CITATION: Tacora Resources Inc. (Re), 2024 ONSC 2612
COURT FILE NO.: CV-23-00707394-00CL
DATE: 20240508

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

RE: **IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TACORA RESOURCES INC.**

BEFORE: KIMMEL J.

COUNSEL: *Alex Rose, Lee Nicholson, and RJ Reid*, for the Applicant, Tacora Resources Inc.

Colm Seviour and John Samms, for 1128349 BC Ltd.

Alan Merskey and Stephanie Voudouris, for the Monitor FTI Consulting

HEARD: April 16, 2024

ENDORSEMENT
(MFC ROYALTY DISPUTE)

The Parties and the MFC Royalty Dispute

[1] Tacora operates an iron ore mine, the Scully Mine, located at Wabush, Newfoundland, and Labrador, pursuant to rights granted to it as lessee under the Amendment and Restatement of Consolidation of Mining Leases, 2017, made between 0778539 B.C. Ltd. and Tacora (the "Scully Mine Lease"). 1128349 B.C. Ltd. ("112 Ltd.") is an affiliate of the lessor/landlord under the Scully Mine Lease, 0778539 B.C. Ltd. ("077 Ltd.", together with 112 Ltd., "MFC"). Tacora mines non-renewable minerals for which 112 Ltd. receives rent in the form of a royalty based on Tacora's "Net Revenues" derived from the sale of "Iron Ore Products" from the Scully Mine (the "MFC Royalty").

[2] The Scully Mine Lease provides for two different ways to calculate Net Revenues for purposes of determining the MFC Royalty, depending on whether the Net Revenues are derived from the sale of "Iron Ore Products" under an arm's length *bona fide* contract of sale, or whether Tacora otherwise sold its products in non-arm's length transactions. There has only ever been one purchaser of iron ore from Tacora, Cargill International Trading Pte Ltd.[1] ("Cargill"), under an iron ore sales agreement dated April 5, 2017, as the same may have been amended or restated from time to time (the "Cargill Offtake Agreement").

[3] Tacora first paid a royalty to 112 Ltd. under the Scully Mine Lease following attainment of commercial production in 2019. Tacora admits that it owes MFC $15,443,190.80 in unpaid Pre-CCAA filing MFC Royalties. Since the CCAA filing, Tacora has calculated and paid the MFC

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[1] Cargill Intl is a wholly-owned subsidiary of Cargill Inc., a global commodities enterprise.

Royalty on the same basis as it did pre-CCAA Filing, using the formula for arm's length Net Revenues in accordance with the method that Tacora claims is applicable under the Scully Mine Lease. 112 Ltd. contends that Tacora has not been calculating Net Revenues (and therefore, the MFC Royalty) properly.

[4] Tacora seeks declarations regarding the amount of quarterly MFC Royalties payable under the Scully Mine Lease (in this "MFC Royalty Motion"), specifically:[2]

a. That the only amounts owed by Tacora to 112 Ltd. with respect to the MFC Royalty are the 2023 Q2, Q3, and pre-filing Q4 royalty payments based on the arm's length Net Revenue calculation method contained in clause (j)(i) of the Scully Mine Lease; and

b. In the alternative, even if the MFC Royalty should be calculated pursuant to the alternative Net Revenue calculation method contained in clause (j)(ii) the Scully Mine Lease, there are no additional or incremental amounts owed to 112 Ltd.

[5] 112 Ltd. claims that Tacora has not been calculating the MFC Royalty properly and that Tacora owes an additional $4,699,103.46[3] representing royalties for the period Q1 2020 – Q3 2023. 112 Ltd. also claims to be owed a further unquantified amount of underpaid royalties post-CCAA filing, from Q4 2023 to date. These claims are based upon allegations that Tacora is not at arm's length with the purchaser of all of its iron ore product from the Scully Mine, and has not been since at least 2018, prior to the first MFC Royalty payment. On this basis, 112 Ltd. claims that Net Revenues for purposes of determining the MFC Royalty amount must be calculated using the methodology for non-arm's length transactions in clause (j)(ii) of the Scully Mine Lease.

[6] The issues raised in the MFC Royalty Motion were the subject of a notice of default delivered by MFC on August 25, 2023 that led to the commencement of an arbitration prior to the

[2] Tacora's motion was originally constituted to determine whether the MFC Royalty obligations aligned with the cure costs that had been agreed to as part of a sale transaction (the "Investor Transaction") for which the court's approval was being sought, together with a reverse vesting order ("RVO"). If the court's approval had been granted, it was contemplated that the Investor Transaction sale proceeds would be used to pay approved cure costs to certain parties for various pre-CCAA filing liabilities, including MFC. However, the allocated cure costs to MFC were dependent upon Tacora's interpretation of the Scully Mine Lease. This MFC Motion, to determine the amount of MFC's Royalty claim against Tacora, had been scheduled to be heard shortly after the RVO and Investor Transaction approval motion, within the summary procedure available under the CCAA to determine claims against a debtor. The RVO and Investor Transaction approval motion was adjourned on April 10, 2024. However, the court decided (following a request by MFC for this motion to be adjourned, which Tacora and the Monitor opposed) that there were other good reasons in the context of these ongoing CCAA proceedings for there to be a determination of the MFC Royalty Dispute. The adjournment was denied for reasons indicated in an endorsement dated April 12, 2024 and this MFC Royalty Motion proceeded as scheduled.

[3] The industry expert who did the calculation of the underpayment for 112 Ltd., Mr. Persampieri, initially did a comparison that yielded an underpayment amount of $7,295,253.73 (CDN) for the period Q1, 2020 - Q3, 2023. In his cross-examination, Mr. Persampieri corrected and adjusted this amount to reflect a credit or deduction for the Knoll Lake royalty which is payable by 112 Ltd. under the Scully Mine Lease, yielding a balance of $4,699,103.46 (CDN) as the amount of the claimed pre-CCAA MFC Royalty underpayment.

Tacora CCAA filing, in which MFC alleged, among other things, historic and continuing underpayments of royalties. That arbitration was stayed as a result of these CCAA proceedings.

[7] 112 Ltd. asks that Tacora's motion be dismissed and instead that an order be granted requiring Tacora to pay the pre-CCAA MFC Royalty underpayment amount that was the subject of the arbitration proceeding it commenced, as well as the unquantified post-CCAA filing MFC Royalty underpayments from Q4, 2023 to date.

[8] The overlapping issues raised by the 112 Ltd. arbitration and this MFC Royalty Motion together comprise the "MFC Royalty Dispute", now being determined by the court.

Summary of Outcome

[9] For the reasons that follow, Tacora's request for a declaration that the only amounts owed by Tacora to 112 Ltd. with respect to the MFC Royalty are the 2023 Q2, Q3, and pre-filing Q4 royalty payments based on the arm's length method of calculating Net Revenues contained in clause (j)(i) of the Scully Mine Lease, is granted. These pre-CCAA filing amounts owing total $15,442,190.80, the amount acknowledged by Tacora.

The MFC Royalty Calculation

[10] The MFC Royalty (defined in the Scully Mine Lease as the "Earned Royalties") is payable quarterly in "an amount equal to seven percent (7%) of the Net Revenues from iron ore products produced or derived at the Scully Mine.

[11] The definition of "Net Revenues" is at the heart of the MFC Royalty Dispute. Net Revenues is defined in clause (j) of the Scully Mine Lease as follows (emphasis added):

> i. *in the event that the lessee sells Iron Ore Products under an arm's length, bona fide contract of sale*, the amount per Metric Tonne (weight determined by vessel draft survey) actually received by or otherwise payable or credited to the account of the Lessee and its affiliates calculated f.o.b. Pointe Noire, Quebec of such other applicable port on the St. Lawrence seaway from which such Iron Ore Products is shipped to the Lessee's customers (the "Part"), or in the case of sales ex-mine gate or ex-rail, calculated at the point of actual sale, including, without limitation, all payments, incentives, bonuses, allowances, profit sharing or other consideration received by, credited or payable to the Lessee and/or its affiliates in respect thereof, less: (A) the Deductible Expenses; and (B) any royalties or overriding royalties measured by production of Iron Ore Products that are imposed on the Lessee under applicable laws by the Province of Newfoundland and are actually paid to such Province by the Lessee in respect of such sale of such Iron Ore Products (it being acknowledged that no such royalties or overriding royalties exist on the date hereof); and
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> ii. *in the event that the Lessee otherwise sells Iron Ore Products, including, without limitation, in a non-arm's length transaction*, the amount per Metric Tonne by reference to a standard industry publication or service containing

> prizes or quotations of the prices at which Iron Ore Products of equivalent types and qualities are being sold or purchased at a specific point of delivery (an "Industry Service") or, if such Industry Service is unavailable, then by such other means, in accordance with mining industry practice, as may establish such prices or quotations of the prices at which Iron Ore Products or equivalent types are being sold and purchased, calculated at f.o.b. the Port.

[12] "Deductible Expenses", referenced in clause (j)(i)(A), are defined in clause (c) of the definitions and are to be calculated based on each Metric Tonne of iron ore products shipped from the Scully Mine, to be the lesser of (a) a pre-determined cap; or (b) any reasonable *bona fide* vessel loading and dock handling costs (some examples of which are specified) paid by or on behalf of Tacora for the shipment of such iron ore products from the Port pursuant to the Cargill Offtake Agreement or any other sales agreement for iron ore products that are subject to this Scully Mine Lease.

[13] Clause 1(h) of the Scully Mine Lease contemplates that there may need to be retroactive determinations of the Earned Royalties because "…the Cargill [Offtake] Agreement provides for payment to the Lessor of a "Provisional Purchase Price" (as defined in the Cargill [Offtake] Agreement) and third party service providers may invoice the Lessee for Deductible Expenses after the end of a calendar quarter, and both such factors shall impact the final determination of Net Revenues (including Deductible Expenses)."

Factual Context

[14] Some important non-contentious events concerning Tacora's investment in the Scully Mine and early contractual dealings with Cargill and MFC are as follows:

a. In January 2017, shortly after Tacora was incorporated, it began negotiating an iron ore offtake agreement with Cargill for the Scully Mine.

b. In March 2017, Tacora secured a commitment letter for equity financing from Proterra Investment Partners in the event of its acquisition of the Scully Mine.

c. The Offtake Agreement (defined in the Scully Mine Lease as the Cargill Agreement) was entered into between Tacora and Cargill on April 5, 2017. Tacora entered into this Offtake Agreement so that it could demonstrate that it had a viable business plan for its planned acquisition of the Scully Mine.

d. Tacora entered into an asset purchase agreement to acquire the Scully Mine from its previous owner (in the context of a CCAA restructuring of that company) on June 2, 2017.

e. An affiliate of Proterra Investment Partners (Proterra M&M MGCA B.V., or "Proterra Holding") became the majority shareholder of Tacora on July 17, 2018. Proterra M&M MGCA Cooperatief ("Proterra Cooperatief") was, and remains, the sole shareholder of Proterra Holding.

f. Tacora’s acquisition of the Scully Mine closed on July 18, 2017.

g. On November 17, 2017, Tacora and MFC entered into the Scully Mine Lease.

h. In November 2018, the Cargill Offtake Agreement was amended and restated (the “First Offtake Amending Agreement”) to extend its term (by ten years, to 2033), among other things (but without changing the pricing formula).

i. The first MFC Royalty was paid in 2019.

Tacora’s Relationship with Cargill

[15] Tacora’s relationship with Cargill is at the heart of the MFC Royalty Dispute. The outcome of this dispute is very much dependent upon the court’s determination of whether Tacora and Cargill were dealing with each other at arm’s length.

[16] Cargill was described in Tacora’s disclosure for a 2018 public offering (that did not proceed) as a “passive investor” in certain Black River Capital funds managed by Proterra Investment Partners. Those funds held indirect minority interests in Tacora through Proterra investment vehicles.

[17] Cargill acquired a 14% interest in Proterra Cooperatief (the sole shareholder of Proterra Holding that, in turn, was a majority shareholder of Tacora) later in 2018. At that time, Cargill held an estimated 10% indirect or “look through” equity interest in Tacora.

[18] Cargill’s investment in Proterra Cooperatief occurred around the same time that Tacora and Cargill entered into the First Offtake Amending Agreement, in November 2018. At that same time, a Cargill employee (Phil Mulvihill) was appointed by Proterra Holding as one of Tacora’s seven board members.

[19] While 112 Ltd. argues that Cargill was a passive investor in Tacora dating back to 2017, for purposes of the determination of the MFC Royalty Dispute it is content to have the court begin the analysis with the indirect 10% look through equity interest that Cargill has indisputably held in Tacora since 2018.

[20] Cargill and Tacora entered into a Stockpile Agreement dated December 17, 2019 (the “Stockpile Agreement”) under which Cargill paid Tacora for the Scully Mine concentrate when it was delivered to the stockpile at the port, rather than at the time of shipment for ocean voyage. The effect of the Stockpile Agreement was to advance the time of payment for the Scully Mine concentrate, and to function as a working capital facility for Tacora. Cargill describes this agreement to be “a financing solution for Tacora”.

[21] The Cargill Offtake Agreement was amended again in March 2020 (the “Second Offtake Amending Agreement”) to give Cargill the option to extend its term to the life of the mine. This was done in conjunction with a $20 million USD cash call funded by Proterra Cooperatief.

[22] As at March 31, 2021, the Black River Capital funds (in which Cargill was invested) held the majority (57.7%) of the equity in Proterra Cooperatief and Cargill also continued to hold an interest in Proterra Cooperatief.

[23] In November of 2022, Cargill invested $15 million (U.S.) directly in Tacora to acquire convertible preferred shares which carried a 15% accretion right. It was a result of this direct investment in convertible shares (that were never converted) that Tacora identified Cargill as a related party in its December 2022 financial statements. As a condition of this direct investment, Cargill acquired the right to appoint a Tacora board member. There was never more than one Cargill employee or nominee on Tacora's board.

[24] In early 2023, Tacora and Cargill Intl entered into a $30 million (U.S.) Advance Payments Facility, which was subsequently amended. This arrangement provided advance funding for the purchase of Scully Mine concentrate and guaranteed Tacora a floor price of $105 per tonne, in exchange for which the first $15 million USD of the advance was retained by Cargill. In connection with this financing arrangement, Cargill implemented the life of mine term that had been put in place under the Second Offtake Amending Agreement.

[25] In an earlier decision of this court (*Re Tacora Resources Inc.*, 2023 ONSC 6126, 9 C.B.R. (7th) 234) Cargill's relationship to Tacora, primarily focused on its debt holdings and the contracts under which the debt arose, was described as follows (at paras. 9–18):

> *Cargill*
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> [9] The other significant secured creditor of Tacora is Cargill International Trading Pte Ltd. ("Cargill"), with first and second ranking secured debt of almost $35 million.
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> [10] Cargill is party to various commercial arrangements and contracts with Tacora. Tacora sells 100% of the iron ore concentrate production at the Scully Mine to Cargill pursuant to an offtake agreement between Tacora, as seller, and Cargill, as buyer, dated April 5, 2017 and restated on November 9, 2018 (as amended from time to time, the "Offtake Agreement"). Pursuant to an amendment dated March 2, 2020, the term of the Offtake Agreement was extended to a life of mine contract such that Tacora is required to sell and Cargill is required to buy all iron ore concentrate produced at the Scully Mine while it remains operational.
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> [11] The sale of the iron ore concentrate is also subject to a stockpile agreement between Tacora, as seller, and Cargill, as buyer, dated December 17, 2019 (the "Stockpile Agreement"), which works in conjunction with the Offtake Agreement. The Offtake Agreement and other commercial arrangements between Cargill and Tacora have resulted in significant payments by Tacora to Cargill since 2019 despite Tacora's liquidity issues and financial challenges during this period.
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> [12] In or around December 2022, Tacora required additional financing to fund operations through the liquidity challenges it was facing at that

time. On January 3, 2023, Tacora, as seller, and Cargill, as buyer, entered into an advance payment facility agreement (as amended from time to time, the "APF Agreement"). Pursuant to the APF Agreement, Cargill provided Tacora with an advance payment facility (the "Advance Payments Facility") under which Cargill made advance payments under the Offtake Agreement in the total principal amount of $30,000,000 (the "Initial Advances") to Tacora. Until termination of the APF Agreement, Cargill is required to continue paying Tacora for iron ore concentrate under the Offtake Agreement and may not credit such deliveries against the outstanding balance of the Advance Payments Facility.

[13] Subsequently, on May 29, 2023, Tacora and Cargill entered into an Amended and Restated APF Agreement (the "Second APF Amendment") to provide Tacora with additional liquidity. The Second APF Amendment provided for a new facility under the Advance Payments Facility whereby Cargill would make margin advances ("Margin Advances") of up to $25,000,000 to Tacora. The Margin Advances were primarily made to finance margin payments payable to Cargill under the Offtake Agreement. The outstanding amount of Margin Advances fluctuate daily based on the Platts Index 62% price movement. The Margin Advances rank *pari passu* with the Senior Priority Note and senior to the Senior Notes and the Initial Advances. Pursuant to the Second APF Amendment, the maturity date of the Advance Payments Facility was extended to September 12, 2023.

[14] On June 23, 2023, Tacora entered into a further amendment to the APF Agreement (the "Third APF Amendment") to provide greater flexibility to Tacora on utilizing the new margin facility provided by the Second APF Amendment. Under the Third APF Amendment, Cargill, in its sole discretion, could make additional prepay advances ("Additional Prepay Advances" and together with the Margin Advances, the "Senior Priority Advances") to Tacora utilizing any availability under the $25,000,000 facility created by the Second APF Amendment. On June 29, 2023, Cargill made an Additional Prepay Advance in the amount of $3,000,000. Additional Prepay Advances are repayable upon demand and rank *pari passu* with the Senior Priority Notes and the Margin Advances, and senior to the Senior Notes and the Initial Advances. No further Additional Prepay Advances have been made by Cargill and the only Additional Prepay Advance made to Tacora has been repaid.

[15] To further enhance the company's liquidity position in the face of continued negative cash flow, Cargill and the company entered into a wet concentrate purchase and sale agreement (the "Wetcon Agreement") dated July 10, 2023, whereby Cargill agreed to purchase

> a stockpile of 172,000 tonnes of wet concentrate located at the Scully Mine from Tacora.
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> [16] In connection with discussions and negotiations between Tacora's stakeholders regarding a potential consensual recapitalization transaction, Cargill agreed to extend the maturity date of the Advance Payments Facility from time to time, most recently to October 10, 2023. At the October 24, 2023 hearing, Cargill agreed to further extend the maturity date to allow the court time to render its decision on the come-back motion and the AHG's cross-motion.
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> [17] Tacora's former co-founder, Chief Operating Officer, and Chief Commercial Officer, Matt Lehtinen, was hired by Cargill in 2023 and has responsibility for Cargill's relationship with Tacora. There are Cargill employees on site on a day-to-day basis in connection with the management of the Scully Mine. Cargill has also had a representative on Tacora's board of directors ("Board") for many years. Mr. Leon Davies is a Cargill employee and was its Board appointee when the Offtake Agreement was last amended and throughout the DIP Process (defined below).
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> [18] Two Cargill entities are equity-holders in Tacora. Cargill is described as a "related party" under IFRS standards in Tacora's financial statements.

Tacora's Public Disclosure About its Relationship with Cargill

[26] Tacora's May, 2021 Offering Memorandum identified Tacora's transactions with Cargill and its affiliates to be transactions with its direct and indirect shareholders. Tacora's Consolidated Financial Statements for 2021/2022 formally stated that Cargill Inc. was a related party: "[a]s a result of the $15 million preferred share investment described in Note 25, Cargill is a related party as of December 31, 2022."

[27] The International Financial Reporting Standards ("IFRS") provides: "... an entity is related to a reporting entity if, among other circumstances, it is a parent, subsidiary, fellow subsidiary, associate or joint venture of the reporting entity, or is controlled, jointly controlled or significantly influenced by a person who is a related party." It was Cargill's direct interest (in the convertible preferred shares) that was the stated reason for the related party disclosure, although 112 Ltd. contends that the relationship is deeper than that through Cargill's, or its affiliates', prior and subsequent, indirect holdings.

Contract Interpretation Framework

[28] The decision of the Supreme Court of Canada in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 SCR 633 requires the court to arrive at the meaning of "arm's length" or "non-arm's length" in clause (j) of the Scully Mine Lease through principles of contractual interpretation with careful regard to the contract's surrounding circumstances. The

overriding concern in a post-*Sattva* contractual interpretation analysis is to "determine the intent of the parties and the scope of their understanding". See *Sattva* at para. 47.

[29] There is no need to search through the surrounding circumstances or factual matrix of the Scully Mine Lease to ascertain what the parties intended by clause (j) because the parties agree on this: the intent of clause (j) and the definition of Net Revenues is that the MFC Royalty is to be calculated and paid with regard to the market value of Tacora's iron ore concentrate.

[30] Two possible Net Revenue calculations exist under the Scully Mine Lease: (1) arm's length transactions and (2) non-arm's length transactions. They are both aimed at the same goal: that the computation of the MFC Royalty is done with reference to market prices for Tacora's product. They are not a guarantee of fair market value, but they reflect the two proxies for market value pricing for Tacora's product that the parties agreed would be used to calculate the MFC Royalty.

[31] The different approach to determining Net Revenues reflects the assumption that commercial parties dealing at arm's length will be primarily motivated by their own self-interests and they will agree to a price that reflects the fair value pricing in the marketplace, whereas non-arm's length transactions will not. When the MFC Royalty is calculated under the arm's length definition (clause (j)(i)), it is done on the assumption that the Lessee (Tacora) and the purchaser of Tacora's iron ore product are dealing independently of one another and that their agreed upon pricing for the sale of Tacora's product reflects this. Whereas, when iron ore product is sold by Tacora otherwise, including without limitation in non-arm's length transactions, the MFC Royalty is computed by reference only to standard industry benchmarks under clause (j)(ii).

[32] Within this contractual framework, the primary question is whether Tacora and Cargill were arm's length or non-arm's length to each other when they agreed upon the pricing for the sale of Tacora's product to Cargill.

Analysis

[33] The parties agree that the court must first determine whether Tacora's sales of iron ore products to Cargill pursuant to the Cargill Offtake Agreement were sales under an arm's length, *bona fide* contract of sale. The court must consider whether the Cargill Offtake Agreement was an arm's length *bona fide* contract of sale, per clause (j)(i) of the Scully Mine Lease when it was entered into (in 2017) and when it was restated (in 2018) and when it was amended (in 2020).

[34] 112 Ltd. argues that, even if the Cargill Offtake Agreement is found to have been an arm's length *bona fide* contract of sale, the court must still determine whether any of the sales of Tacora's iron ore products to Cargill under that agreement were non-arm's length transactions, per clause (j)(ii). Tacora disagrees with this approach and argues that clause (j)(ii) is not relevant to the determination of Net Revenues if the Cargill Offtake Agreement is found to be an arm's length *bona fide* contract of sale within the meaning of clause (j)(i) of the Scully Mine Lease. So the second question for the court to decide is whether clause (j)(ii) is engaged.

[35] Next, if Net Revenues are to be calculated under clause (j)(ii), then the court must determine whether, and if so, what Deductible Expenses or other adjustments should be made to determine the "net" revenues from which to calculate the MFC Royalty and determine the amount payable.

[36] Finally, the amount of the underpaid MFC Royalties needs to be decided.

[37] The above questions for the court will be addressed in turn.

Is the Cargill Offtake Agreement and Arm's Length Bona Fide Contract of Sale Under Clause (j)(i)?

a) The Cargill Offtake Agreement is a *Bona Fide* Contract of Sale

[38] Tacora sells 100% of its iron ore products to Cargill. Pursuant to the Cargill Offtake Agreement, Cargill markets and sells the product to third party buyers in exchange for a portion of the profits. Effectively, Cargill serves as an intermediary akin to a sales and marketing agent. It has not been suggested, and there is no evidence, that Cargill has not been selling Tacora's products to third parties at the highest possible price available in the market. Tacora has paid more than $117 million to Cargill under the Cargill Offtake Agreement.

[39] MFC's expert agreed that offtake agreements are a standard feature of the mining market that allow producers to focus on mining instead of sales, provide them with security of demand, and help them tap into new markets. These types of offtake arrangements can help smaller producers market their products and access foreign markets that they might otherwise not have access to. Much of Tacora's iron ore product is sold by Cargill to end customers in China.

[40] Under the Cargill Offtake Agreement, the parties agreed that the amount Tacora will be paid by Cargill for its iron ore concentrate would be determined by the market commodity price (as determined by a market index), less freight costs, and plus a share of the profits derived from Cargill's sale of the iron ore concentrate to third parties above the market index (the "Purchase Price"). Neither the restatement nor the amendment of the Offtake Agreement had a material impact on the Purchase Price to be paid to Tacora.

[41] The Cargill Offtake Agreement was signed, amended, performed and has been acknowledged by Tacora and Cargill throughout. It is a genuine contract. There has been no suggestion by 112 Ltd. that it is a sham or entered into for a fraudulent or deceitful purpose. See *Bank of Montreal v. Wheeler*, 1980 CarswellNat 654, citing *Re Ontario Human Rights Commission and City of North Bay*, 1977 CanLII 1253 (ON CA). It is a *bona fide* contract of sale.

b) The Cargill Offtake Agreement is an Arm's Length Contract of Sale

[42] While 112 Ltd.'s primary position is that Cargill and Tacora were not arm's length by at least 2018, which was prior to the first payment of the MFC Royalty, it contends that there were undisclosed *indicia* of a non-arm's length relationship dating back to when the Cargill Offtake Agreement was signed in April 2017.

[43] Tacora acknowledges that this is not a one-time assessment. It agrees that the question of whether the Cargill Offtake Agreement is an arm's length contract of sale should be assessed at the time that agreement was entered into in April 2017, and again when it was restated in November 2018 and again when it was amended in March 2020.

[44] The meaning of "non-arm's length" has been considered in the jurisprudence under the *Income Tax Act*, RSC, 1985, c. 1 (5th Supp), the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 and other statutes dealing with preferences in insolvency or near insolvency situations.

[45] The leading case on the meaning of "non-arm's length" in the context of the *Income Tax Act* is *Canada v. McLarty*, 2008 SCC 26, [2008] 2 SCR 79. For purposes of the *Income Tax Act*, related persons shall be deemed not to deal with each other at arm's length; and, it is a question of fact whether persons not related to each other were at a particular time dealing with each other at arm's length: See s. 251(1). In *McLarty*, the parties were not related beyond a less than 2% ownership interest. To determine whether the parties were at any particular time dealing at arm's length, the Court considered the following questions: (a) Was there a common mind which directs the bargaining for both parties to a transaction? (b) Were the parties to a transaction acting in concert without separate interests? and, (c) Was there de facto control? See *McLarty*, at para. 62.

[46] The Court of Appeal in *Montor Business Corporation v. Goldfinger*, 2016 ONCA 406, 351 OAC 241, considered various authorities that had looked at whether or not parties were contracting at arm's length, noting at paras. 66 and 71 that the outcome in each case depended upon specific findings of fact.

[47] 112 Ltd. asks the court to adopt what it describes as the more flexible approach to determining whether parties are dealing at arm's length, drawn from the leading non-tax case of *Gingras, Robitaille, Marcoux Ltée v. Beaudry* (1980), 36 CBR (NS) 111 (QC S.C.), indexed as *Re Tremblay*, a fraudulent conveyance case in the bankruptcy context. This contextual analysis asks (at *Tremblay* paras. 21–25) whether the parties are related; whether there is "influence"; whether there are "bonds of dependence"; or, [moral or psychological] "leverage sufficient to diminish or influence the free decision-making of the other". This was the approach preferred in the more recent case of *Doyle Salewski Inc v. Scott*, 2019 ONSC 5108 (reversed in 2022 ONCA 590 on other grounds, leave to appeal to Supreme Court of Canada granted on March 30, 2023, judgment reserved by Supreme Court of Canada on December 5, 2023; also referred to as "*Golden Oaks*").

[48] In *Salewski* (also a BIA preference case) the judge at first instance observed that the *McLarty* factors, which were derived from a Canada Revenue Agency guide, were a "useful starting point" but that a court "must ultimately determine, by reviewing all of the relevant evidence, whether they show an independence of thought and purpose, and the adverse economic interest and *bona fide* negotiating that characterizes ordinary commercial transactions." In so doing, the court adopted the Court of Appeal's emphasis in *Goldfinger* on the fact-driven nature of the analysis (see *Salewski*, at paras. 207 and 210). In concluding that one of the individuals, Mr. Ho, was not dealing with the debtor at arm's length, the fact that he engaged in self-interested bargaining or independent thinking was held not to be enough to demonstrate arm's length dealings in that case. The court suggested (at para. 212) that a broader consideration of whether there were any elements of a "common venture" was appropriate.

[49] In this case, which turns on the interpretation and meaning of the phrases "arm's length" and "non-arm's length" in the Scully Mine Lease, in addition to the starting point factors (taken from the *McLarty* line of *Income Tax Act* cases) and the contextual analysis (take from the preference cases such as *Tremblay* and *Salewski*), there are the added contract interpretation considerations from *Sattva* that also must be factored in, including the factual matrix and the other

provisions of the Scully Mine Lease, reading that contract and its provisions together, harmoniously (see *Sattv*a at para. 47). This involves consideration of the pricing terms of the Cargill Offtake Agreement (as restated and amended) and how it was viewed by the parties to the Scully Mine Lease when the lease was signed.

[50] Since this is a contract interpretation case, it makes sense to start with the contract and then consider the broader jurisprudence. It is important to consider whether the treatment of the Cargill Offtake Agreement in the Scully Mine Lease gives any indication as to whether it was viewed as an arm's length contract for the sale of Tacora's iron ore products to Cargill that was expected to generate revenues for Tacora based upon the fair prices of Tacora's iron ore in the marketplace. The Cargill Offtake Agreement, with its Purchase Price formula that included profit-sharing based on sales in the marketplace to end purchasers of Tacora's iron ore products, existed at the time the Scully Mine Lease was entered into and is expressly referred to in it.

[51] Among other places, clause 1(h) of the Scully Mine Lease contemplates that there may need to be retroactive determinations of the Earned Royalties because "…the Cargill [Offtake] Agreement provides for payment to the Lessor of a 'Provisional Purchase Price' (as defined in the Cargill [Offtake] Agreement) and third party service providers may invoice the Lessee for Deductible Expenses after the end of a calendar quarter, and both such factors shall impact the final determination of Net Revenues (including Deductible Expenses). Deductible Expenses are only expressly referred to in the definition of Net Revenues under clause (j)(i)(A) (sales under an arm's length contract). These references to and treatment of the Cargill Offtake Agreement in the Scully Mine Lease are an indication that the parties contemplated that sales of Tacora's iron ore products under the Cargill Offtake Agreement would fall within the arm's length calculation of Net Revenues under clause (j)(i).

[52] That provides some indication of the parties' common intention and understanding as to the arm's length nature of the Cargill Offtake Agreement, but it is not the end of the analysis.[4]

[53] Turning to the jurisprudence, and starting with the *McLarty* factors: (a) Was there a common mind which directed the bargaining for both parties (Tacora and Cargill) when then negotiated and entered into the Offtake Agreement or any of its amendments? (b) Were Tacora and Cargill acting in concert without separate interests when the Offtake Agreement or its amendments were being negotiated? and, (c) Was there *de facto* control of Tacora by Cargill when the Offtake Agreement or its amendments were negotiated and signed?

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[4] MFC argues that it was misled by Tacora about the nature of its relationship with Cargill from the outset and thus suggests that how the Cargill Offtake Agreement was characterized or treated under the Scully Mine Lease was not based on its full knowledge or understanding of their relationship between Tacora and Cargill. That allegation, that MFC was misled, is disputed, and is countered by an allegation by Tacora that MFC laid in the weeds, accepted Royalty Payments, conducted two audits that produced no basis for complaint and then only raised its challenge that the MFC Royalty had been underpaid when Tacora was facing a liquidity crisis in 2023 in order to gain leverage. The court does not need to analyze and make any findings about these accusations between the parties in order to decide the MFC Royalty Dispute and determine the MFC Royalty payable. For immediate purposes, they essentially cancel each other out and are not going to be addressed.

[54] There is no evidence that any of these *McLarty* factors were present at any time, either leading up to the execution of the Offtake agreement in 2017, when it was restated in 2018, when it was amended in 2020, or at any time after that. Certainly since the CCAA proceedings have commenced, there can be little doubt that Tacora and Cargill are not acting under the direction of a common mind or in concert or that Cargill has the ability to exercise *de facto* control over Tacora. They have been at odds with each other throughout most of these proceedings.

[55] 112 Ltd. argues that the cumulative influence that Cargill had through its indirect and direct holdings in Tacora, and convertible preference shares, gave it de facto control over Tacora. However, this is an assertion with no evidentiary support. All of 112 Ltd.'s supposition about indirect control by Cargill through passive investments in private equity funds remains unsubstantiated. What the evidence demonstrates is to the contrary:

a. Cargill has never directly held outstanding common shares in Tacora and has never converted its preferred shares nor exercised its warrants.

b. Cargill's indirect ownership of Tacora on a look-through basis has never exceeded around 11%.

c. Cargill has never had more than one representative on the Tacora Board of Directors and has never exercised control over the board.

d. Cargill's employee on the Tacora board recused themself when the Board was considering matters involving Cargill, even when not technically required to do so under corporate law, and did not report to Cargill about matters discussed at the Tacora Board.

[56] Based on the *McLarty* factors, throughout the relevant time period Tacora and Cargill were dealing with each other at arm's length. Turning next to the *Tremblay* (and other) contextual factors: were the parties related; was there "influence"? were there "bonds of dependence"? or, [moral or psychological] "leverage sufficient to diminish or influence the free decision-making of the other"?

[57] 112 Ltd. argues that there are the hallmarks of a non-arm's length relationship in this case, because of its assertions that:

a. the contracting parties are related, as was acknowledged after Cargill's November 2022 $15 million investment in convertible preferred shares, although it is argued that they were related even before that because of indirect passive investments;

b. there were bonds of dependence or influence as a result of Cargill's creeping financial support of Tacora and because Cargill was Tacora's only customer (from the outset);

c. there existed the ability of one party to exercise control, influence or moral pressure on the other party's will as a result of both (a) and (b) above and also Cargill's employee who sat on Tacora's Board starting in November 2018, employees providing on-site support at the Scully Mine starting in 2023 and with various side agreements that Cargill continued to offer Tacora as it experienced increasing pressure on its cash flow and liquidity starting in or about September, 2021.

[58] This contextual analysis, culminating in the overarching question of whether one party to a contract exercised influence over the other party that precluded the other party's free participation in the contract in an independent manner, must be broken down temporally.

[59] The first time the MFC Royalty was calculated under the Scully Mine Lease was for Net Revenues earned in 2019. Tacora has paid 112 Ltd. $121 million in royalties since Q1 2020. All of these MFC Royalties have been calculated based on revenues earned by Tacora under the Cargill Offtake Agreement after it was restated in November 2018.

[60] At the time of the First Offtake Amending Agreement in November 2018, Cargill only had indirect holdings in Tacora through its passive investments in the Black River funds and had not provided any (or at least any material) financing. None of the other factors noted above came into play until after that. The fact that it was Tacora's only customer, known from the outset, is not an indicia of control or influence beyond what would be expected in the normal commercial dealings between a producer of product and its customer.

[61] There is no evidence of Cargill wielding influence or leverage over Tacora, or of Tacora's dependence on Cargill, so as to diminish or affect Tacora's ability to make free decisions or deal with Cargill at arm's length when it negotiated and entered into the Cargill Offtake Agreement in April 2017 or the First Offtake Amending Agreement in November 2018.

[62] It was not until around the same time as the First Offtake Amending Agreement was signed in November 2018 that Cargill acquired a membership interest in Proterra Cooperatief, which gave it an approximately 10% indirect interest in Tacora on a look-through basis. In March of 2020 when the Second Offtake Amending Agreement was negotiated and signed, Cargill still held its indirect 10% look through interest, had started to provide some financial support under the Stockpile Agreement (entered into in 2019), and had one employee on Tacora's Board of seven (who recused himself from decisions involving Cargill, even when not strictly required to do so under corporate law conflicts requirements, and who testified to understanding his fiduciary obligations to Tacora earlier in these CCAA proceedings).

[63] *Salewski* emphasizes broader contextual factors that must be considered when the court reviews all of the relevant evidence and considers whether it demonstrates the existence of independence of thought and purpose, and the adverse economic interest and *bona fide* negotiating that characterizes ordinary commercial transactions.

[64] Tacora has put in evidence to demonstrate the normal back and forth of sophisticated commercial parties acting through their counsel in the course of the negotiation of the contractual terms of the Cargill Offtake Agreement and its restatement and amendment. This does show Tacora's and Cargill's independence of thought and adversity of economic interests. This evidence was not challenged. For example:

a. Cargill and Tacora each conducted due diligence review of the other;

b. Cargill and Tacora performed their own analyses of transaction economics;

c. Cargill and Tacora were advised by separate counsel and advisory teams in the process; and

d. Cargill and Tacora exchanged offers and counters for a proposed offtake arrangement and profit share structure and Tacora has consistently negotiated in an adversarial format and to maximize its economic self-interest.

[65] An indirect minority holding, a board representative who says he respected his fiduciary obligations to Tacora, and some mark to market pricing arrangements negotiated within the context of a long term commercial contractual arrangement between sophisticated parties with their own legal advisors, do not amount to influence by, or dependence on, or leverage exerted by Cargill over Tacora sufficient to diminish or influence Tacora's free decision-making when it negotiated and entered into the Second Offtake Amending Agreement in 2020. Nor did these circumstances render Tacora and Cargill "related parties".

[66] 112 Ltd. argues that the jurisprudence about non-arm's length contracts does not require it to demonstrate that Cargill was paying below market and that it is enough for 112 Ltd. to demonstrate that there is a possibility of that occurring because of the nature of the relationship between Tacora and Cargill. However, 112 Ltd. nonetheless asks the court to consider and take into account that the Net Revenues, as calculated by Tacora under clause (j)(i), must be below market because when MFC's expert does the calculation under clause (j)(ii) the number is higher. Tacora challenges the assumptions and inputs that the MFC expert used (and contends that when calculated properly under clause (j)(ii) the Net Revenues are actually not higher). Tacora also points out that clause (j)(ii) uses an index or proxy for assumed market values when actual arm's length transactions in the market are not available, whereas here there can be no suggestion that the sales "brokered" by Cargill of Tacora's product to end purchasers in the marketplace were not concluded at fair market value, so the use of the index as a proxy is misleading and should only be applied if clause (j)(ii) is actually triggered.

[67] The formulas for calculating the MFC Royalties under clause (j) would not necessarily be expected to produce the same MFC Royalty number. The issue here is not which one, in hindsight, is a better reflection of fair market value, but rather which one should be used in the particular circumstances of this case based on the agreed upon approach and formula.

[68] In the context of these CCAA proceedings, the Offtake Agreement has been described by many parties, including Tacora, as an "off-market" bad deal for Tacora, in the sense that it is too onerous for Tacora and favours Cargill. 112 Ltd. contends that Cargill has acted as Tacora's marketer around the globe since commercial production commenced at the Scully Mine in exchange for which Cargill exacts an "extortionate share" of the profits, which in plain terms is a discount on the purchase price, ultimately resulting in a deprivation to 112 Ltd. on the MFC Royalty. This is said to have given rise to the marketing/profit sharing and critical financing bonds of dependence.

[69] Tacora counters that there is no evidence to indicate that the effective remuneration for Cargill's other services (such as marketing the product, brokering sales, shipping it to end users and offering mark to market pricing to enhance Tacora's cash flow and make it less vulnerable to day to day market price fluctuations) is off-market. Further, if Tacora was not paying Cargill it

would be paying another third party to carry out these marketing and related functions that it does not have the in-house expertise or capacity to carry out. Either way, Tacora says these would be relevant expenses to take into account in determining its Net Revenues.

[70] The most talked about feature of the Offtake Agreement that renders it to be “off market” is its life of mine provision, which does not affect day to day sale prices and revenues to Tacora. While 112 Ltd. argues that the net result of that bad deal meant that the Cargill Entities were predominantly the only game in town for Tacora in terms of attracting further debt and equity post-2018, that is belied by the significant noteholder investments made in 2021, 2022 and 2023.

[71] The fact that Tacora made what has proven, and it readily now acknowledges, to be an uneconomic and off market deal with Cargill in the Cargill Offtake Agreement does not mean that it was the product of a non-arm’s length relationship. MFC's own expert acknowledged this.

[72] The focus of this analysis needs to be on the relationship between Tacora and Cargill and whether it was arm's length or not. The legal relationship of Cargill and Tacora as “related parties” was recognized for the first time in the 2021/2022 Tacora financial statements, after November 10, 2022 when Tacora issued 15,000,000 non-voting, Series C Preferred Shares to Cargill in exchange for $15 million cash consideration. This is the first time that Cargill directly held shares in Tacora.

[73] 112 Ltd. argues that the indirect 10% look through investment dating back to 2018 also fits the related party definition. This argument by 112 Ltd. is premised on its earlier assertion that the *Tremblay* factors were in play in this case dating back to 2018. However, I have found that the *Tremblay* factors were not engaged in this case (above) since it was not established that Cargill exerted “influence” or that there were “bonds of dependence” between Cargill and Tacora or that Cargill exerted moral or psychological “leverage sufficient to diminish or influence the free decision-making of Tacora.

[74] The evidentiary record does not support a finding that Tacora was subject to influence or leverage exerted by, or dependence on, Cargill that could have diminished or affected Tacora’s free decision-making so as to render it unable to deal with Cargill at arm’s length in this time frame leading up to the last, March 2020, amendment to the Cargill Offtake Agreement. There were no amendments to the Cargill Offtake Agreement after March 2020. Even if Tacora and Cargill were deemed not to be dealing at arm’s length because they were related parties for financial reporting purposes, that was not until later, after the Second Offtake Amending Agreement had been negotiated and signed. Tacora argues that this is the end of the analysis on the question of whether the Cargill Offtake Agreement is an arm’s length contract of sale. I agree.

[75] In any event, while it would be a factor to consider, the related party status of Tacora and Cargill in 2022 is not determinative of the question of whether the Cargill Offtake Agreement was an arm’s length contract. As the court observed in *Salewski* (at para. 202): “In short, two parties [who] are related persons may still be dealing at arm’s length, or not, depending on the facts of the case.”

[76] After the 2022 “related-party” disclosure, the dealings between Cargill and Tacora were more focused on financing or debt. Cargill and Tacora entered into a series of Advance Facility

Payment agreements pursuant to which Cargill provided margin financing and became a secured creditor of Tacora. Cargill has never held the majority of Tacora's debt. Tacora took on significant debt (in excess of $230 million) to noteholders, that have no relationship to Cargill, in 2021, 2022 and 2023.

[77] Tacora and Cargill also entered into a series of side letters that have been suggested to include price protection or hedging. 112 Ltd. refers to clause A(13) of the Scully Mine Lease that provides for special treatment of "Trading Activities" (including price protection) that could push the parties into a (j)(ii) non-arm's length Net Revenues definition. 112 Ltd. suggests that these side letters are an *indicium* of the critical strategic financing arrangements that rendered Tacora and Cargill to be non-arm's length. These financing and other arrangements provided support to Tacora but it is not suggested that the price extracted for this support is off market, or that Tacora did not require the support.

[78] In addition, beginning in 2023, Cargill also provided two employees to Tacora to provide on-site consulting and technical support to Tacora at the Scully Mine on operational matters and capital expenditure planning.

[79] If it is relevant, in the circumstances of the contractual arrangements and history of dealings between Tacora and Cargill I do not consider these later dealings between Tacora and Cargill, including and following the related party status reported at the end of 2022 to give rise to the level of influence or leverage exerted by, or dependence on, Cargill that could have diminished or affected Tacora's free decision-making so as to render it unable to deal at arm's length with Cargill.

[80] 112 Ltd. also argues that the Scully Mine was a "common venture" of Tacora and Cargill (per *Salewski*), because both Cargill and Tacora have a vested economic interest in increasing the production and sale of iron ore from that mine as a result of their contractual and economic dealings. In *Salewski,* the findings in this regard (at para. 212) were that: "[Ho] and the company were engaged in a common venture directed by Lacasse. Ho sometimes acted independently, but always in furtherance of the scheme developed by Lacasse". The finding was made based on evidence of collusion and a lack of any adversity of interests (as was noted at para. 219): "In the case at bar, there is credible, uncontradicted evidence from Collins and Pierre that Ho received payments from Golden Oaks in the context of a common purpose, directed by Lacasse, to defraud investors. This is completely inconsistent with arm's length dealings".

[81] In contrast, one of the other investors whose dealings with Golden Oaks were also being challenged in *Salewski* was found to have been acting at arm's length even though he was an investor with a pre-existing business relationship. The court observed (at para. 268): "The existence of a relationship does not, however, automatically mean that parties were not dealing at arm's length." Where the only evidence of a relationship was that "Laframboise was involved in Golden Oaks in 2012 as … a creditor or investor" the court concluded that he was acting at arm's length.

[82] The court in *Salewski* made a point (at para. 216) of distinguishing the common venture that had been established in that case with the situation in *Goldfinger*. In *Goldfinger*, "there was a dearth of evidence suggesting that the parties were not at arm's length," and the Court of Appeal concluded that "the trial judge did not err in finding to the contrary." (at para. 71). Goldfinger

asserted that he invested in what he himself described as a "joint venture" for real estate development (at paras. 8 and 9); yet he was found to be acting at arm's length from Kimel in connection with a negotiated agreement that they entered into, having regard to the fact that:

a. There was no common mind directing Goldfinger and Annopol or indeed, Kimel. They were adverse in interest and on the verge of litigation. The evidence also fails to suggest that they were acting in concert. (at para. 69)

b. As mentioned, although Goldfinger and Kimel decided on the amount Goldfinger would be paid, the overall structure and details of the settlement were negotiated with the assistance of counsel. (at para. 70)

[83] The alleged "common venture" between Tacora and Cargill in this case is more similar to that in Goldfinger (no common directing mind, negotiated contractual terms with the assistance of counsel, a common interest in the success of something that they have both invested in, and adversity in subsequent litigation) than in comparison to the situation in *Salewski*. Tacora and Cargill have a commercial relationship that has led to them have a common interest in the economic success of the Scully Mine. They were not engaged in a collusion, but rather were engaged in commercial transactions that were independently investigated, subjected to due diligence, reviewed and negotiated through counsel, and then approved by their independent boards of directors.

[84] If the existence of operational contracts, equity holdings and financing arrangements in a commercial context is sufficient to lead to a finding that two commercial contracting parties have a "common venture" such that they would no longer be considered to be dealing at arm's length, I expect that would have relatively significant and broad-sweeping implications for many businesses. That is not what the court in *Salewski* was addressing, nor is it reasonably inferred from the reasoning in that case which was quite fact-specific. It is not the case here either.

c) <u>Conclusion re: Clause (j)(i) Arm's Length *Bona Fide* Contract of Sale</u>

[85] Having considered the context of the Scully Mine Lease, the Cargill Offtake Agreement (including its 2018 and 2020 amendments), the relevant jurisprudence and the dealings between Tacora and Cargill throughout, I find that Tacora sells its iron ore products under an arm's length, bona fide contract of sale with Cargill, namely the Offtake Agreement.

Has Clause (j)(ii) Been Triggered?

a) <u>Are (j)(i) and (ii) Mutually Exclusive?</u>

[86] Clause (j)(ii) begins with the words: "*in the event that the Lessee otherwise sells Iron Ore Products, including, without limitation, in a non-arm's length transaction*."

[87] 112 Ltd. argues that, even if the Cargill Offtake Agreement was and is an arm's length *bona fide* contract for the sale of iron ore from Tacora to Cargill within the meaning of clause (j)(i), the court still must consider whether Tacora otherwise sells iron ore products to Cargill in non-arm's length transactions. Tacora disagrees with this interpretation of clause (j). It says clause

(ii) only applies if the Cargill Agreement is found not to be an arm's length *bona fide* contract for the sale of Iron Ore from Tacora to Cargill within the meaning of clause (j)(i).

[88] The plain words of clause (j)(i) and (ii), when read together harmoniously and as a whole as they must be (see *Sattva*, at para. 47), do not support 112 Ltd.'s interpretation.

[89] Clause (j)(i) clearly deals with the situation of an arm's length *bona fide* contract for the sale of iron ore from Tacora to Cargill. Clause (j)(ii) begins with the words: "in the event that the Lessee *otherwise* sells Iron Ore Products." The word "otherwise" in clause (j)(ii) is to contrast it with the situation in clause (j)(i). The Collins English dictionary explains: You use otherwise after stating a situation or fact, in order to say what the result or consequence would be if this situation or fact was not the case. That means in the context of the definition of Net Revenues under the Scully Mine Lease: if there is no (j)(i) arm's length *bona fide* contract for the sale of Tacora's iron ore, then look to clause (j)(ii).

[90] 112 Ltd. emphasises the phrase "without limitation" to suggest that clause (ii) is paramount over clause (i). It contends that the proper way to read clause (j) is: even if there is an arm's length *bona fide* contract for the sale of Tacora's iron ore, there can be non-arm's length transactions under that contract and, if so, then those are governed by clause (j)(ii), so as to provide a reality check to make sure that each sale transaction is arm's length. I disagree with this interpretation. It would be highly impractical to evaluate every sale transaction under the Cargill Offtake Agreement, nor does it make commercial sense. If the parties intended to have each transaction under the Cargill Offtake Agreement (in other words, every shipment of iron ore that leaves the port on a Cargill boat destined to be sold in the marketplace) to be assessed to determine whether it was otherwise being sold in a non-arm's length transaction, there would be no need for clause (j)(i).

[91] The "without limitation" qualifies the words that follow, "in a non-arm's length transaction". This means, if there is no arm's length *bona fide* contract, but Tacora is otherwise (in the absence of such a contract) selling its iron ore product, then in all such circumstances, including without limitation in a non-arm's length transaction, the clause (j)(ii) formula for calculating Net Revenues shall apply.

[92] To achieve the objective purpose of clause (j), which is for the MFC Royalty to be calculated and paid with regard to the market value of Tacora's iron ore concentrate, the parties must have intended that it would be through the combination of the Net Revenues formula under (j)(i) and the Purchase Price as determined under the Cargill Offtake Agreement, which was expressly referenced in the Scully Mine Lease.

[93] There is no need to consider clause (j)(ii) in light of the earlier finding that the Cargill Offtake Agreement is an arm's length *bona fide* contract for the sale of iron ore from Tacora to Cargill within the meaning of clause (j)(i).

[94] The parties intended that either of these methods for determining the Net Revenues could serve as the proxy for achieving the intended goal of the MFC Royalty being calculated with regard to market value for the sales of Tacora's iron ore products. That is achieved, by applying the Net Revenues calculation under clause (j)(i) to the Purchase Price under the Offtake Agreement that is

market index based and adjusted to reflect actual prices to end purchasers and then adjusted for costs agreed upon as between Tacora and Cargill that were known to the parties to the Scully Mine Lease when it was signed.

[95] That is the end of the analysis. There is no need to consider or apply clause (j)(ii) in the determination of Net Revenues for the purposes of calculating the MFC Royalty.

b) <u>Clause (j)(ii) Applicable to "Trading Activities"</u>

[96] There is one further point that was mentioned in passing that I will briefly address. Clause A13 of the Scully Mine Lease stipulates that: "The parties agree that the Lessor is not a participant in the Trading Activities of the Lessee or any of its affiliates, and therefore Earned Royalties will not be diminished or improved by losses or gains of the Lessee or any of its affiliates in any such Trading Activities." Trading Activities include forward sales, futures trading or commodity options trading and other price hedging, price protection, derivatives, synthetic and speculative arrangements.

[97] Clause A13 goes on to provide that: "If the Lessee or its affiliates engage in Trading Activities, the Earned Royalties on the Iron Ore Products underlying such Trading Activities will be determined on the basis of the value of such Iron Ore Products without regard to the price or proceeds actually received by the Lessee or any of its affiliates for or in connection with the sale. or the manner in which a sale to a third party is made by the Lessee or any of its affiliates. The aforementioned value will be determined in accordance with paragraph (ii) of the definition of 'Net Revenues' herein."

[98] Both parties referred to clause A13 in passing, but it was not the focus of either side's submissions. There was some suggestion that Tacora's arrangements with Cargill under various side letters entered into after the Second Offtake Amending Agreement involved hedging or price protection. Although the particulars were not in evidence, I would expect these could impact both the actual revenues received by Tacora and the fees or other compensation paid to Cargill.

[99] Tacora says these are dealt with entirely outside of the Cargill Offtake Agreement. They are not pursuant to the Offtake Agreement; they are side deals that, if and when triggered, are not factored into the MFC Royalty calculation one way or the other. Rather, its calculation of the MFC Royalty payable based on Net Revenues calculated in accordance with clause (j)(i) was based only on the Cargill Offtake Agreement.

[100] In oral argument, counsel for 112 Ltd. clarified that it is not suggesting that clause (j)(ii) applies because of any "Trading Activity". Rather, what 112 Ltd. argues is that the existence of the side letters and price protection provided for therein is an indication of a non-arm's length relationship in this contractual context. This point has already been addressed earlier in this endorsement.

What are the Net Revenues for Purposes of Calculating the MFC Royalty?

[101] There is no dispute about how to determine the Net Revenues for purposes of calculating the MFC Royalty payable if they fall under clause (j)(i).

[102] If clause (j)(ii) had been triggered, this would have been a more complex question to answer as it would have entailed a consideration of whether the Deductible Expenses referred to in Clause (j)(i) should be deducted from the indexed-based determination of revenues/metric tonne. Tacora says they should be, whereas MFC and its industry expert says they should not be. MFC's industry expert acknowledged that certain standard deductions would be appropriate, but not the Deductible Expenses. Tacora also challenges certain assumptions made by the MFC expert.

[103] MFC's expert says that, based on his methodology and assumptions, $4,699,103.46 more would be owing for the MFC Royalty under clause (j)(ii) than has been calculated and paid under clause (j)(i) up to Q4 2023. Tacora says that if the assumptions and methodology are adjusted in the manner they argue is appropriate nothing more would be owing.[5]

[104] I do not need to decide these points of disagreement, since I have concluded that clause (j)(ii) has not been triggered. To do so would require a more in depth contractual analysis as well as consideration of the expert evidence, industry practices and the practices of the parties, about which the evidentiary record may not be as robust as it could have been. It could involve some analytics and calculations that go beyond picking one or the other of the parties' positions. In light of the court's earlier findings, there is no need for the court to undertake this analysis or the math that may flow from it at this time.

What is the amount of the MFC Royalty Payable by Tacora?

[105] For the reasons above, the MFC Royalty is to be calculated based upon Net Revenues calculated pursuant to clause (j)(i) for sales made pursuant to an arm's length *bona fide* contract (the Cargill Offtake Agreement). That is the manner in which Tacora has been calculating the MFC Royalty and Tacora's calculation was not challenged by 112 Ltd. on any basis other than the assertion that Tacora's relationship with Cargill was non-arm's length, thereby requiring the Net Revenues to be calculated pursuant to clause (j)(ii).

[106] The MFC expert evidence was devoted to the question of how to properly calculate the MFC Royalty under clause (j)(ii), which has not been triggered for reasons indicated above.

[107] I accept Tacora's calculation of Pre-Filing MFC Royalty amount owing, to be $15,442,190.80.

Final Disposition and Costs

[108] The parties were not prepared to make their cost submissions at the conclusion of the hearing, and there would have been no time for that. They were to agree upon a date by which their cost outlines would be exchanged and advise the court when that occurred, understanding that no decision would be released until after that exchange. That was confirmed to have taken

[5] The details of the calculations have intentionally been omitted from these reasons. There is a sealing order (dated April 26, 2024) that applies to certain commercially sensitive confidential information about Tacora sales and Cargill's pricing. There is no need to refer to any of the confidential sealed information.

place on May 2, 2024. The parties indicated that they would attempt to agree upon costs, but advised on May 7, 2024 that they have been unable to do so.

[109] Now that the parties have this endorsement, they are encouraged to try to reach an agreement on costs. They shall advise the court by May 17, 2024 as to whether any agreement has been reached. Failing which, they shall arrange to attend a case conference before me for further directions regarding cost submissions based on proposals that they shall exchange with each other in advance of that case conference. The case conference should be booked in the normal course through the Commercial List office.

Kimmel J.

Kimmel J.

Date: May 8, 2024