed that the CCAA Parties are debtor companies within the meaning of section 2 of the CCAA, because they are "companies" as defined in the CCAA and they are insolvent, the discretionary power described in section 11 applies only to a claim "in relation to" such a debtor company.

23. Therefore, the real question is not whether the CCAA applies to the CCAA Parties because they fall within the definition of "debtor company" in section 2 of the CCAA. The CCAA clearly applies to the CCAA Parties, as evidenced by the CCAA Proceedings. The real question is whether the Orders sought by the Wabush Motion can be granted under section 11 of the CCAA.

- *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp*., 2008 BCCA 327, para. 24 [**TAB 3**].

24. Twinco submits that the Wabush Motion, while framed as part of the CCAA Proceedings, is simply not an application in respect of a debtor company.

25. The purpose of the CCAA Proceedings relates to the liquidation of the CCAA Parties. The Issues in the Wabush Motion, however, do not relate to the relationship between the Wabush Parties and their creditors, but rather requires an adjudication of the affairs of Twinco or CFLCo, both of which are strangers to the CCAA Proceedings.

26. Rather, the Motion is squarely an application in respect of Twinco and its affairs. Clearly the courts of Newfoundland and Labrador have jurisdiction over the objects of the Wabush Motion.

27. As mentioned above, it requires adjudication of Twinco's contractual rights, a review and accounting of Twinco's history of transactions, and the winding up of Twinco or an order for Twinco to purchase the shares of the Wabush Parties.

28. The orders sought do not relate to any contractual relationship or creditor/debtor relationship of the Wabush debtor companies. At best, they relate to their contingent rights as shareholders of Twinco, for claims that have presumably existed for many years now.

29. Twinco and CFLCo are not subject to the orders in the CCAA Proceedings and have not entered the CCAA Proceedings as creditors of the CCAA companies. The only connection of Twinco to the CCAA proceedings is having the Wabush Parties as minority shareholders, while CFLCo has no connection to the CCAA Proceedings.

30. Twinco submits that the relief requested in the Wabush Motion is thus outside the scope of section 11 of the CCAA.

31. As such, this Honourable Court does not have jurisdiction to decide the Issues on the basis of section 11 of the CCAA.

32. Furthermore, the statutory discretion under section 11 of the CCAA does not extend to the Orders sought by the Wabush Motion because they clearly defeat the purpose of the CCAA.

33. In *Stelco Inc. (Bankruptcy), Re*, the Ontario Court of Appeal summarized the purpose of the CCAA as follows and reiterated the importance of the distinction between the inherent jurisdiction of a superior court and the discretion granted under section 11 of the CCAA:

> [36] In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its

> creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme, and that for the most part supplants the need to resort to inherent jurisdiction. In that regard, I agree with the comment of Newbury J.A. in Clear Creek Contracting Ltd. v. Skeena Cellulose Inc., 2003 BCCA 344 (CanLII), [2003] B.C.J. No. 1335, 43 C.B.R. (4th) 187 (C.A.), at para. 46, that:
>
> ... the court is not exercising a power that arises from its nature as a superior court of law, but is exercising the discretion given to it by the CCAA. ... This is the discretion, given by s. 11, to stay proceedings against the debtor corporation and the discretion, given by s. 6, to approve a plan which appears to be reasonable and fair, to be in accord with the requirements and objects of the statute, and to make possible the continuation of the corporation as a viable entity. It is these considerations the courts have been concerned with in the cases discussed above [See Note 2 at the end of the document (sic)], rather than the integrity of their own process.
>
> [Our emphasis.]

- *Stelco Inc. (Bankruptcy), Re*, 2005 CanLII 8671 (ON CA), para. 36 [**TAB 4**]. See also *Shermag inc. (Arrangement relatif à)*, 2009 QCCS 537, paras. 87-97 [**TAB 5**], in which Robert Mongeon, j.c.s. endorsed the comments of the Ontario Court of Appeal in *Stelco Inc. (Bankruptcy), Re*.

34. In *Ernst & Young Inc. v. Essar Global Fund Limited*, the Ontario Court of Appeal provided a very detailed and enlightening history of the objectives sought by the CCAA:

> (a) The Purpose of CCAA Restructurings
>
> [98] As has been repeatedly described, the CCAA was originally enacted in 1933 to respond to the ravages of the Great Depression and to allow large corporations with outstanding bonds and debentures to restructure their debt in a court-supervised process through plans of arrangement or compromise negotiated with their creditors.
>
> [99] As outlined by Deschamps J. in *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379, the CCAA fell into disuse after amendments in 1953 that limited its application

to companies issuing bonds. Courts breathed new life into the statute in the early 1980s in response to an economic recession, and the CCAA became the primary vehicle through which major restructurings were attempted. Amendments to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA"), introduced in 1992, allowed insolvent debtors to make proposals to creditors under that statute, and were expected to supplant the CCAA. However, the CCAA continues to be employed as the vehicle of choice to restructure large corporations, particularly where flexibility is needed in the restructuring process: Roderick J. Wood, *Bankruptcy & Insolvency Law*, 2nd ed. (Toronto: Irwin Law, 2015), at pp. 336-337; and Century Services, at para. 13.

[100] The corporate restructuring process at the heart of the CCAA "provide[s] a constructive solution for all stakeholders when a company has become insolvent": *Indalex Ltd*., Re, 2013 SCC 6, [2013] 1 S.C.R. 271, at para. 205. There are a number of justifications for why such a process is desirable. The traditional justification for CCAA-enabled restructurings, as explained by Duff C.J. shortly after the statute's enactment, was to rescue financially-distressed corporations without forcing them to first declare bankruptcy: *Reference Re Constitutional Validity of the Companies' Creditors Arrangement Act (Dom.)*, 1934 CanLII 72 (SCC), [1934] S.C.R. 659, at p. 661.

[101] The restructuring process can also allow creditors to obtain a higher recovery than may otherwise be available to them through bankruptcy or other liquidation proceedings, by preserving the corporate entity or the value of its business as a going concern: Wood, at pp. 338-339. Additionally, restructuring proceedings can provide an opportunity to evaluate the root of a corporation's financial difficulties, and develop strategies to achieve a turnaround, whether the best option be a full restructuring, or a liquidation of the corporation within the restructuring regime: Wood, at p. 340.

[102] The benefits of the restructuring process are not limited to creditors. Even early commentary lauded restructurings as promoting the public interest by salvaging corporations that supply goods or services important to the economy, and that employ large numbers of people: see Stanley E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 Can. Bar Rev. 587, at p. 593. This view remains applicable today, with restructurings "justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic

relationships in order to avoid the negative consequences of liquidation": *Century Services*, at para. 18.

[103] To summarize, by enabling the restructuring process, the CCAA can achieve multiple objectives. It permits corporations to rehabilitate and maintain viability despite liquidity issues. It allows for the development of business strategies to preserve going-concern value. It seeks to maximize creditor recovery. It can serve to preserve employment and trade relationships, protecting non-creditor shareholders and the communities within which the corporation operates: see Janis P. Sarra, Rescue! The *Companies' Creditors Arrangement Act*, 2nd ed. (Toronto: Thomson Reuters, 2013), at pp. 13-17. The flexibility inherent in the restructuring process permits a broad balancing of these objectives and the multiple stakeholder interests engaged when a corporation faces insolvency.

[Our emphasis.]

- *Ernst & Young Inc*. v. *Essar Global Fund Limited*, 2017 ONCA 1014, paras. 98-103 [**TAB 6**].

35. In *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp*., the British-Columbia Court of Appeal reiterated that the discretionary power under section 11 of the CCAA is limited and should only be exercised "in furtherance of the CCAA's fundamental purpose", which is, as the title of the Act suggests, "to facilitate compromises and arrangements between companies and their creditors":

[26] In my opinion, the ability of the court to grant or continue a stay under s. 11 is not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a "restructuring", a term with a broad meaning including such things as refinancings, capital injections and asset sales and other downsizing. Rather, s. 11 is ancillary to the fundamental purpose of the CCAA, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the CCAA's fundamental purpose.

[27] The fundamental purpose of the CCAA is expressed in the long title of the statute:

"An Act to facilitate compromises and arrangements between companies and their creditors".

[28] This fundamental purpose was articulated in, among others, two decisions quoted with approval by this Court in *Re United Used Auto & Truck Parts Ltd.*, 2000 BCCA 146, 16 C.B.R. (4th) 141. The first is A.G. Can. v. A.G. Que.(sub. nom. *Reference re Companies'*

Creditors Arrangement Act), 1934 CanLII 72 (SCC), [1934] S.C.R. 659, 16 C.B.R. 1 at 2, [1934] 4 D.L.R. 75, where the following was stated:

> . . . the aim of the Act is to deal with the existing condition of insolvency in itself to enable arrangements to be made in view of the insolvent condition of the company under judicial authority which, otherwise, might not be valid prior to the initiation of proceedings in bankruptcy. Ex facie it would appear that such a scheme in principle does not radically depart from the normal character of bankruptcy legislation."
>
> The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors.
>
> [29] The second decision is *Hongkong Bank* v. *Chef Ready Foods (1990)*, 1990 CanLII 529 (BC CA), 4 C.B.R. (3d) 311 (B.C.C.A.) at 315-16, where Gibbs J.A. said the following:
>
> The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. It is available to any company incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company, or a loan company. When a company has recourse to the C.C.A.A., the Court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success, there must be a means of holding the creditors at bay, hence the powers vested in the Court under s. ll.
>
> [Our emphasis.]

- *Cliffs Over Maple Bay Investments Ltd.* v. *Fisgard Capital Corp*., 2008 BCCA 327, paras. 26-29 [**TAB 3**].

36. As such, the CCAA was not designed to be a “liquidating CCAA” (contrary to the *Bankruptcy and Insolvency Act*).

37. It is against this backdrop that the statutory discretion under section 11 of the CCAA must be assessed. In Twinco’s view, in light of the objectives pursued by

the CCAA, the section 11 discretionary power does not extend to the Orders sought by the Wabush Motion.

38. As the Ontario Court of Appeal has validly pointed out, "… the s. 11 discretion is not open-ended and unfettered. Its exercise must be guided by the scheme and object of the Act …"

- *Stelco Inc. (Bankruptcy), Re*, 2005 CanLII 8671 (ON CA), para. 44 [**TAB 4**].

39. In *Victorian Order of Nurses for Canada (Re)*, the Ontario Superior Court of Justice confirmed that there are limits to this discretionary power:

> [32] … the discretionary power to make an order under s. 11 of the CCAA must be exercised in a manner that advances the policy objectives of the CCAA by usefully furthering the CCAA's remedial purpose – avoiding the social and economic losses which result from liquidation of an insolvent company.

- *Victorian Order of Nurses for Canada (Re)*, 2016 ONSC 5540, para. 32 [**TAB 7**].

40. As such, the discretionary power of courts under section 11 of the CCAA cannot be exercised in a way that has the effect of distorting the purposes and intent of the CCAA.

41. Also in *Stelco Inc. (Bankruptcy), Re*, the Ontario Court of Appeal interpreted section 11 of the CCAA in light of accepted principles of statutory interpretation:

> [41] The rule of statutory interpretation that has now been accepted by the Supreme Court of Canada, in such cases as R. v. Sharpe, 2001 SCC 2 (CanLII), [2001] 1 S.C.R. 45, [2001] S.C.J. No. 3, at para. 33, and Rizzo & Rizzo Shoes Ltd. (Re), 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, at para. 21, is articulated in E.A. Driedger, The Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983) as follows:
>
> Today, there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> See also Ruth Sullivan, Sullivan and Driedger on the Construction of Statutes, 4th ed. (Toronto: Butterworths, 2002), at p. 262.
>
> [42] The interpretation of s. 11 advanced above is true to these principles. It is consistent with the purpose and scheme of the CCAA, as articulated in para. 38 above, and with the fact that corporate governance matters are dealt with in other statutes. In

> addition, it honours the historical reluctance of courts to intervene in such matters, or to second-guess the business decisions made by directors and officers in the course of managing the business and affairs of the corporation.

- *Stelco Inc. (Bankruptcy), Re*, 2005 CanLII 8671 (ON CA), paras. 41-42 [**TAB 4**].

42. It is therefore in the light of recognized principles of statutory interpretation that section 11 of the CCAA must be interpreted.

43. As the Supreme Court of Canada stated in *Rizzo & Rizzo Shoes Ltd. (Re)*, "the legislature does not intend to produce absurd consequences":

> 27 In my opinion, the consequences or effects which result from the Court of Appeal's interpretation of ss. 40 and 40*a* of the *ESA* are incompatible with both the object of the Act and with the object of the termination and severance pay provisions themselves. It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, *supra*, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, *Construction of Statutes*, *supra*, at p. 88).

- *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, para. 27 [**TAB 8**].

44. What the CCAA Parties are arguing is essentially that the mere fact of being a minority shareholder of a foreign company – without any debtor-creditor relationship – gives rise to the courts' discretionary power provided for in section 11 of the CCAA, including the power to apply for any remedy provided for in the CBCA.

45. Twinco submits that this result is not only incompatible with the purpose of the CCAA, but also leads to extremely unreasonable and dangerous consequences. Indeed, if this Honourable Court were to conclude that it has jurisdiction to hear the Wabush Motion, then it opens the door for a party in another proceeding to seek the liquidation, under the CCAA, of a U.S. or European company, for example.

46. Thus, in the absence of a clear indication that the discretionary power under section 11 of the CCAA is broad enough to permit a judge supervising a

restructuring under the CCAA to hear an application such as the Wabush Motion and grant orders such as the ones sought by the CCAA Parties, this Honourable Court should not presume that such a remedy exists under the CCAA.

47. A careful reading of section 11 of the CCAA does not disclose anything which may go as far as permitting a CCAA court to grant the Orders sought by the CCAA Parties, and this Honourable Court should refrain from doing so.

ii. Oppression Claims and Wind-Up Claim

48. Orders (d) and (e) sought by the CCAA Parties seek to wind up Twinco or, in the alternative, force Twinco to buy out the Wabush Parties' respective equity holdings in Twinco.

49. Both Orders (d) and (e) also seek to mandate the respective amounts to be paid by Twinco to the Wabush Parties in either scenario. Importantly, these pay-out amounts are related to, and reliant upon, the amounts which would be determined in the course of granting Orders (a), (b) and (c).

50. Per the Wabush Motion, Orders (d) and (e) are requested pursuant to sections 214 and 241 of the CBCA, on the basis that Twinco and the CFLCo nominees on the Twinco Board of Directors have engaged in oppressive conduct which oppresses, unfairly prejudices and/or unfairly disregards the interests the Wabush Parties. Order (d) is also requested pursuant on the basis that it is just and equitable to liquidate and dissolve Twinco.

51. Twinco submits that it is contrary to the statutory provisions of the CBCA and the CCAA for the Superior Court of Québec to consider or grant Orders (d) and (e).

1. This Honourable Court Does Not Have Jurisdiction Under Sections 214 and 241 of the CBCA

52. Section 207 of the CBCA states that, for Part XVIII (which includes section 214), an application in respect of liquidation or dissolution of a company is to be brought in the court having jurisdiction in the province in which the company has its registered office:

> **207** In this Part, ***court*** means a court having jurisdiction in the place where the corporation has its registered office.
>
> [Emphasis in the original.]

53. In the case of Twinco, its registered office is located in St. John's, Newfoundland and Labrador, as demonstrated by the CBCA registration record included as Exhibit R-4 filed with the Court in support of the Wabush Motion.

54. As such, pursuant to section 214 of the CBCA, the proper forum for the hearing of the Wabush Motion is the Supreme Court of Newfoundland and Labrador.

55. We should point out that section 241 of the CBCA empowers "a court" – where it finds that oppression as therein defined exists – to make any interim or final order "it thinks fit" including "an order liquidating and dissolving the corporation".

56. Section 241 is not subject to section 207 and its definition of "court". Rather, "court" in section 241 of the CBCA is broader and refers to the definitions in section 2 of the CBCA, which states that "court" means the superior court of any province or territory. An application under section 241 of the CBCA in respect of Twinco could thus be brought either in the Québec Superior Court or the Supreme Court of Newfoundland and Labrador.

57. That said, as we explained in section (a) above, there lacks any connecting factor whatsoever under article 3148 CCQ between the underlying subject matter of the Oppression Claims and the jurisdiction of Québec courts. As we will explain below in section (c), there also lacks a real and substantial connection pursuant to article 3135 CCQ.

58. Thus, even under article 241 of the CBCA, the appropriate forum for the hearing of the Wabush Motion is the Supreme Court of Newfoundland and Labrador.

2. This Honourable Court Does Not Have Jurisdiction Under Section 9(1) and 42 of the CCAA

59. Alternatively, section 9(1) of the CCAA relates to the jurisdiction of a court to receive applications related to the more broadly defined term "company".

60. Section 9(1) specifies that "the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated" is the proper forum to hear an application under any provision of the CCAA.

61. Twinco again notes that its head office and chief place of business is in Newfoundland and Labrador.

62. As such, since the Wabush Motion primarily and significantly relates to Twinco's affairs, it should be brought in the jurisdiction of Newfoundland and Labrador.

c. <u>Alternatively, if this Honourable Court Determines that it Has Jurisdiction to Hear the Wabush Motion, it Should Decline its Jurisdiction on the Basis of *Forum Non Conveniens*</u>

63. Article 3135 CCQ recognizes that even if a Québec Court determines it has jurisdiction, it may decline jurisdiction where it considers the courts of another jurisdiction "are in a better position to decide the dispute".

64. As such, if this Honourable Court determines that it has jurisdiction to hear the Wabush Motion, Twinco submits that this Honourable Court is not the most convenient or appropriate forum to determine the Issues.

65. Instead, this Honourable Court should decline its jurisdiction on the basis that the Supreme Court of Newfoundland and Labrador is clearly the most appropriate forum, pursuant to article 3135 CCQ.

66. In *Spar Aerospace*, the Supreme Court of Canada, referring to the *Oppenheim* decision of the Québec Court of Appeal, listed the following 10 factors to be considered in applying the doctrine of *forum non conveniens*:

> 71 With respect to the first requirement, a number of cases have set out the relevant factors to consider when deciding whether or not the authorities of another country must be in a better position to decide the matter. The motions judge (at para. 18) referred to the 10 factors listed by the Quebec Court of Appeal in the recent case, *Lexus Maritime inc. v. Oppenheim Forfait GmbH*, 1998 CanLII 13001 (QC CA), [1998] Q.J. No. 2059 (QL), at para. 18, none of which are individually determinant:
>
> 1) The parties' residence, that of witnesses and experts;
>
> 2) the location of the material evidence;
>
> 3) the place where the contract was negotiated and executed;
>
> 4) the existence of proceedings pending between the parties in another jurisdiction;
>
> 5) the location of Defendant's assets;
>
> 6) the applicable law;
>
> 7) advantages conferred upon Plaintiff by its choice of forum, if any;
>
> 8) the interest of justice;
>
> 9) the interest of the parties;
>
> 10) the need to have the judgment recognized in another jurisdiction.

- *Spar Aerospace Ltd. v. American Mobile Satellite Corp*., 2002 SCC 78, at para. 71 [**TAB 9**], in which the Court refers to *Oppenheim forfait GMBH v. Lexus maritime inc*, [1998] AQ No 2059 (C.A.), at p. 7 [**TAB 10**]. See also *Groupe SNC-Lavalin inc.* c. *Siegrist*, 2020 QCCA 1004, para. 120 [**TAB 11**];

Transax Technologies inc. c. *Red Baron Corp. Ltd*., 2017 QCCA 626, para. 43 [**TAB 12**].

67. As noted by the Court, none of these criteria is individually determinative. They must be considered globally.

- *Breeden* c. *Black*, 2012 CSC 19, para. 25 [**TAB 13**]; *Spar Aerospace Ltée* c. *American Mobile Satellite Corp*., para. 71 [**TAB 9**]; *Oppenheim Forfait GmbH* c. *Lexus Maritime inc*., p.8 [**TAB 10**]. See also *Groupe SNC-Lavalin inc.* c. *Siegrist*, 2020 QCCA 1004, para. 121 [**TAB 11**]; *Transax Technologies inc.* c. *Red Baron Corp. Ltd*., 2017 QCCA 626, para. 44 [**TAB 12**].

68. In the present case, it is apparent that the Superior Court of Québec is not an appropriate forum to hear the Issues raised by the Wabush Motion.

69. On the contrary, the real and substantial connection between the Issues and the forum of Newfoundland and Labrador is plainly evident.

70. First, as mentioned above, both Twinco and CFLCo are not domiciled or resident in Québec. Rather, they are headquartered and chiefly operate in Newfoundland and Labrador.

71. Second, the Material Agreements are not governed by the laws of Québec. Two of the Material Agreements, the Sublease and the Participation Agreement (each as defined in paragraph 26 of the Wabush Motion), expressly provide that they are governed by the laws of Newfoundland (now Newfoundland and Labrador); the third Material Agreement, the Operating Lease (as defined at paragraph 26 of the Wabush Motion) is silent on jurisdiction but is a subsidiary document of the Sublease.

72. Furthermore, any consideration of any potential environmental liabilities that Twinco might have would arise exclusively under the laws of Newfoundland and Labrador.

73. As well, the jurisdiction of Newfoundland and Labrador is where witnesses and evidence required for the determination of the Issues and the required monetary calculations for the Orders are located.

74. Finally, on January 14, 2021, the mise-en-cause Churchill Falls (Labrador) Corporation Limited, in its capacity of shareholder of Twinco, filed an originating application in the Supreme Court of Newfoundland and Labrador seeking the issuance of a liquidation and dissolution order in respect of Twinco pursuant to the CBCA (Court File No. 2021 01G 0432). Petitioners Wabush Resources and Wabush Iron Co. Limited are also parties to these proceedings.

75. The existence of proceedings pending between the parties in another jurisdiction militates in favour of the Wabush Motion being heard before the Supreme Court of Newfoundland and Labrador, not to mention the risk of contradictory judgments resulting from the multiplication of proceedings.

76. The only thing connecting Twinco or the Material Agreements to the CCAA Proceedings is that the Wabush Parties collectively own a total of 17.062% of the shares of Twinco, the remainder being held by Iron Ore Company of Canada ("**IOC**") (49.6%) and CFLCo (33.3%). This is not, however, a "connecting factor" under article 3148 CCQ.

77. The Supreme Court of Newfoundland and Labrador would be the court having a real and substantial connection to Twinco and CFLCo, and the Material Agreements and the laws which govern them. It is a clearly more appropriate forum and, as such, it is, in the interest of justice, better suited to take jurisdiction.

78. This Honourable Court should not determine the respective rights and liabilities of Twinco and CFLCo, two Newfoundland and Labrador-based corporations, under the Material Agreements.

79. Twinco submits that even is this Court determines it has jurisdiction to hear the Wabush Motion, this matter would be an appropriate context to decline to exercise jurisdiction on the basis of *forum non conveniens*.

80. We should note that contrary to the situation that prevailed in *Arrangement relatif à Bloom Lake*, where the Court was being asked to seek the assistance of another court, this Honourable Court is being asked to decline jurisdiction on the basis of *forum non conveniens*. Accordingly, the Court's conclusion in that case that it was "not necessary or appropriate to refer to Article 3135 C.C.Q. in the present context" can be distinguished from the case at bar.

- *Arrangement relatif à Bloom Lake*, 2017 QCCS 284, paras. 34-38 [**TAB 14**].

d. <u>Alternatively, the Québec Superior Court Should Seek the Supreme Court of Newfoundland and Labrador's Help Pursuant to Section 17 of the CCAA</u>

81. Alternatively, if this Honourable Court concludes that it has jurisdiction and is the most appropriate forum to hear the Wabush Motion, Twinco submits that it should seek aid from the Supreme Court of Newfoundland and Labrador.

82. Section 17 of the CCAA provides that courts that have jurisdiction under the CCAA shall aid each other and be auxiliary to each other on request:

> **17** All courts that have jurisdiction under this Act and the officers of those courts shall act in aid of and be auxiliary to each other in all matters provided for in this Act, and an order of a court seeking aid

> with a request to another court shall be deemed sufficient to enable the latter court to exercise in regard to the matters directed by the order such jurisdiction as either the court that made the request or the court to which the request is made could exercise in regard to similar matters within their respective jurisdictions.

83. In *Arrangement relatif à Bloom Lake*, the Québec Superior Court recognized that there are circumstances where it is appropriate for a CCAA court to refer legal issues to other courts pursuant to section 17 of the CCAA:

> [34] There are however situations where another court can deal more efficiently with specific issues. The CCAA Court has jurisdiction to ask for the assistance of another court under Section 17 CCAA: […]
>
> [Citation omitted.]

- *Arrangement relatif à Bloom Lake*, 2017 QCCS 284, para. 34 [**TAB 14**].

84. The Court also cited two cases in which this solution was adopted:

> [52] There are nevertheless circumstances where the CCAA court has referred legal issues to the courts of another province. The Curragh and Yukon Zinc judgments were cited as examples of such cases. However, in both cases, the legal issues related to the Yukon Miners Lien Act. Justice Farley in Curragh wrote:
>
> This legislation and its concept of the lien affecting the output of the mine or mining claim is apparently unique to the Yukon Territory.
>
> [References omitted.]

- *Arrangement relatif à Bloom Lake*, 2017 QCCS 284, para. 52 [**TAB 14**]; referring to *Canada (Minister of Indian Affairs and Northern Development)* v. *Curragh Inc.*, [1994] O.J. No. 953 (Gen. Div.) [**TAB 15**]; and *Yukon Zinc Corp. (Re)*, 2015 BCSC 1961 [**TAB 16**].

85. The factors enumerated by the Court in *Arrangement relatif à Bloom Lake* on which this discretionary decision should be based – such as cost, expense, risk of contradictory judgments, and expertise – demonstrate that it is an appropriate case to refer the Issues to the Supreme Court of Newfoundland and Labrador. For the same reasons described above, the Supreme Court of Newfoundland and Labrador is best qualified to hear the Wabush Motion.

- *Arrangement relatif à Bloom Lake*, 2017 QCCS 284, para. 38 [**TAB 14**].

III. Petitioner's *Motion for the Expansion of the Monitor's Powers*

86. On May 6, 2021, the CCAA Parties filed a *Motion for the Expansion of the Monitor's Powers* allegedly pursuant to sections 11 and 23 of the CCAA, specifically sections 23(1)(c) and (k).

87. The CCAA Parties are seeking the issuance of an order expanding the powers of the monitor such that they may, directly or through counsel:

> - compel the production, from time to time, from **any Person** having possession, custody or control of any books, records, accountings, documents, correspondences or papers, electronically stored or otherwise, relating to the Twinco Interest, CFLCo Indemnity and CFLCo Maintenance Obligations (each as defined below), including the Twinco Requested Information (as defined below) (the "Requested Information") in respect of the period from and after January 1, 2010 and such earlier periods as may be approved by further order of the Court (the "Disclosure Period");
>
> - require any Requested Information to be delivered within thirty (30) days of the Monitor's request or such longer period as the Monitor may agree to in its discretion; and
>
> - conduct investigations from time to time, including examinations under oath of **any Person** reasonably thought to have knowledge relating to the Requested Information, in respect of the Disclosure Period.
>
> [Our emphasis.]

88. Twinco submits that no interpretation of section 11 of the CCAA, alone or read in conjunction with sections 23(1)c) and (k), permits such an order in the present circumstances.

89. More specifically:

> - The proposed orders are not in respect of a debtor company;
>
> - The Court does not have the power to delegate such broad powers to the Monitor, without an explicit statutory authorization;
>
> - The Court does not have the power to compel a party outside of Québec to respond to such an order.

a. The Statutory Discretion under Section 11 of the CCAA Does Not Extend to the Orders Sought by the CCAA Parties

i. The CCAA Proceedings Is Not the Appropriate Vehicle for Investigation of Third Parties to the CCAA Proceedings: Limit to the Statutory Discretion under Section 11 of the CCAA

90. In *Century Services Inc.* v. *Canada (Attorney General)*, the Supreme Court of Canada restates "that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the CCAA text before turning to inherent or equitable jurisdiction to anchor measures taken in a CCAA proceeding".

- *Century Services Inc.* v. *Canada (Attorney General)*, 2010 SCC 60, para. 65 [**TAB 17**].

91. Just like the Wabush Motion, the *Motion for the Expansion of the Monitor's Powers* is based on section 11 of the CCAA, which enunciates the general power of a CCAA court "in respect of a debtor company".

92. Twinco submits that, as for the Wabush Motion, the *Motion for the Expansion of the Monitor's Powers*, while framed as part of the CCAA Proceedings, is not an application "in respect of a debtor company".

93. Section 23(1) enumerates the monitor's duties and functions, which are essentially to monitor the debtor company, investigate its state of affairs, report to the court, and advise the courts and the creditors.

94. The powers provided for in sections 23(1)(c) and (k) of the CCAA are not broad enough to cover the powers claimed by the CCAA Parties in their *Motion for the Expansion of the Monitor's Powers*. Moreover, those powers only relate to a debtor company.

95. Section 21(1)(c) provides that the monitor shall "make, or cause to be made, any appraisal or investigation the monitor considers necessary to determine with reasonable accuracy the state of **the company's** business and financial affairs and the cause of its financial difficulties or insolvency and file a report with the court on the monitor's findings" (our emphasis).

96. Section 21(1)(k) provides that the monitor shall "carry out any other functions in relation to the company that the court may direct."

97. "Company" necessarily means "debtor company" as referred to in paragraph 1 of this provision:

> 23 (1) The monitor shall
> (a) except as otherwise ordered by the court, when an order is made on the initial application in respect of **a debtor company**, […]
> (c) make, or cause to be made, any appraisal or investigation the monitor considers necessary to determine with reasonable accuracy the state of the company's business and financial affairs and the cause of its financial difficulties or insolvency and file a report with the court on the monitor's findings;
> […]
> (k) carry out any other functions in relation to the company that the court may direct.
>
> [Our emphasis.]

98. The CCAA Parties' suggestion that the monitor should be able to investigate "any person" goes well beyond the powers provided for in the CCAA, which only provide for investigations of a debtor company.

99. To be clear, Twinco is not a debtor company within the meaning of the CCAA.

100. Therefore, it is not appropriate for this Court to grant the CCAA Parties' *Motion for the Expansion of the Monitor's Powers*.

101. Furthermore, the CCAA specifically and directly provides a right to access to documents, but only those of the debtor company:

> 24 For the purposes of monitoring the company's business and financial affairs, the monitor shall have access to the company's property, including the premises, books, records, data, including data in electronic form, and other financial documents of the company, to the extent that is necessary to adequately assess the company's business and financial affairs.

102. If the legislator wanted to further expand the right to access to third parties to the proceeding, they would have done so.

103. Neither Twinco nor CFLCo is a party to the CCAA Proceedings, nor is either corporation a party governed by the original or any subsequent order issued in the CCAA Proceedings. Instead, both Twinco and CFLCo are third parties to the CCAA Proceedings in which the *Motion for the Expansion of the Monitor's Powers* has been brought forward.

104. Rather, it is an effort to investigate the internal affairs of a third party, in which Wabush holds an interest as a shareholder (and which it also had a board seat until 2017), based on the possibility that there might be some claim that could affect the value of its shareholding interest.

105. The CCAA was not designed to grant either a debtor company, nor a Monitor, more rights than it otherwise has as a shareholder. It is not because this proceeding involves a "liquidating CCAA" that the situation should be different.

106. As such, for the same reasons as stated above, Twinco submits that this Honourable Court does not have the discretionary power to issue an order expanding the powers of the monitor in the CCAA Proceedings pursuant of section 11 of the CCAA.

107. As pointed out in paragraphs 33 to 37 of this Argumentation Plan, the objectives pursued by the CCAA is to facilitate an arrangement between the insolvent debtor company and its creditors. The discretionary power conferred by section 11 serves just that purpose: to offer breathing room to the insolvent debtor such that they can resume operations despite their financial difficulties though an arrangement plan. It is not meant to alter the debtor's role or powers with regard to its debtors, or the companies in which it owns shares.

108. The role of the Court in CCAA proceedings is described as a "'gatekeeper's' role in granting initial protection and thereafter performs a 'supervisory' role in allowing the debtor company some breathing room to attempt a work out with its creditors."

- Frank BENNETT, *Bennett on Bankruptcy,* 22e ed., Toronto, LexisNexis, 2020, p.1716 [**TAB 18**].

109. To borrow a metaphor from the Quebec Court of Appeal, « [l]a situation du juge, aidé du contrôleur, s'apparente plutôt à celle du capitaine dans la tempête qui doit décider s'il jette à la mer la cargaison problématique pour sauver le navire. »

- *9145-7978 Québec inc. (Arrangement relatif à)*, 2007 QCCA 768 [**TAB 19**].

110. Regardless of whether the supervisory role is described as that of a gatekeeper or a captain, the judge is supervising the debtor company and its relationship with the creditor and other stakeholders *of the debtor company*.

111. That is why the CCAA facilitates a plan of arrangement between the debtor company and the creditors, and section 11 provides the discretion essential to the supervising court to maintain the arrangement and protect the debtor company from enforcement, while permitting its operations.

112. Besides the orders stay of proceedings, examples provided by doctrine and the Supreme Court in *Century Services Inc.* v. *Canada (Attorney General)*, 2010 SCC 60, para. 62 to illustrate the flexibility given to the Court included the "creative use

of CCAA" to "authorize post-filing security for debtor in possession financing or super-priority charges on the debtor's assets when necessary for the continuation of the debtor's business during the reorganization" or "to release claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors".

113. Where a supervising judge issued an order against a third party, it was to protect the restructuring process of the debtor company. In *Lehndorff General Partner Ltd. (Re),* for example, Justice Farley after a clear display of the objective of the CCAA, permitted the stay insofar as it is served the objective, and he was comforted by the many existing precedents. But he found section to be clear: "I am not persuaded that the words of s. 11 which are quite specific as relating as to a company can be enlarged to encompass something other than that."

- *Lehndorff General Partner Ltd. (Re),* [1993] O.J. No. 14, p. 6, where a stay was granted in a context of a limited partnership [**TAB 20**]..

114. Nothing in the *Motion for the Expansion of the Monitor's Powers* serves a similar objective to safeguard the debtor company's operations.

115. In *9354-9186 Québec inc*. v. *Callidus Capital Corp*, Chief Justice Wagner and Justice Moldaver, for the majority, recognized the broad discretion authorized by section 11 of the CCAA, but noted that it was not infinite, the discretion having to be exercised while respecting the objectives of the law:

> 40 Together, Canada's insolvency statutes pursue an array of overarching remedial objectives that reflect the wide ranging and potentially "catastrophic" impacts insolvency can have. These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company
>
> 41 Among these objectives, the CCAA generally prioritizes "avoiding the social and economic losses resulting from liquidation of an insolvent company". As a result, the typical CCAA case has historically involved an attempt to facilitate the reorganization and survival of the pre-filing debtor company in an operational state -- that is, as a going concern. Where such a reorganization was not possible, the alternative course of action was seen as a liquidation through either a receivership or under the BIA regime. This is precisely the outcome that was sought in Century Services (see para. 14).

> 42 That said, the CCAA is fundamentally insolvency legislation, and thus it also "has the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm's financial distress ... and enhancement of the credit system generally"
>
> [References omitted.]

- *9354-9186 Québec inc.* v. *Callidus Capital Corp*. 2020 SCC 10 [**TAB 21**].

116. While the CCAA's reach has evolved to cover the liquidation process, it remains a law that, through a plan of arrangement, looks to balance the interests of the debtor company and its creditors. In describing the consideration of due diligence required from a supervising court in the exercise of its discretion, the function of the judge and the fairness that underlines the CCAA proceedings the Supreme Court states:

> 51 The third consideration of due diligence requires some elaboration. Consistent with the CCAA regime generally, the due diligence consideration discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuver or position themselves to gain an advantage. The procedures set out in the CCAA rely on negotiations and compromise **between the debtor and its stakeholders**, as overseen by the supervising judge and the monitor. This necessarily requires that, to the extent possible, those involved in the proceedings be on equal footing and have a clear understanding of their respective rights. A party's failure to participate in CCAA proceedings in a diligent and timely fashion can undermine these procedures and, more generally, the effective functioning of the CCAA.
>
> […]
>
> 54 In this respect, the comments of Tysoe J.A. in Canadian Metropolitan Properties Corp. v. Libin Holdings Ltd., 2009 BCCA 40, 305 D.L.R. (4th) 339 ("Re Edgewater Casino Inc.), at para. 20, are apt:
>
> ... one of the principal functions of the judge supervising the CCAA proceeding is to attempt to **balance the interests of the various stakeholders during the reorganization process**, and it will often be inappropriate to consider an exercise of discretion by the supervising judge in isolation of other exercises of discretion by the judge in endeavoring to balance the various interests... . CCAA proceedings are dynamic in nature and the supervising judge has intimate knowledge of the reorganization process. The nature of the

> proceedings often requires the supervising judge to make quick decisions in complicated circumstances.
>
> […]
>
> 75 We also observe that the recognition of this discretion under the CCAA advances the basic fairness that "permeates Canadian insolvency law and practice". As Professor Sarra observes, fairness demands that supervising judges be in a position to recognize and meaningfully address circumstances in which parties are working against the goals of the statute:
>
> The Canadian insolvency regime is based on the assumption that **creditors and the debtor share a common goal of maximizing recoveries**. The substantive aspect of fairness in the insolvency regime is based on the assumption that all involved parties face real economic risks. Unfairness resides where only some face these risks, while others actually benefit from the situation ... . If the CCAA is to be interpreted in a purposive way, the courts must be able to recognize when people have conflicting interests and are working actively against the goals of the statute.
>
> ("The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 30 (emphasis added))
>
> [References omitted.] [Our emphasis.]

- *9354-9186 Québec inc.* v. *Callidus Capital Corp*. 2020 SCC 10 [**TAB 21**].

117. Here, Twinco is a third party, with no link with the CCAA Proceedings. Twinco is not one “the court must often be cognizant of the various interests at stake in the reorganization” as per *Century Services Inc*. v. *Canada (Attorney General)*, 2010 SCC 60, para. 60. Twinco is neither the debtor, nor a creditor, an employee, a director, a shareholder, nor another party doing business with the insolvent company. It has no interest whatsoever in the recovery, and now, in the liquidation of the CCAA Parties.

118. Normal legal pathways exist for the CCAA Parties to request and obtain information. As shareholders, the CCAA Parties have rights with respect to the disclosure of financial information under the CBCA.

119. In addition, there is already a winding-up proceeding of Twinco underway in the proper forum, Newfoundland and Labrador. If the Debtor has any rights, that is the proper forum to have them determined.

120. Before coming to this Court seeking the granting of truly exceptional powers, the Monitor should demonstrate that the winding-up proceeding will be inadequate to protect the Debtor's rights.

121. Using CCAA proceedings to bypass the habitual modes of obtaining information or advancing legal rights is not a permitted use of the CCAA powers.

122. Not even the BIA, where the trustee has the seisin of the assets gives the trustee the rights to inquiry into "any books, records, accountings, documents, correspondences or papers of a debtor" as the CCAA Parties motion requests.

123. The powers of investigation requested by the CCAA Parties in the *Motion for the Expansion of the Monitor's Powers* was not what the legislator intended. Twinco respectfully submits that the CCAA was not meant to and should not evolve into a shortcut for the normal and direct means of asserting potential legal rights or remedies.

ii. Under the CCAA, the Monitor is Ill-Placed to Investigate Third Parties

124. The nature of the role the monitor fills in the CCAA does not allow the expansion of powers the CCAA Parties seek.

125. The monitor, had, at its creation and before the codification in 1997, the role "to monitor the debtor during the proceeding, to ensure that the debtor does not engage in any conduct that will prejudice the interests of the creditors and other stakeholders".

- Janis SARRA, *Rescue! The Compagnies's Creditors Arrangement Act*, Toronto, Thomson Carswell, 2007, p. 260 [**TAB 22**].

126. The role of the monitor may have expanded as the CCAA evolved, but always in respect to the debtor company: the expanded role permits it "to overstep the supervisory nature of its duties and play an active role in the management of the business while having direct powers over the assets, property and undertakings of an insolvent corporation".

- Luc Morin and Arad Mojtahedi, "In Search of a Purpose: The Rise of Super Monitors & Creditor-Driven CCAAs" in Jill Corraini and Blair Nixon (eds.), *Annual Review of Insolvency Law*, Toronto, Thomson Reuters, 2019, p. 205 [**TAB 23**].

127. For example, the possibility for the monitor to exceptionally take action against a third party, is founded in the fact that he represents the debtor company, its creditors and all stakeholders of the debtor company.

- *Ernst & Young Inc.* v. *Essar Global Fund Limited*, 2017 ONCA 1014 [**TAB 24**].

128. Precisely because one of the monitor's duties is to maximize creditor recovery (*Ernst & Young Inc* v *Essar Global Fund Limited*, 2017 ONCA 1014, para 103), and that they may attempt action against third parties, they cannot, at the same time, pretend to go above normal procedure and possess an inquiry power, simply because, on paper, they are an officer of the Court representing all the stakeholders.

129. The CCAA Parties motion for powers of investigation on any Person would, if granted, gran the Monitor truly exceptional powers, which are only authorised by specific statute.

130. These are powers reserved to institutions which by their nature have an investigatory role in the public interest, such as the *Autorité des Marchés Financiers*, the Syndic of a professional order, or a public inquiry commission who may "require the attendance before them, at a place and time therein specified, of any person whose evidence may be material to the subject of inquiry, and may order any person to bring before them such books, papers, deeds and writings as appear necessary for arriving at the truth" and "require the usual oath or affirmation from every person examined before them."

- *Act respecting public inquiry commissions*, RLRQ, c. C-37, sect. 9 [**TAB 25**].
- See *Act Respecting the Regulation of the Financial Sector*, RLRQ, c. E-6.1, for the *Autorité des Marchés Financier*, with section 14 referencing the *Act respecting public inquiry commissions* [**TAB 26**],
- See *Securities Act*, RLRQ, c. V-1.1, with sections 237 and 242 conferring to the *Autorité des Marchés Financier* inquiry power with a broad wording similar to the *Motion for the Expansion of the Monitor's Powers* [**TAB 27**].

131. These highly intrusive powers are carefully and precisely defined in the statutes; when the legislator intends to bestow an inquiry power, he does so directly.

132. The Court cannot simply delegate such powers, without any constraint, without a clear statutory authorization. While the discretion of the supervising judge is broad, it is not infinite.

133. Even if it were possible to read section 23(k) as authorising powers such as those currently being sought, it should be reserved for exceptional situations, (for example, in *Arrangement relatif à 9227-1584 Québec inc*., Justice Kalichman

granted a similar request in the unique situation where the shareholders of the third parties were the same as those of the debtor company, which is not the case here). No such exceptional situation is present here. The motion submitted by the CCAA parties requests a power ordinarily conferred by statute in a Court order which is not meant to serve as legislation.

- *Arrangement relatif à 9227-1584 Québec inc*., 2021 QCCS 1342 [**TAB 28**].

b. Alternatively, this Honourable Court Does Not Have Jurisdiction Rationae Loci Under Article 3148 CCQ and Does Not Have the Power to Compel a Party Outside of Québec to Respond to such an Order Demanded by the Motion for the Expansion of the Monitor's Powers

134. This Honorable Court has no jurisdiction *rationae loci* pursuant article 3148 CCQ (paragraphs 8 to 14 of this Argumentation Plan). No direct link exists between Twinco and the province of Quebec.

135. Just like the Wabush Motion, nothing in the *Motion for the Expansion of the Monitor's Powers* founds the jurisdiction of this Court. The fact that the Requested Information may be of "particular importance", as paragraph 61 of the *Motion* submits, does not suffice to anchor the jurisdiction of this Honourable Court over Twinco; the simple fact that some company in Quebec may be a shareholder in a corporation in Newfoundland and Labrador does not provide jurisdiction to a court in Quebec over such companies.

136. Twinco respectfully submits that, furthermore, such an order would be unconstitutional. In a decision regarding the jurisdiction of the Ontario Superior Court of Justice in two distinct cases, the Supreme Court of Canada writes:

> 31 Thus, in the course of this review, we should remain mindful of the distinction between the real and substantial connection test as a constitutional principle and the same test as the organizing principle of the law of conflicts. With respect to the constitutional principle, the territorial limits on provincial legislative competence and on the authority of the courts of the provinces derive from the text of s. 92 of the Constitution Act, 1867. These limits are, in essence, concerned with the legitimate exercise of state power, **be it legislative or adjudicative**. The legitimate exercise of power rests, inter alia, **upon the existence of an appropriate relationship or connection between the state and the persons who are brought under its authority**. The purpose of constitutionally imposed territorial limits is to ensure the existence [page594] of the relationship or connection needed to confer legitimacy.

[Our emphasis.]

- *Club Resorts Ltd*. v. *Van Breda*, [2012] 1 S.C.R. 572 [**TAB 29**].

137. It is in *Morguard Investments Ltd.* v. *De Savoye* that Justice La Forest lays the foundations of the necessity of a real and substantial connection to justify the jurisdiction of a court in Canada:

> 41 […] As I see it, the courts in one province should give full faith and credit […] to the judgments given by a court in another province or a territory, so long as that court has properly, or appropriately, exercised jurisdiction in the action.
>
> 42 […] I added that recognition in other provinces **should be dependent on the fact that the court giving judgment "properly" or "appropriately" exercised jurisdiction**. It may meet the demands of order and fairness to recognize a judgment given in a jurisdiction that had the greatest or at least significant contacts with the subject-matter of the action. But **it hardly accords with principles of order and fairness to permit a person to sue another in any jurisdiction, without regard to the contacts that jurisdiction may have to the defendant or the subject-matter of the suit**. **Thus, fairness to the defendant requires that the judgment be issued by a court acting through fair process and with properly restrained jurisdiction**.
>
> 43 As discussed, fair process is not an issue within the Canadian federation. The question that remains, then, is when has a court exercised its jurisdiction appropriately for the purposes of recognition by a court in another province? This poses no difficulty where the court has acted on the basis of some ground traditionally accepted by courts as permitting the recognition and enforcement of foreign judgments -- **in the case of judgments *in personam* where the defendant was within the jurisdiction at the time of the action or when he submitted to its judgment whether by agreement or attornment**. In the first case, the court had jurisdiction over the person, and in the second case by virtue of the agreement. No injustice results.
>
> 44 The difficulty, of course, arises where, as here, the defendant was outside the jurisdiction of that court and he was served ex juris. To what extent may a court of a province properly exercise jurisdiction over a defendant in another province? The rules for service ex juris in all the provinces are broad, in some provinces, Nova Scotia and Prince Edward Island, very broad indeed. It is clear, however, that if the courts of one province are to be expected

> to give effect to judgments given in another province, **there must be some limits to the exercise of jurisdiction against persons outside the province**. […]
>
> 52 The private international law rule requiring substantial connection with the jurisdiction where the action took place is supported by the constitutional restriction of legislative power "in the province". As Guérin J. observed in Dupont v. Taronga Holdings Ltd. (1986), 49 D.L.R. (4th) 335 (Que. Sup. Ct.), at p. 339, [TRANSLATION] "In the case of service outside of the issuing province, service ex juris must measure up to constitutional rules." The restriction to the province would certainly require at least minimal contact with the province, and there is authority for the view that the contact required by the Constitution for the purposes of territoriality is the same as required by the rule of private international law between sister-provinces.
>
> 53 There are as well other discretionary techniques that have been used by courts for refusing to grant jurisdiction to plaintiffs whose contact with the jurisdiction is tenuous or where entertaining the proceedings would create injustice, notably the doctrine of forum non conveniens and the power of a court to prevent an abuse of its process.
>
> [Reference omitted.]

- *Morguard Investments Ltd.* v. *De Savoye*, [1990] 3 SCR 1077 [**TAB 30**]; see also *Chevron Corp.* v. *Yaiguaje*, 2015 SCC 42, paras. 30-36 [**TAB 31**].

138. In *Tolofson v. Jensen; Lucas (Litigation Guardian of)* v. *Gagnon*, Justice La Forest, analyzes *lex loci delicti* as one of the possible substantial connections giving a court jurisdiction:

> 43 […] Moreover, it would seem to meet normal expectations. Ordinarily people expect their activities to be governed by the law of the place where they happen to be and expect that concomitant legal benefits and responsibilities will be defined accordingly. **The government of that place is the only one with power to deal with these activities. The same expectation is ordinarily shared by other states and by people outside the place where an activity occurs. If other states routinely applied their laws to activities taking place elsewhere, confusion would be the result. In our modern world of easy travel and with the emergence of a global economic order, chaotic situations would often result if the principle of territorial jurisdiction were not, at least generally, respected. Stability of transactions and well grounded legal**

> **expectations must be respected.** Many activities within one state necessarily have impact in another, but a multiplicity of competing exercises of state power in respect of such activities must be avoided. […]
>
> 71 It is useful, however, in understanding why one should not venture far from what is clearly constitutionally acceptable, to give some notion of the nature of these problems. Unless the courts' power to create law in this area exists independently of provincial power, subject or not to federal power to legislate under its residuary power -- ideas that have been put forth by some of the Australian judges in Breavington v. Godleman, supra, but never, so far as I know, in Canada -- **then the courts would appear to be limited in exercising their powers to the same extent as the provincial legislatures**; see John Swan, "The Canadian Constitution, Federalism and the Conflict of Laws" (1985), 63 Can. Bar Rev. 271, at p. 309. […]
>
> [Our emphasis.]

- *Tolofson* v. *Jensen; Lucas (Litigation Guardian of)* v. *Gagnon,* [1994] 3 S.C.R. 1022 [**TAB 32**].

139. In Quebec, the substantial connection has received a codified definition than in common law provinces: as the Supreme Court puts it, “[l]ooking at the wording of art. 3148 itself, it is arguable that the notion of a “real and substantial connection” is already subsumed under the provisions of art. 3148(3), given that each of the grounds listed (fault, injurious act, damage, contract) seems to be an example of a “real and substantial connection” between the province of Quebec and the action.”

    - *Spar Aerospace Ltd.* v. *American Mobile Satellite Corp.*, 2002 SCC 78, para. 56 [**TAB 9**]; see *Partner Reinsurance Company Ltd.* c. *Optimum Réassurance inc.*, 2020 QCCA 490, para. 47 [**TAB 33**].

140. Thus, even where a worldwide injunction was ordered on a third party to the proceedings, the defendant had a direct link with the jurisdiction.

    - *Google Inc.* v. *Equustek Solutions Inc*., 2017 SCC 34 [**TAB 34**].

141. In *Actava TV, Inc*. v. *Matvil Corp,* the “enforcement order [that] compels a non-party to produce its confidential and proprietary financial and valuation documents […] to assist the expert of parties to an action in the United States calculate their damages using comparative industry data” emitted before a US Court was not to be applied by an Ontario Court:

> [37] […] Matvil submits that the order under appeal is the first and only order in any commonwealth jurisdiction, including Ontario, to direct a non-party to produce documentation and information for the sole purpose of informing an expert to assist a party in calculating damages. It argues that the order failed to satisfy the test for enforcement of an LoR and that the application judge erred in her application of the test and in her relevance and public policy analyses.

142. To the Court of Appeal of Ontario, the fact that Matvil was a third party to the proceeding held an important place in the analysis:

> [48] Importantly, in *Zingre*, the Supreme Court recognized that the principles underlying the enforcement of LoRs may at times come into conflict. Notably, Dickson J. explained, at p. 401, that where sovereignty has conflicted with comity, Canadian courts have refused to order testimony for use in foreign proceedings in a number of situations. Examples given included where: (i) a request for production of documents was vague and general; (ii) discovery was sought against a non-party to the litigation, in violation of local laws of civil procedure; and (iii) the main purpose of the examination was to serve as a "fishing expedition", a procedure which was not allowed in Canadian courts. […]
>
> [56] […] Indeed, unlike in the U.S., in Ontario, an order of the court is required to examine a non-party or to compel a non-party to produce documents: see Rules of Civil Procedure, rr. 31.10, 30.10. Thus, examination of, and production from, a non-party is the exception, not the rule, in Ontario. […]
>
> [87] Lastly, although not determinative, such production by a non-party would be unparalleled in Ontario. Actava cites no case in which LoRs have been enforced requiring a non-party to disclose confidential and proprietary information for the sole purpose of assisting a party to calculate damages. Indeed, even with the broader discovery rules in the U.S., counsel for Actava was unable to refer this court to any U.S. authority to that effect either.
>
> [Reference omitted.]

- *Actava TV, Inc*. v. *Matvil Corp*., 2021 ONCA 105 [**TAB 35**].

143. The fact that orders for production of documents from a non-party is exceptional in Ontario under the habitual procedures underlined the conclusion that the ability to

obtain discovery from non-parties of the US procedural discovery was not to be applied in Ontario, and so, the order, not to be enforced.

144. Furthermore, the extra-territorial scope of the order sought by the CCAA Parties in the *Motion for the Expansion of the Monitor's Powers* and would not be enforceable in Newfoundland and Labrador. The order seeks to obtain the Requested Information from *any person* who may detain them. It does not limit itself to the Requested Information detained by Twinco or even CFLCo. Surely, this Honorable Court does not intend to permit the Monitor to command the disclosure of *any Person from anywhere* as the broad phrasing of the Motion may suggest.

145. In *Pro Swing Inc.* c. *Elta Golf Inc.*, the Supreme Court held that non-money judgements made by a US Court were not enforceable in Ontario Courts, notably because it was unclear if the injunction was meant to be extraterritorial. On such relief, the Court writes:

> 25 […] Under the traditional rule, the issue of clarity and specificity is not a concern, but if injunctive relief is to be enforced, **its territorial scope has to be specific and clear**. Canadian residents should not be made subject to unforeseen obligations from a foreign court or to orders in a form unknown to Canadian courts. This issue goes not to the jurisdiction of the foreign court, but either to the framing of new conditions for recognition and enforcement or to new defences.
>
> 56 […] In my view, in the **absence of explicit terms** making the settlement agreement a worldwide undertaking, the consent decree cannot be said to clearly apply worldwide.
>
> [Our emphasis.]

- *Pro Swing Inc.* c. *Elta Golf Inc*., 2006 CSC 52 [**TAB 36**].

146. The preoccupation with extraterritoriality in judgements foreign to the provincial authorities is significant. Twinco respectfully submits that, in a case like the *Motion for the Expansion of the Monitor's Powers*, the breadth of the power sought does not lend itself to an extraterritorial application by an eventual Newfoundland and Labrador Court.

147. In Quebec, article 3155 CCQ establishes the condition by which a decision "rendered outside Québec is recognized"; like in any other province, Québec authority must recognize a decision for it to be enforceable, and will do just that if the authority that rendered the decision has jurisdiction. If the order sought was

rendered by this Honorable Court, the same debate of jurisdiction would come before a Court in Newfoundland and Labrador.

148. To be clear, an order of this Honorable Court would be unlikely to be enforceable, in practice and in theory. Recently, the Court of Appeal of Ontario held that:

> [49] There are good reasons for giving different treatment for limitations purposes to the enforcement in Ontario of a judgment of an Ontario court, on the one hand, and a judgment of a foreign court, on the other hand. The principle of territorial sovereignty means that the judgment of a court has effect only inside the territory in which the court is located and cannot be enforced outside its borders: Stephen G.A. Pitel & Nicholas S. Rafferty, Conflict of Laws, 2d ed. (Toronto: Irwin Law, 2016), at p. 162. The extraterritorial enforcement of a court's order is not a legitimate exercise of state power: see Tolofson v. Jensen, 1994 CanLII 44 (SCC), [1994] 3 S.C.R. 1022, at p. 1052; Club Resorts Ltd. v. Van Breda, 2012 SCC 17, [2012] 1 S.C.R. 572, at para. 31; Chevron, at paras. 47-48; and Endean v. British Columbia, 2016 SCC 42, 401 D.L.R. (4th) 577, at para. 45.

- *Independence Plaza 1 Associates, L.L.C.* v. *Figliolini*, 2017 ONCA 44 [**TAB 37**].

149. In this case, the burden is on the CCAA Parties to prove that this Honorable Court has jurisdiction, despite the *Motion for the Expansion of the Monitor's Powers* clear impact a company with no link to Québec Court, Twinco. Legislative dispositions, such as article 3148 CCQ and section 16 CCAA, which provide that orders made "by the court in any province" in respect of any arrangement "shall have full force and effect in all the other provinces and shall be enforced in the court of each of the other provinces […]", exists. As for an order such as the *Motion for the Expansion of the Monitor's Powers*, the legislator remained silent.

150. If, despite article 3148 CCQ, this Court finds that it has jurisdiction, Twinco submits that, as for the Wabush Motion and as argued at para. 63 to 80 of this Argument Plan, this Honorable Court should decline jurisdiction on the basis of *forum non conveniens.*

151. If the difficulty to enforce a decision cannot, per se, limit the jurisdiction of this Honorable Court, the difficulty to sanction a potential non-compliance strongly favours declining jurisdiction.

- *Transat Tours Canada inc.* c. *Impulsora Turistica de Occidente, s.a. de c.v.*, 2006 QCCA 413, para. 36 [**TAB 38**]; confirmed in *Impulsora Turistica de Occidente, S.A. de C.V.* v. *Transat Tours Canada Inc.*, 2007 SCC 20.

MONTREAL, this 2nd day of June 2021

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Nº **500-11-048114-157**

SUPERIOR COURT (Commercial Division)
DISTRICT OF MONTREAL
PROVINCE OF QUEBEC

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

BLOOM LAKE GENERAL PARTNER LIMITED & AL.
Petitioners

-and-

THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP & AL.
Mises-en-cause

-and-

FTI CONSULTING CANADA INC.
Monitor

-and-

TWIN FALLS POWER CORPORATION
CHURCHILL FALLS (LABRADOR) CORPORATION LIMITED
Mises-en-cause

TWIN FALLS POWER CORPORATION'S ARGUMENT PLAN IN SUPPORT OF ITS MOTION TO DISMISS THE APPLICATION FOR LACK OF JURISDICTION AND FOR FORUM NON-CONVENIENS

ORIGINAL

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