Court File No. CV-23-00707394-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TACORA RESOURCES INC.

APPLICANTS

FACTUM OF THE CONSORTIUM OF NOTEHOLDERS RESPONDING TO CARGILL'S PRELIMINARY MOTION AND CROSS-MOTION

April 6, 2024

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PART I - NATURE OF THE MOTIONS

1. This factum is filed on behalf of the Consortium Noteholder Group (the "**Consortium**") in opposition to motions brought by Cargill Incorporated and Cargill International Pte Ltd. ("**Cargill**") to frustrate and delay the only actionable restructuring transaction available to Tacora Resources Inc. ("**Tacora**" or the "**Company**").

2. On February 5, 2024, Cargill served a preliminary motion (the "**Preliminary Motion**") seeking to prevent Tacora from obtaining the relief sought in its motion for the Sale Approval Order. The basis for the Preliminary Motion was stated to be that Tacora was not entitled to obtain the Sale Approval Order unless it first disclaimed the Offtake Agreement in accordance with section 32 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "**CCAA**").

3. Cargill asserts that the Offtake Agreement cannot be assigned without Cargill's consent and that it contains limited termination rights. Cargill argues that this Court cannot override these rights except under section 11.3 of the CCAA, which applies to the assignment of contracts containing a commercial restriction on assignment. Cargill's position is that, since Tacora cannot comply with section 11.3 in "assigning" the Offtake Agreement to ResidualCo pursuant to the proposed reverse vesting structure, "the only procedural method" for Tacora to be relieved of an existing contract is by means of the disclaimer process under section 32 of the CCAA.

4. The positions adopted by Cargill in the Preliminary Motion are without legal merit and do not withstand scrutiny. Indeed, CCAA courts on numerous occasions have approved transfers of contracts containing assignment restrictions to residualCos as part of reverse vesting transactions, without holding that those contracts must first be disclaimed and where no notice of disclaimer had been issued. Importantly, the court-appointed Monitor, in its Supplement to the Fourth Report,

has expressed the view that such disclaimer is not legally required in this case.[1] Cargill's position is based, in part, on an incorrect interpretation of section 11.3 of the CCAA, which does not apply in a reverse vesting transaction. The Court's authority to permit the transfer of such contracts to a residualCo in a reverse vesting transaction is grounded in section 11 of the CCAA, not section 11.3. Cargill's contention that the Court's broad discretion under section 11 should be limited by the availability of an order under section 11.3 is inconsistent with how the Supreme Court of Canada has interpreted the scope of section 11. Cargill's Preliminary Motion should be dismissed.

5. In a responding cross-motion dated March 1, 2024 (the "**Responding Cross-Motion**"), as an alternative to the Consortium Transaction, Cargill puts forward its own proposed CCAA plan (the "**Proposed Cargill Plan**") completely outside the SISP, baldly stating that it is "superior" to the Consortium Transaction. Cargill requests a meeting order authorizing it to file its Proposed Cargill Plan with the Court and authorizing Cargill to call a meeting of affected creditors to consider the Proposed Cargill Plan. Cargill also seeks a claims procedure order. Alternatively, Cargill seeks an order directing Tacora to file a plan on terms acceptable to Cargill and to call a meeting of creditors to consider that plan.

6. The Proposed Cargill Plan is structured around the retention of the off-market Offtake Agreement as the sole marketing agreement for the Scully Mine's iron ore. This is a transparent attempt to preserve Cargill's own interests and profits, to the detriment of Tacora and all of its other stakeholders. It is not supported by the Company, the Senior Secured Noteholders, the Monitor, or any other interested stakeholder. This Court should disregard the Proposed Cargill Plan as it is, among other things, a collateral attack on the SISP, to which Cargill expressly consented. It is also unexecutable as it lacks the necessary financing that every interested

[1] Supplement to the Fourth Report of FTI Consulting Canada Inc., in its Capacity as Court-Appointed Monitor dated March 26, 2024 **Supplement to Fourth Report**") at para. 30.

stakeholder, including Cargill itself, agrees is essential to a successful restructuring. The Proposed Cargill Plan is also based on an improper treatment of the Noteholders' secured indebtedness.

7. As a further alternative to its Proposed Cargill Plan, and following from Cargill's assertion that the Court should not grant the proposed Sale Approval Order, Cargill seeks to have the Court order a new auction in which both Cargill and the Consortium would be required to put forward their best proposals. Cargill seeks this relief, even though the opportunity to do so within the SISP has long passed and Cargill by its own admission failed to put forward a qualifying bid.

8. If this Court grants the proposed Sale Approval Order, the relief sought by Cargill in respect of a CCAA plan or an auction becomes moot. In any event, this Court should refuse to entertain this baldfaced attempt by Cargill, a bitter bidder, to have a second (or third) kick at the can. This would be fundamentally unfair in light of the evidence that Cargill deliberately chose not to submit a qualifying bid under the SISP, not to mention the fact that Cargill now knows all of the terms of the Consortium Transaction.

9. The Consortium therefore submits that the Responding Cross-Motion should also be dismissed.

PART II - THE FACTS

10. The Consortium relies on the facts set out in its factum of March 27, 2024 in support of the proposed Sale Approval Order (the "**Consortium Sale Approval Factum**").[2]

[2] Capitalized terms not otherwise defined have the meaning set out in the Consortium Sale Approval Factum.

PART III - THE ISSUES AND THE LAW

A. Response to the Preliminary Motion

11. In the Cargill Notice of Preliminary Motion,[3] Cargill's position depends on two propositions, both of which must be correct in order for the relief it seeks to be considered.

12. First, Cargill asserts that the Offtake Agreement cannot be transferred to ResidualCo under the proposed reverse vesting order ("**RVO**") because such "assignment" requires Cargill's consent. As part of this argument, Cargill claims that section 11.3 of the CCAA, which would allow this Court to override this requirement, cannot be satisfied because ResidualCo will not be performing the Offtake Agreement.

13. Second, if Cargill were able to establish that the first proposition is correct, Cargill then submits that the Offtake Agreement must be subjected to the formal disclaimer process contemplated by section 32 of the CCAA. Cargill asserts that, if the disclaimer of the Offtake Agreement is permitted and approved, then and only then can Tacora transfer the resulting damages liability to ResidualCo.

14. Neither of the above propositions is correct as a matter of law, and none of the cases in which RVOs have been granted (or refused) support either of these propositions.

(a) Section 11.3 of the CCAA Does Not Apply

15. Not a single CCAA court that has approved an RVO in the numerous cases involving such orders has indicated that a transfer of an excluded contract to a residualCo requires the Court to be satisfied that such an order is justified under section 11.3 of the CCAA.

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[3] Motion Record for Cargill's Preliminary Threshold Motion, dated February 5, 2024, Tab 1, Notice of Motion dated February 5, 2024 ("**Cargill Notice of Preliminary Motion**").

16. Section 11.3(1) of the CCAA provides that, on "application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment."

17. Section 11.3 does not apply in a reverse vesting transaction. There are numerous examples of excluded contracts being transferred to residualCos as part of a reverse vesting structure, even where those contracts contain commercial restrictions on assignment that would, in the ordinary course, require the consent of the counterparty for an assignment to a third party.[4]

18. The Courts have grounded their jurisdiction to grant RVOs, including to effect the transfer of all excluded assets and liabilities to residualCos, in section 11 of the CCAA, not section 11.3.[5] Section 11 gives this Court the broad jurisdiction to grant any order it thinks fit in furtherance of the restructuring.[6]

19. Contrary to Cargill's assertion, section 11.3 does not constitute a "restriction" under the CCAA that would limit the Court's ability to transfer a contract as part of the implementation of an RVO transaction under section 11. The language that makes section 11 "subject to the

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4 To cite only a few examples, see *Acerus Pharmaceuticals Corporation (Re)*, 2023 ONSC 3314 (RVO approving a Subscription Agreement that, under ss. 1.1, 2.2, and Schedule 2.2(c), transferred an Amended and Restated Promissory Note, despite provisions at s. 7 precluding sale or assignment without consent); *Re Aleafia Health Inc. et al*. (30 October 2023), Toronto CV-23-00703350-00CL (Ont. S.C.), supplementing *Re Aleafia Health Inc. et al*. (27 October 2023), Toronto CV-23-00703350-00CL (Ont. S.C.) (RVO approving a Subscription Agreement, which at ss. 1.1, 2.5, 2.6, and Schedule 2.5 transferred three Promissory Notes, despite provisions in each precluding assignment without consent); *Arrangement relatif à Blackrock Metals Inc.*, 2022 QCCS 2828 [*Blackrock Metals*], leave to appeal ref'd 2022 QCCA 1073 (RVO approving an Agreement of Purchase and Sale, including the transfer at ss. 1.1(zz), 2.2, and Schedule B of an offtake agreement that precluded the seller from assigning the contract at s. 14.6); *Harte Gold Corp (Re)*, 2022 ONSC 653 [*Harte Gold*] (RVO approving a Subscription Agreement which at ss. 1.1., 3.2, and Schedule "D" transferred the Facility Agreement despite provisions at s. 11.05 precluding assignment without consent).

5 See, for example, *Harte Gold* at para. 37; *Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al.*, 2022 ONSC 6354 at para. 29 [*Just Energy*].

6 CCAA, s. 11. See also *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 at para. 48.

restrictions set out in this Act"[7] refers to ***express*** restrictions – of which there are numerous examples contained within the CCAA.[8] As the Court of Appeal has noted, "where other provisions of the statute are intended to restrict the powers under ss. 11 and 11.02 of the statute, they do so in unequivocal terms."[9] Similarly, a majority of the Supreme Court of Canada recently held in *Canada North* that "the general language of s. 11 is not restricted by the availability of […] more specific orders."[10]

20. Section 11.3 is a tool that permits the debtor company, at its own option, to make an application to assign a contract and thereby obtain value for the company. It is not an express restriction of section 11, nor is it a complete code that limits the Court to only transfer contracts pursuant to s. 11.3.[11] Taking such an expansive view of s. 11.3, and a restrictive view of s. 11, would be antithetical to the flexibility that is a hallmark of the CCAA. It would also undermine what a majority of the Supreme Court has deemed the "most important feature of the CCAA" – "the broad discretionary power it vests in the supervising Court" under section 11.[12]

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7 Prior to amendment in 2005, the language "subject to the restrictions set out in this Act" in section 11 had read "subject to this Act." In *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at paras. 67-68 [*Century Services*], a majority of the Supreme Court interpreted this amendment as being an endorsement of the broad reading of CCAA jurisdiction that had been developed in the jurisprudence. See also *U.S. Steel Canada Inc. (Re)*, 2016 ONCA 662 at para. 75 [*U.S. Steel*].

8 See, for example, CCAA, s. 11.01(a): "No order made under section 11 or 11.02 has the effect of (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made": *Groupe Dynamite inc. c. Deloitte Restructuring Inc*., 2021 QCCS 3 at para. 12.

9 *U.S. Steel* at paras. 83-87, citing *North American Tungsten Corporation v. Global Tungsten and Powders Corp*., 2015 BCCA 426 at para. 34. See also *Re: Essar Steel Algoma Inc. et al*, 2016 ONSC 595 at note 1 [*Essar Steel*], where the Court disagreed with the argument that "failure to fall into the language of section [11.4] which provides that a court *may* make an order can be read to be a restriction under section 11," noting that it "is commonplace in CCAA proceedings to make orders requiring supply without invoking section [11.4]."

10 *Canada v. Canada North Group Inc.*, 2021 SCC 30 at para. 24 [*Canada North*], citing *Century Services* at para. 70.

11 *Essar Steel* at para 27: "The CCAA is skeletal in nature and does not contain a comprehensive code that lays out all that is permitted or barred."

12 *Canada North* at para 21.

21. Section 11.3 was enacted to address the exact opposite situation from an RVO – i.e. a transaction in which a third-party purchaser has paid value for the contract on the basis that it intends to benefit from that contract and perform the obligations thereunder. By contrast, a residualCo in an RVO structure is incorporated by the debtor company and added as an applicant in the CCAA proceeding for the express purpose of receiving all of the excluded contracts and liabilities that the purchaser does *not* intend to assume. Section 11.3 cannot somehow be elevated to constitute an implied restriction on the Court's ability to vest a contract in a residualCo as part of an RVO under s. 11 when section 11.3 was enacted for an entirely different purpose.

22. The purpose of section 11.3, which was enacted in 2009 when the CCAA was substantially amended, is to "protect and enhance the assets of the debtor company by allowing the debtor company to assign existing agreements to third parties for value."[13] In other words, where a purchaser determines to acquire a contract as part of the purchased assets, section 11.3 gives the Court the ability to override a provision requiring consent of the counterparty to an assignment of the agreement. It applies where it is in the interests of the restructuring to obtain value from the agreement, and therefore establishes corresponding protections for the counterparty that will be required to look to a third party for ongoing performance of the obligations under that agreement.

23. The factors that must be considered in determining whether a section 11.3 order can be made include "whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations" and "whether it would be appropriate to assign the rights and obligations to that person."[14] These requirements are consistent with the need to ensure that, in overriding the commercial consent requirements in an agreement and imposing a new counterparty

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13 Industry Canada, *Bill C-55: Clause by Clause Analysis*, Bill Clause No. 128 - CCAA Section 11.3 [*Clause by Clause Analysis*].

14 CCAA, s. 11.3(3)(b)-(c).

on the solvent contracting party there will be an ability to perform the agreement.[15] That is not the structure or intent of an RVO transaction.

24. Under a section 11.3 assignment, the debtor is also required to pay all outstanding "cure" costs – i.e. amounts that are unpaid, often to unsecured creditors, as a result of the insolvency of the debtor as the original counterparty.[16] The requirement to pay cure costs balances interests by ensuring that the estate of the debtor does not benefit financially from the consideration paid by the purchaser to acquire the rights under the agreement, at the same time that the counterparty is required to take a loss.[17]

25. None of the requirements of section 11.3 are relevant where the transfer of excluded contracts is carried out under an RVO structure. In those circumstances, the purchaser has decided *not* to acquire the rights and assume the burdens of the particular contract, and it is effectively "left behind."

26. Since most commercial agreements contain restrictions on assignment or transfer, Cargill's position would mean that no contracts can ever be transferred to a residualCo without the express consent of the counterparty as part of an RVO transaction because the requirements of section 11.3 can never be satisfied in an RVO context. Counterparties would always take the position that the residualCo as "assignee" is not "appropriate" because residualCo is never intended to perform the obligations under the contract. Giving effect to Cargill's position on this point would also be fundamentally inconsistent and entirely incompatible with the numerous prior RVO cases which

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15 See, for example, *Dundee Oil and Gas Limited (Re)*, 2018 ONSC 3678 at para. 27, noting that an order under section 11.3 subjects the counterparty to a "non-consensual assignment" and requires that party "to deal with the credit-risk of an assignee post-insolvency and potentially for a long time."

16 CCAA, s. 11.3(4).

17 *Clause by Clause Analysis*, Bill Clause No. 128 - CCAA Section 11.3.

approved RVOs that included the transfer of excluded contracts to residualCos without reference to section 11.3.[18]

27. Vesting a contract in a residualCo is functionally equivalent to a traditional purchase transaction that takes the form of an approval and vesting order in which the purchaser acquires a number of assets but does not acquire particular contracts or liabilities. Although those assets or liabilities are left behind in the debtor company instead of being vested in a residualCo, this is not an impediment to the approval of an approval and vesting order transaction. Whether any resulting liabilities may be satisfied depends on the value provided by the transaction after fully canvassing the market. As long as the Court is satisfied that the requirements for approval are met and the purchase transaction has been selected after a fair process that has fully tested the market, the transaction can be approved, even where some resulting liabilities will be unsatisfied.[19]

28. The RVO structure is merely a mechanism that operates to achieve the same result in a situation where the assets cannot readily be transferred to the purchaser – for example, to preserve licenses, permits and agreements in the context of a highly-regulated business such as Tacora's.[20] ResidualCo is not a true third party receiving a contract by way of an assignment, as there is no intention for ResidualCo to perform the obligations under the agreements, and ResidualCo is not providing value to acquire the agreements. The requirement to pay cure costs (and the underlying rationale for such requirement) is manifestly not applicable. In fact, imposing such a requirement

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18 See above at note 3.

19 See, for example, *Bellatrix Exploration Ltd. (Re)*, 2020 ABQB 332 at paras. 58-62; *White Birch Paper Holding Company (Arrangement relatif à)*, 2010 QCCS 4915 at paras. 51-52 [*White Birch*], leave to appeal ref'd 2010 QCCA 1950; *Nelson Education Limited (Re)*, 2015 ONSC 5557 at para. 38(e); *Grafton-Fraser v. Cadillac*, 2017 ONSC 2496 at paras. 23-25.

20 *Just Energy* at paras. 36-45; *Harte Gold* at paras. 70-76; *Blackrock Metals* at paras. 114-116.

could result in the unsecured counterparty obtaining an effective priority over secured or other unsecured claimants.

29. The RVO case law confirms that, if the Court is satisfied under section 11, as well as based on the other relevant considerations for a sale approval set out in the Consortium Sale Approval Factum in support of the approval of the Consortium Transaction, excluded contracts containing commercial restrictions on assignment can be vested in ResidualCo without regard for section 11.3. These principles apply regardless of the magnitude of any asserted damages claim of the contracting party.

30. Section 11.3 of the CCAA does not apply to the transfer of excluded contracts in an RVO context, does not restrict the scope of section 11 and therefore cannot constitute a legal impediment to an RVO structure.

(b) Transfer to ResidualCo Does Not Depend on Disclaimer

31. Cargill contends that, since it is allegedly impossible to assign the Offtake Agreement to ResidualCo pursuant to section 11.3, the only other way Tacora could transfer its offtake obligations to ResidualCo is by completing the formal disclaimer process under section 32 of the CCAA, such that the resulting damages liability can be transferred (assuming the disclaimer is approved). This is also without merit.

32. Cargill's position is not supported by *any* of the RVO cases cited above[21] in which excluded contracts were transferred to a residualCo as part of an RVO without any reference to a formal disclaimer notice being issued prior to such transfer.

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[21] See above at note 3.

33. If this Court accepts that section 11.3 of the CCAA is not applicable, and that the Offtake Agreement can be transferred to ResidualCo under this Court's jurisdiction pursuant to section 11, there is clearly no need for a formal disclaimer. Even without considering section 11.3, CCAA case law establishes that a debtor company is not required to follow the process in section 32 of the CCAA in order to divest itself of an uneconomic contract.

34. The disclaimer process under section 32 permits the debtor to determine whether to disclaim particular agreements. Assuming the monitor approves and the debtor issues the notice on that basis, the counterparty has fifteen days from the issuance of the disclaimer notice to object, in which case the Court will determine whether the agreement can and should be disclaimed. Once this process is complete, and assuming that the disclaimer is upheld, the disclaimer takes effect on the 30th day after the notice was issued, or a later day fixed by the Court.[22]

35. If an agreement is disclaimed, the party to the agreement who suffers a loss as a result has a provable claim.[23] However, there is no guarantee that such a claim will be satisfied. That depends on the values provided under the restructuring.

36. While a debtor may choose to avail itself of the section 32 process, a debtor is not *required* to engage in the process in order to cease performing an executory contract to which it is a party. This issue was addressed by the Alberta Court of Queen's Bench in *Bellatrix #2*, in which a creditor sought to require the debtor to continue to perform an executory contract which had been determined to be exempt from the disclaimer process.[24]

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22 CCAA, s. 32(1)-(5).

23 CCAA, s. 32(7).

24 *Bellatrix Exploration Ltd (Re)*, 2020 ABQB 809 [*Bellatrix #2*], leave to appeal ref'd 2021 ABCA 85 [*Bellatrix #2 Leave*]. Note that, at the time of the Court's reasons, the finding that the particular gas supply agreement was an eligible financial contract ("**EFC**") and therefore exempt from the disclaimer process was under appeal: at para. 15, citing *Bellatrix Exploration Ltd, Re*, [2020] A.J. No. 329 (Q.B.), leave to appeal granted 2020 ABCA 178, appeal subsequently dismissed for mootness 2021 ABCA 148. In *Bellatrix #2*, the Court therefore addressed

37. In rejecting this argument, Romaine J. held that, even where the disclaimer process under section 32 is not available in relation to a particular contract, this does not mean that the debtor has to continue performing that contract. In other words, section 32 is not a complete code that requires a debtor to continue performing contracts unless and until they can be validly disclaimed.[25] As the Alberta Court of Appeal held in refusing leave to appeal from Romaine J.'s decision in *Bellatrix #2*, that interpretation of section 32 of the CCAA is based on "legal fictions" and would "undermine the operation of the [CCAA]."[26]

38. In *Bellatrix #2,* Romaine J. noted that the disclaimer process is not mandatory; it is intended to benefit debtors and creditors by providing a formal process for terminating a contract. It gives the counterparty an opportunity to object to the disclaimer. While the disclaimer process provides an orderly mechanism for disclaiming a contract, including by providing a particular termination date if the disclaimer is approved, the debtor is entitled to unilaterally cease performing a contract without recourse to the disclaimer process. In such event, if the counterparty sought an order seeking to compel the debtor to perform, the Court might consider the same factors that would be considered on a formal disclaimer.[27]

39. This result is consistent with ordinary commercial circumstances outside the CCAA. A contracting party is always entitled to unilaterally breach an agreement, resulting in an unsecured damages claim. Whether such a claim can be satisfied is a separate issue.

40. Thus, the Company is not required to resort to a formal disclaimer in order to cease performing the Offtake Agreement and replace it with the new iron ore marketing arrangements

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the debtor's ongoing obligations to perform on the assumption that the contract was an EFC and could not be disclaimed.

25 *Bellatrix #2* at paras. 41-47.

26 *Bellatrix #2 Leave* at paras. 62, 66.

27 *Bellatrix #2* at paras. 44-47.

under the Consortium Transaction. It can cease performing before the Offtake Agreement is vested in ResidualCo, if it wishes to. Or it can do so by vesting the Offtake Agreement in ResidualCo, thereby triggering a damages claim.

41. In any event, Cargill has had the opportunity to fully assert objections to the proposed RVO transaction, and to explore any objections that it might have to a formal disclaimer, even if the Company had determined to follow that process. In this regard, the Consortium adopts the submissions of Tacora to the effect that the Offtake Agreement is not exempt from the disclaimer process either on the basis that it is an EFC or a financing agreement.

42. And even if the Offtake Agreement were an EFC, which it is not, this would not preclude Tacora from divesting itself of this agreement and replacing it with the new marketing arrangements for iron ore provided by the Consortium Transaction. The reasons of the Alberta Courts in *Bellatrix #2*, which involved a contract that had been determined to be an EFC,[28] stand for the proposition that Tacora, as the supplier of iron ore under the Offtake Agreement, could simply cease performing, thereby triggering the resulting damages claim, and then assign that liability to ResidualCo.

43. Cargill has had a full opportunity to object to the treatment of the Offtake Agreement based on alleged prejudice. As submitted in the Consortium Sale Approval Factum, any such alleged prejudice must be balanced against the significant benefits to stakeholders as a whole provided by the Consortium Transaction.

44. The alleged prejudice of a single creditor is not determinative of the appropriateness of the Consortium Transaction, viewed in its entire context.

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[28] *Bellatrix #2*, discussed above at paras. 36-38.

45. Cargill's position in the Preliminary Motion regarding section 32 is not only unfounded and contrary to the purpose of the CCAA, but giving effect to it would essentially allow a triumph of form over substance. This is because if this Court were to conclude that the transfer of the Offtake Agreement could not occur because of 11.3, this conclusion would not compel the Company to formally disclaim the Offtake Agreement in order to transfer it to ResidualCo. Rather, the Company could simply cease performing the Offtake Agreement and transfer the resulting liability to ResidualCo without engaging the formal process under section 32.

46. Cargill's objections to the RVO based on section 11.3 and section 32 are not legal impediments to the RVO transaction structure. They were raised in February as further roadblocks, in furtherance of Cargill's overall litigation strategy to create delay in the hope of coopering up its non-qualifying bid in the SISP. By characterizing these issues as a "Preliminary Threshold Motion,"[29] Cargill's initial plan was that the determination of these issues would need to occur before the hearing to determine the sale approval motion, thereby ensuring the longest possible delay to obtain approval for the Consortium Transaction and permit an exit from these proceedings.

47. This tactic, like the others discussed in the Consortium Sale Approval Factum, should not succeed. The Preliminary Motion has no merit and should be dismissed.

B. The Proposed Cargill Plan Should be Disregarded

48. As an alternative to the Consortium Transaction, in its Responding Cross-Motion, Cargill puts forward its own Proposed Cargill Plan, completely outside the SISP, based essentially on the same recapitalization transaction that was the subject of Cargill's rejected non-qualifying bid over two months ago.[30] The Proposed Cargill Plan is structured around the retention of the Offtake

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[29] Cargill Notice of Preliminary Motion at 5, subpara. (f).

[30] Reply Record of the Applicant (Approval and Reverse Vesting Order) dated March 14, 2024, Tab 1, Reply Affidavit of Joe Broking sworn March 14, 2024 ("**Reply Broking Affidavit**") at para. 13.

Agreement in an obvious attempt to preserve Cargill's own interests and profits, to the detriment of Tacora and all of its other stakeholders. This Court should disregard the Proposed Cargill Plan as it is, among other things, a collateral attack on the SISP and is unexecutable, as it lacks the financing that everyone, including Cargill, agrees is an essential element of a successful restructuring. It is also based on a proposed improper treatment of the Noteholders' secured indebtedness.

(a) This Court Should Not Consider the Proposed Cargill Plan

49. Cargill asks that this Court declare the Proposed Cargill Plan to be the "superior" transaction.[31] There is no basis on which this relief can be granted. This Court has the power to refuse to approve the Consortium Transaction if the well-established legal test is not satisfied, which is not the case here. However, this Court is not in a position to declare the Proposed Cargill Plan to be the superior transaction or to somehow require the Company to present it to creditors, over its objection and that of the Monitor, or to allow Cargill to unilaterally do so.

50. First, the Proposed Cargill Plan was not a bid submitted in the SISP. Declaring the Proposed Cargill Plan to be the "superior transaction" would effectively require the Court to disregard the SISP and this CCAA process in its entirety. Cargill had the opportunity to submit a qualifying bid in the SISP, including a bid that took the form of a plan. It chose not to do so. As the Monitor noted, it would be "highly unusual and potentially value damaging … to re-open the bidding process following a final bid deadline in a situation where at least one qualified bid has

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[31] Responding Motion Record and Motion Record for the Responding Cross-Motion of Cargill, Incorporated and Cargill International Trading PTE Ltd. dated March 1, 2024 ("**Cargill RCMR**"), Tab 1, Notice of Responding Cross-Motion dated March 1, 2024 at subparas. (n), (q), (r); Factum of Cargill, Incorporated and Cargill International Trading PTE Ltd. Re: Responding Cross-Motion dated March 27, 2024 ("**Cargill Responding Cross-Motion Factum**") at paras. 56, 61.

been submitted."[32] Such a step would undermine the integrity of the process, resulting in fundamental unfairness to the Consortium that invested material resources in preparing the only compliant bid within the SISP.

51. Second, it is not the role of this Court to determine that the Proposed Cargill Plan represents the "superior" restructuring solution for the Company. This is a matter, first and foremost, for the business judgment of the Board and also for consideration by the Monitor. This judgment has already been exercised, with the support of the Monitor, in favour of the Consortium Transaction and against the recapitalization transaction that is the basis for the Proposed Cargill Plan. CCAA Courts have stated on numerous occasions that the informed business judgment of the Board, with the concurrence of the Monitor, must be granted considerable deference.[33]

52. Third, the Proposed Cargill Plan exhibits a number of the same flaws that existed in Cargill's rejected non-qualifying bid. Among other things, it remains conditional on raising new equity financing that is not available after a lengthy canvass by Cargill seeking such financing, and the Proposed Cargill Plan is therefore not even actionable in its current form. As the Monitor noted in the Supplement to Fourth Report, over two months have passed and Cargill still has no committed equity financing to support its proposed recapitalization transaction and any late bid submitted by Cargill at this stage would be non-compliant with the SISP.[34]

53. Additionally, the Proposed Cargill Plan will leave the Company with material secured indebtedness to the Noteholders, not to mention other new secured indebtedness. Tacora will be

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[32] Fourth Report of FTI Consulting Canada Inc., in its Capacity as Court-Appointed Monitor dated March 14, 2024 at para. 63.

[33] *Bloom Lake, g.p.l. (Arrangement relatif à)*, 2015 QCCS 1920 at para. 28, leave to appeal ref'd 2015 QCCA 754, citing *AbitibiBowater inc. (Arrangement relatif à)*, 2010 QCCS 1742 at paras. 70-71 [*AbitibiBowater* 2010], *AbitibiBowater inc. (Arrangement relatif à)*, 2009 QCCS 6460 at para. 59.

[34] Supplement to the Fourth Report at para. 19.

significantly overleveraged and it will be difficult, if not impossible, for the Company to service the contemplated indebtedness.[35] The Proposed Cargill Plan will also maintain an uneconomic, off-market Offtake Agreement that has already resulted in hundreds of millions of losses to the Company and that no other potential restructuring partner in this proceeding or outside it was willing to retain. And the sole purpose of this would be to allow Cargill to maintain its economic stranglehold over the Company and avoid giving rise to an unsecured damages claim on replacement of those arrangements under the Consortium Transaction.

54. Apart from anything else, there is no indication that *any* creditors or any other stakeholders would support such a plan, or that the Company could move forward on a viable basis if they did. While Cargill may claim that it hopes in the future to secure the necessary financing or backstop such financing itself (which it has so far expressly and consciously chosen not to do), it is now much too late. Moreover, this does not mean that the Proposed Cargill Plan would be executable. To the contrary, the delay alone involved in developing an actionable plan – if such a path could be undertaken in the face of the outcome of the SISP, which is denied – would create unacceptable levels of uncertainty, potentially jeopardizing the Company's ability to restructure at all.

55. If Cargill wanted to preserve its status as an offtake party, it was incumbent on Cargill to submit a qualifying bid under the SISP and to include sufficiently favourable terms such that the Company could select that bid as the Successful Bid. It chose not to. It cannot be allowed to circumvent the Court-approved SISP by now putting forward the Proposed Cargill Plan.

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[35] Reply Broking Affidavit at para 14.

(b) Proposed Cargill Plan Cannot Be Implemented without Noteholder Support

56. Additionally, the Proposed Cargill Plan is based on the false premise that the Noteholders' fully secured indebtedness can simply be reinstated, against their will, and they can be forever precluded from relying on the insolvency and other defaults under their note indentures.[36] Additionally, the Proposed Cargill Plan adds new secured indebtedness that ranks ahead of (or potentially *pari passu* with) the indebtedness owed to the Noteholders, contrary to the terms of the Note Indentures and to the material prejudice of the Noteholders.[37]

57. In *Doman Industries*, the Court cautioned that it was not possible for the debtor to treat the secured creditors as "unaffected" under its plan, while requiring them to waive all pre-existing defaults, without giving them the opportunity to vote on the plan.[38] This principle does not depend on whether the particular indebtedness is being compromised under the plan; it is based on whether

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[36] Cargill Responding Cross-Motion Factum at paras. 13, 34; Plan of Compromise and Arrangement in respect of Tacora Resources Inc., Exhibit "R" to Cargill RCMR, Tab 2, Affidavit of Matthew Lehtinen sworn March 1, 2024 ("**Lehtinen Affidavit**") at ss. 10.2, 5.2(m), 3.5(b). At note 47 of the Cargill Responding Cross-Motion Factum, Cargill cites to five proceedings in support of its position that this Court may approve the waiver of default provision in the Proposed Cargill Plan. In four of these cases, there appears to have been no objection regarding the waiver provision made by creditors who were otherwise deemed to be "unaffected" under the plan. The only other case relied on by Cargill is inapplicable: *12178711 Canada Inc v. Wilks Brothers, LLC*, 2020 ABCA 430, leave to appeal ref'd 2021 CanLII 44589 (S.C.C.), was a proceeding under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ("**CBCA**") where the Court determined that the objecting "unaffected" creditor was relying on a default that would not be triggered by the implementation of the plan, that the creditor's legal rights were not affected by the plan and that, in any event, even if legal rights were compromised by the waiver provision, the absence of a vote was not determinative because – unlike under the CCAA – no vote is required under the CBCA: see paras. 39-43. Additionally, the creditor in question lay in the weeds and did not object to the inclusion of the waiver provision in the interim order (which authorized the meeting to vote on the plan) or argue that they should be given a vote at that time: see para. 45.

[37] Exhibit "R" to Lehtinen Affidavit at ss. 5.2(f)-(g). Section 5.2(f) of the Proposed Cargill Plan provides that Tacora shall enter into the "New Senior Secured Pre-Payment Facility," which is defined as a new senior secured pre-payment facility in the approximate range of US$150-200 million on terms acceptable to the New Equity Participants, or in such other amount as agreed by the New Equity Participants. Section 5.2(g) of the Proposed Cargill Plan provides that the Senior Priority Margining Facility, if agreed by Cargill and Tacora, shall be increased by US$25 million to US$75 million in availability to facilitate a comprehensive hedging program for Tacora on market terms to be agreed to. "Senior Priority Margining Facility" is defined as the facility consisting of Margin Advances made available to Tacora by CITPL from and after May 29, 2023 under the Advance Payment Facility Agreement. Margin Advances under the Advance Payment Facility Agreement rank senior to the Senior Secured Notes and *pari passu* with the Senior Priority Notes: Sale Approval Affidavit, para 6.

[38] *In the Matter of Doman Industries et al*, 2003 BCSC 376 at para. 9, citing *Menegon v. Phillip Services Corp.* (1999), 11 C.B.R. (4th) 262 (Ont. S.C.) at para. 38.

the creditor's legal rights are affected. If the Proposed Cargill Plan were presented to creditors, it is the Consortium's position that they would be entitled to a vote and therefore would have a veto such that the Proposed Cargill Plan cannot be approved without their support.

58. The Consortium strongly objects to the legality and fairness of its treatment under the Proposed Cargill Plan and would have no choice but to object to such treatment if the Proposed Cargill Plan is presented to creditors. The Proposed Cargill Plan is doomed to fail.

(c) No Legal Requirement to Prefer a Plan

59. Cargill appears to be suggesting that Tacora was *required* to pursue a plan under the CCAA and that the Board should not have approved the Consortium Transaction, as implemented through the proposed RVO, but should have pursued a plan instead. However, Cargill's own non-qualifying bid in the SISP was not structured as a plan, but as an asset sale. The terms of the SISP contemplated that bidders could propose a plan, among a number of restructuring alternatives; Cargill chose not to do so (and chose not to submit a qualifying bid at all).

60. In any event, there is no legal requirement to pursue a plan in a CCAA proceeding. The numerous cases in which RVOs have been granted amply demonstrate this fact. Although CCAA Courts have stated that an RVO structure is not intended to be the norm, this means only that the Court must be careful to scrutinize the factors that are relevant to determining whether an RVO structure is appropriate to make sure that the transaction structure itself does not cause prejudice relative to another viable alternative,[39] which the Proposed Cargill Plan is not.

61. None of the cases considering whether an RVO should be granted required the Court to ignore the results of a court-approved SISP in favour of a plan, no matter when or how such plan

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[39] *Harte Gold* at para. 38, cited in *Blackrock Metals* at para. 99.

is proposed. The case law certainly does not suggest that the Court should disregard the results of a court-approved SISP in favour of a late-breaking plan submitted by a bitter bidder that failed to provide a qualifying bid in that SISP.

62. This applies with particular force where the proposed plan is based on a non-qualifying bid that has already been rejected and where that proposed plan continues to suffer from the same flaws that caused it to be rejected. Such a result would be fundamentally inconsistent with the large body of case law supporting the need to protect the integrity of court-approved sale processes.[40]

C. Proposed "Auction" is Misconceived

63. Recognizing the very significant impediments to even a consideration of their Proposed Cargill Plan, Cargill proposes as an alternative to have this Court require a further auction at which both the Consortium and Cargill submit their best bids.[41] This is predicated on the assumption that the Court will refuse to approve the Consortium Transaction. If this Court approves the Consortium Transaction, this request for relief can be disregarded.

64. In any event, both parties had their opportunity to put their best foot forward before the bid deadline in the SISP. The Consortium did so; Cargill chose not to. Granting such relief would effectively disregard the terms of the court-approved SISP, undermining its integrity and creating a chilling effect for participants in such processes generally, who will not want to engage in such processes and undertake the risk that their bids within the process could be trumped after the fact.

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[40] See, for example, *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.) at para. 22, per Galligan J.A., adopting *Cameron v. Bank of Nova Scotia* (1981), 45 N.S.R. (2d) 303 (C.A.) at 314; *AbitibiBowater* 2010 at para. 72; *White Birch* at paras. 39-41.

[41] Cargill Responding Cross-Motion Factum at para. 1(d).

65. Moreover, any subsequent "auction" that this Court may order cannot be fair in these circumstances, given that Cargill has now had the opportunity to cooper up its bid with the full knowledge of the terms of the Consortium Transaction.

66. In any event, an auction would only cause further delay and uncertainty, to the material detriment of the Company and its stakeholders and for the sole benefit of Cargill.

PART IV - RELIEF REQUESTED

67. The Consortium requests that Cargill's Preliminary Motion and Responding Cross-Motion be dismissed and costs awarded on an appropriate scale.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of April, 2024:

OSLER, HOSKIN & HARCOURT, LLP/BENNETT JONES LLP

Lawyers for the Consortium Noteholder Group

SCHEDULE "A"
LIST OF AUTHORITIES

Case Law

1. *12178711 Canada Inc v. Wilks Brothers, LLC*, 2020 ABCA 430, leave to appeal ref'd 2021 CanLII 44589 (S.C.C.)
2. *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10
3. *AbitibiBowater inc. (Arrangement relatif à)*, 2009 QCCS 6460
4. *AbitibiBowater inc. (Arrangement relatif à)*, 2010 QCCS 1742
5. *Acerus Pharmaceuticals Corporation (Re)*, 2023 ONSC 3314
6. *Arrangement relatif à Blackrock Metals Inc.*, 2022 QCCS 2828, leave to appeal ref'd 2022 QCCA 1073, leave to appeal ref'd 2023 CanLII 36969 (S.C.C.)
7. *Bellatrix Exploration Ltd. (Re)*, 2020 ABQB 332
8. *Bellatrix Exploration Ltd (Re)*, 2020 ABQB 809, leave to appeal ref'd 2021 ABCA 85
9. *Bellatrix Exploration Ltd, Re*, [2020] A.J. No. 329 (Q.B.), leave to appeal granted 2020 ABCA 178, appeal dismissed 2021 ABCA 148
10. *Bloom Lake, g.p.l. (Arrangement relatif à)*, 2015 QCCS 1920, leave to appeal ref'd 2015 QCCA 754
11. *Cameron v. Bank of Nova Scotia* (1981), 45 N.S.R. (2d) 303 (C.A.)
12. *Canada v. Canada North Group Inc.*, 2021 SCC 30
13. *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60
14. *Dundee Oil and Gas Limited (Re)*, 2018 ONSC 3678
15. *Grafton-Fraser v. Cadillac*, 2017 ONSC 2496
16. *Groupe Dynamite inc. c. Deloitte Restructuring Inc.*, 2021 QCCS 3
17. *Harte Gold Corp (Re)*, 2022 ONSC 653
18. *In the Matter of Doman Industries et al*, 2003 BCSC 376
19. *Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al.*, 2022 ONSC 6354
20. *Menegon v. Phillip Services Corp.* (1999), 11 C.B.R. (4th) 262 (Ont. S.C.)
21. *Nelson Education Limited (Re)*, 2015 ONSC 5557

Case Law

22. *North American Tungsten Corporation v. Global Tungsten and Powders Corp*., 2015 BCCA 426

23. *Re Aleafia Health Inc. et al*. (30 October 2023), Toronto CV-23-00703350-00CL (Ont. S.C.), supplementing *Re Aleafia Health Inc. et al*. (27 October 2023), Toronto CV-23-00703350-00CL (Ont. S.C.)

24. *Re: Essar Steel Algoma Inc. et al,* 2016 ONSC 595

25. *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.)

26. *U.S. Steel Canada Inc. (Re),* 2016 ONCA 662

27. *White Birch Paper Holding Company (Arrangement relatif à)*, 2010 QCCS 4915, leave to appeal ref'd 2010 QCCA 1950

Secondary Sources

28. Industry Canada, *Bill C-55: Clause by Clause Analysis*

SCHEDULE "B"
TEXT OF STATUTES, REGULATIONS & BY-LAWS

***Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36**

General power of court

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.

Rights of suppliers

11.01 No order made under section 11 or 11.02 has the effect of

> **(a)** prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or
>
> **(b)** requiring the further advance of money or credit.

Assignment of agreements

11.3 (1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.

Exceptions

(2) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under

> **(a)** an agreement entered into on or after the day on which proceedings commence under this Act;
>
> **(b)** an eligible financial contract; or
>
> **(c)** a collective agreement.

Factors to be considered

(3) In deciding whether to make the order, the court is to consider, among other things,

> **(a)** whether the monitor approved the proposed assignment;

(b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and

(c) whether it would be appropriate to assign the rights and obligations to that person.

Restriction

(4) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

Copy of order

(5) The applicant is to send a copy of the order to every party to the agreement.

Critical supplier

11.4 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

Obligation to supply

(2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

Security or charge in favour of critical supplier

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

Priority

(4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Disclaimer or resiliation of agreements

32 (1) Subject to subsections (2) and (3), a debtor company may — on notice given in the prescribed form and manner to the other parties to the agreement and the monitor — disclaim or resiliate any agreement to which the company is a party on the day on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or resiliation.

Court may prohibit disclaimer or resiliation

(2) Within 15 days after the day on which the company gives notice under subsection (1), a party to the agreement may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement is not to be disclaimed or resiliated.

Court-ordered disclaimer or resiliation

(3) If the monitor does not approve the proposed disclaimer or resiliation, the company may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement be disclaimed or resiliated.

Factors to be considered

(4) In deciding whether to make the order, the court is to consider, among other things,

(a) whether the monitor approved the proposed disclaimer or resiliation;

(b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and

(c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

Date of disclaimer or resiliation

(5) An agreement is disclaimed or resiliated

(a) if no application is made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1);

(b) if the court dismisses the application made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1) or on any later day fixed by the court; or

(c) if the court orders that the agreement is disclaimed or resiliated under subsection (3), on the day that is 30 days after the day on which the company gives notice or on any later day fixed by the court.

Intellectual property

(6) If the company has granted a right to use intellectual property to a party to an agreement, the disclaimer or resiliation does not affect the party's right to use the intellectual property — including the party's right to enforce an exclusive use — during the term of the agreement, including any period for which the party extends the agreement as of right, as long as the party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

Loss related to disclaimer or resiliation

(7) If an agreement is disclaimed or resiliated, a party to the agreement who suffers a loss in relation to the disclaimer or resiliation is considered to have a provable claim.

Reasons for disclaimer or resiliation

(8) A company shall, on request by a party to the agreement, provide in writing the reasons for the proposed disclaimer or resiliation within five days after the day on which the party requests them.

Exceptions

(9) This section does not apply in respect of

(a) an eligible financial contract;

(b) a collective agreement;

(c) a financing agreement if the company is the borrower; or

(d) a lease of real property or of an immovable if the company is the lessor.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TACORA RESOURCES INC.

Court File No: CV-23-00707394-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT TORONTO

RESPONDING FACTUM OF THE CONSORTIUM OF NOTEHOLDERS TO CARGILL'S PRELIMINARY MOTION AND CROSS-MOTION

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