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.

(Applicant)

RESPONDING FACTUM OF THE APPLICANT
(Re: Preliminary Threshold Motion)
(Returnable April 10-12, 2024)

April 6, 2024

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

Ashley Taylor (LSO #39932E)
Tel: 416-869-5236
Email: ataylor@stikeman.com

Eliot Kolers (LSO #38304R)
Tel: 416-869-5637
Email: ekolers@stikeman.com

Lee Nicholson (LSO #66412I)
Tel: 416-869-5604
Email: leenicholson@stikeman.com

Natasha Rambaran (LSO #80200N)
Tel: 416-869-5504
Email: nrambaran@stikeman.com

Philip Yang (LSO #82084O)
Tel: 416-869-5593
Email: pyang@stikeman.com

Counsel for the Applicant

TO: SERVICE LIST

PART I - OVERVIEW[1]

1. This Court authorized and directed Tacora to run the Court-approved Solicitation Process. On January 19, 2024, the Investors submitted the only Phase 2 Qualified Bid, which was declared the Successful Bid. The Successful Bid and the Transactions contemplated therein are proposed to be implemented pursuant to a reverse vesting order ("**RVO**").

2. Cargill's and Jefferies' internal documents show that Cargill was preparing to submit a fully backstopped Phase 2 Bid that would have paid all secured creditors in full, in cash. However, shortly before the Phase 2 Bid Deadline, Cargill's CEO killed that Bid and Cargill pivoted to a strategy of delay and obstruction to frustrate the Successful Bid and delay Tacora's efforts to emerge from the CCAA Proceedings with the aim of entrenching the Offtake Agreement to the detriment of Tacora and its stakeholders.

3. As part of those efforts, Cargill has brought a cross-motion seeking an order authorizing Cargill to file an unactionable, hostile "cram-up" plan which does not address the fundamental underlying issues that caused Tacora to file for CCAA protection and a "preliminary threshold motion" seeking a declaration that Tacora is prohibited from transferring the Offtake Agreement to ResidualCo pursuant to an RVO absent a valid disclaimer in accordance with section 32 of the CCAA.

4. The "preliminary threshold motion" has no merit. It is unsupported by any authority and is premised on a highly technical and contorted reading of the CCAA that flies in the face of recent Supreme Court of Canada authority in *Callidus* and *Canada North*[2] on the breadth and interpretation of the Court's discretionary powers under section 11 of the CCAA and the Court's well accepted jurisdiction to approve an RVO transaction. Indeed, contrary to Cargill's

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[1] Capitalized terms used and not defined herein have the meanings ascribed to them in the Affidavits of Joe Broking sworn October 9, 2023 (the "**First Broking Affidavit**"), October 15, 2023 (the "**Second Broking Affidavit**"), January 17, 2024 (the "**Third Broking Affidavit**"), February 2, 2024 (the "**Fourth Broking Affidavit**"), March 11, 2024 (the "**Fifth Broking Affidavit**"), and March 14, 2024 (the "**Sixth Broking Affidavit**", and collectively, the "**Broking Affidavits**"), the Affidavits of Michael Nessim sworn February 2, 2024 (the "**First Nessim Affidavit**") and March 14, 2024 (the "**Second Nessim Affidavit**", and together with the First Nessim Affidavit, the "**Nessim Affidavits**") and the Affidavits of Dr. Sharon Brown-Hruska affirmed February 2, 2024 (the "**First Brown-Hruska Affidavit**") and March 14, 2024 (the "**Second Brown-Hruska Affidavit**").

[2] *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 [*Callidus*]; *Canada v. Canada North Group Inc.*, 2021 SCC 30 [*Canada North*].

assertions, the Supreme Court has confirmed that section 11 grants the Court a broad discretionary authority to make any order it considers appropriate in the circumstances of a restructuring unless explicitly prohibited by the Act.

5. Sophisticated commercial courts across the country have applied the Court's broad jurisdiction by approving RVOs in over 50 cases.[3] A hallmark of these RVOs is that unwanted contracts (like the Offtake Agreement) can be transferred to 'Residual Co.' without reference to the assignment provisions of section 11.3 or the disclaimer provisions of section 32 – all with the expectation that 'Residual Co.' will not perform any obligations under the excluded contracts.

6. To give credence to Cargill's arguments on its "preliminary threshold motion" would mean that almost every judge who has approved an RVO transaction did so in excess of the Courts' jurisdiction. From a practical perspective, it would also mean that RVO transactions are unavailable for restructuring purposes in all but the rarest of cases. Cargill's position and its asserted outcomes are untenable and should be rejected.

7. Finally, it bears mention that throughout these CCAA Proceedings, Cargill has implied that it will take the position that the Offtake Agreement is an "eligible financial contract" ("**EFC**") or financing agreement that cannot be disclaimed under section 32 of the CCAA. In anticipation of the EFC argument, Tacora served expert evidence from Dr. Sharon Brown-Hruska that refutes the contention. And while Cargill also delivered expert evidence (albeit without in any way contradicting Dr. Brown-Hruska's opinion), it has not engaged the arguments that the Offtake Agreement is an EFC or financing agreement in its factum in support of the "preliminary threshold motion". Tacora expects that Cargill will split its case on this issue and so has included submissions herein explaining why it is evident that the Offtake Agreement is not an EFC or a financing agreement. Rather, the Offtake Agreement is a supply contract, albeit an off-market, extremely expensive supply contract, for the sale and purchase of iron ore.[4]

[3] Attached as **Appendix "B"** is a list of RVOs approved by courts across the country.
[4] While the Company is not seeking such relief, the Court's decision in *Bellatrix Exploration Ltd. (Re)*, 2020 ABQB 809 [*Bellatrix Two*] clearly provides that a CCAA debtor may choose to use a less formal option than using the disclaimer provisions in the CCAA, but can leave an eligible financial contract behind in a sale and simply not perform any of its obligations under the agreement which cannot be disclaimed.

PART II – FACTS

8. The facts underlying this motion are fully set out in Tacora's Factum in support of its sale approval motion.

PART III – ISSUE

9. The sole issue to be determined on this motion is whether this Court has jurisdiction to vest out and transfer the Offtake Agreement to ResidualCo pursuant to an RVO without Tacora having first complied with the assignment[5] or disclaimer[6] provisions of the CCAA.

PART IV – LAW & ARGUMENT

A. This Court Has Jurisdiction to Approve an RVO

10. The jurisdiction to approve a transaction to be implemented through an RVO is anchored in section 11 of the CCAA, which gives the Court broad discretionary authority to make any order it thinks appropriate in the circumstances.[7] Section 11 of the CCAA states:

> "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."

11. Numerous Canadian courts have harnessed this broad authority, endorsed by the Supreme Court of Canada in *Callidus*, to approve over 50 RVO transactions.[8] In *Harte Gold*, Justice Penny stated he was "wholeheartedly in agreement that s. 11, as broadly interpreted in the jurisprudence including, most recently, *Callidus*, clearly provides the court with jurisdiction to

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[5] CCAA, s. 11.3.
[6] CCAA, s. 32.
[7] *Callidus* at para 48; *Arrangement relatif à Blackrock Metals Inc.*, 2022 QCCS 2828 at para. 87 [*Blackrock Metals*] *Quest University (Re)*, 2020 BCSC 1883, at para. 155 [*Quest*], leave to appeal dismissed (2020 BCCA 364); *Harte Gold Corp. (Re)*, 2022 ONSC 653 at paras. 36-37 [*Harte Gold*].
[8] *Harte Gold* at para. 37; *Blackrock Metals* at para. 92; *Callidus* at paras. 41-43. Appendix "B" is a list of RVOs approved by courts across the country.

issue such an [RVO], provided the discretion available under s. 11 is exercised in accordance with the objects and purposes of the CCAA."[9]

12. In exercising its discretionary authority, the CCAA Court must act in furtherance of the remedial objectives of the CCAA and keep in mind three baseline considerations: (a) that the order sought is appropriate in the circumstances (i.e., whether the order sought advances the policy objectives underlying the CCAA; (b) that the applicant has been acting in good faith; and (c) that the applicant has been acting with due diligence.[10]

13. Through the application of this discretionary authority by sophisticated commercial courts across the country in pursuit of the objectives of the CCAA, CCAA proceedings evolved to permit outcomes that do not result in the emergence of the debtor company in a restructured state, but rather involve some form of reorganization, sale or liquidation. These proceedings, referred to as "liquidating CCAAs", can take diverse forms and have become commonplace.[11] RVOs have developed as another way of implementing a going concern restructuring solution for an insolvent enterprise.

14. Courts have also grounded their jurisdiction to grant an RVO pursuant to section 36.[12] The principles articulated in *Royal Bank v Soundair*[13] and factors outlined subsection 36(3) guide the Court to determine whether it is appropriate in any particular case to approve an RVO.[14]

15. An RVO consists, in essence, of the sale to a purchaser of the shares of a debtor company, while the debtor company also divests certain excluded assets, liabilities and contracts not wanted by the purchaser. The debtor company can emerge from CCAA to continue operations with the purchaser as the new owner of a restructured business with the necessary assets and liabilities. The RVO makes it possible, among other things, to keep

[9] *Harte Gold* at para. 37.
[10] *Callidus* at paras. 49-51.
[11] *Callidus* at paras. 42-43.
[12] *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCS 321 at paras. 2-5. [*Nemaska Lithium*] The QCCS *Nemaska Lithium* decision is only available in French and there has not been an official translation to English. A copy of a certified translation of this decision is at Tab P to Tacora's Book of Authorities ("**BOA**"); *Blackrock Metals* at paras. 87 and 94.
[13] *Royal Bank of Canada v Soundair Corp.*, 1991 CanLII 2727 (Ont. CA) at para. 16.
[14] *Just Energy Group Inc. et. al. v Morgan Stanley Capital Group Inc. et. al.*, 2022 ONSC 6354 at paras. 30-32 [*Just Energy*]; *Blackrock Metals* at para. 87; *Quest* at paras. 175-178.

existing permits, licenses, and essential contracts in force, and to maximize the use of the various tax attributes available, to the ultimate benefit of the debtor company's stakeholders.[15]

16. While functionally the same in the result for stakeholders, an RVO can be contrasted with a traditional vesting order where purchased assets of the debtor company are transferred out of the debtor entity and vested in the purchaser free and clear of any claims or encumbrances, other than those expressly assumed by the purchaser, thereby ensuring that the purchaser will not inherit the unwanted assets and liabilities.[16]

B. This Court Has Jurisdiction to Transfer the Offtake Agreement to ResidualCo

17. Cargill argues that in order to vest out and transfer a contract pursuant to an RVO, the debtor must either assign the contract to ResidualCo pursuant to section 11.3 or disclaim the contract pursuant to section 32. Cargill's position is untenable and contradictory to the existing body of jurisprudence where RVOs have been granted.

18. Section 11 of the CCAA provides courts with broad discretionary authority to grant an RVO and transfer contracts, including those containing assignment restrictions, to a 'Residual Co.'. The assignment and disclaimer provisions of the CCAA do not restrict the Court's exercise of statutory discretion to approve an RVO that transfers the Offtake Agreement to ResidualCo. Further, given the statutory authority of section 11, it is not necessary for the Court to resort to its inherent jurisdiction to grant any of the relief sought by Tacora on its sale approval motion.

(i) RVOs Do Not Require an Assignment Pursuant to Section 11.3

19. In its effort to create additional barriers to the proposed transfer of the Offtake Agreement to ResidualCo pursuant to an RVO, Cargill asserts the position that the proposed transfer of the Offtake Agreement constitutes an "assignment", as contemplated by section 11.3, and then argues that Tacora cannot satisfy the requirements of section 11.3. In standing up and knocking down this strawman, Cargill misconstrues the purpose and effect of section 11.3.

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[15] *Just Energy* at para. 27. *Nemaska Lithium* at paras. 2-5.
[16] *Blackrock Metals* at para. 85.

20. Under section 11.3, the Court is empowered to force the assignment of a contract from a debtor to a purchaser (who is a stranger to the contract) over the objections of the counterparty. To protect the counterparty from future breaches by a new party with whom the counterparty has not agreed to contract, section 11.3 provides that the Court can only force the assignment if certain protections are put in place. First, the Court may not make the order unless it is satisfied that certain monetary defaults are remedied. Second, the Court is required to consider whether (a) the Monitor approved the proposed assignment, (b) the person to whom the contract is to be assigned will be able to perform the obligations, and (c) it would be appropriate to assign the contract to that person.[17]

21. The requirement that the assignee be capable of performing the contract protects the counterparty from future breaches by the assignee in the context of an ongoing contractual relationship with a stranger.[18] In the context of an RVO, the counterparty to the transferred contract is not being forced into an ongoing contractual relationship. On the contrary, the contract is being transferred because it will ***not*** be performed in the future.[19]

22. The risk that a contractual counterparty could lose the benefit of an off-market contract with a CCAA debtor is not new. Where a debtor proposes a plan to its creditors, the CCAA empowers the debtor to disclaim an unfavourable contract. Where the debtor's business is being sold, the purchaser has an unrestricted ability to pick and choose what assets and what liabilities it will assume. Further, where the debtor's business is sold, there is no requirement for the debtor to disclaim a contract that the purchaser has decided to leave behind.

23. Whether or not a contract expressly requires the counterparty's consent to assignment is irrelevant. Justice Gouin of the Superior Court of Quebec dealt with this argument in *Nemaska Lithium*, the relevant paragraphs of which are reproduced below:

> [107] This transfer is part of the Orion/IQ/Pallinghurst Bid and of the planned transaction as a whole, and there is no need to analyze it in isolation, in order to unravel all its facets.

[17] CCAA, s. 11.3.
[18] See *Dundee Oil and Gas Limited (Re)*, 2018 ONSC 3678 at paras. 22-25 and 27-31 for the Court's discussion on the requirement under subsection 11.3(b) that the assignee be capable of performing the contract.
[19] *Just Energy* at para. 27.

> [108] In any event, in the context of an application such as the RVO Application, the Court has the necessary power, after having satisfied itself that the criteria of section 36(3) are met, to order that such transfer be made, without the consent of the Cantore Creditor, or of any other creditor in respect of a contract to be transferred, otherwise the creditor concerned would benefit from a right of veto over the Proposed Transaction, which would be unacceptable.
>
> [109] In the context of the Debtors' insolvency, the overall result of the Proposed Transaction with the Bidders is to the advantage of all, compared to the consequences of the other choices mentioned above.
>
> [110] Although the Cantore Creditor would like the Agreement providing for the payment of the NSR Royalty to be fully protected, without any negative consequences for him, the Court cannot accept this, as it would mean the failure of the transaction provided for in the Orion/IQ/Pallinghurst Bid.[20] (Emphasis added).

24. The Quebec Court of Appeal denied leave to appeal in *Nemaska Lithium* finding courts should broadly interpret, "sell or otherwise dispose of assets outside the ordinary course of business under s. 36(1) *CCAA*" to "allow a *CCAA* judge to grant innovative solutions such as RVOs," consistent with the "wide discretionary powers afforded the supervising judge pursuant to section 11 [sic] *CCAA.*"[21]

25. Appendix "A" to this Factum sets out nine examples of RVOs granted by CCAA courts where agreements with assignment restrictions were transferred to 'Residual Co.'. There are undoubtedly more examples that are not apparent on the face of the publicly available materials, as in most instances, the terms of 'excluded contracts' are not publicly available. The examples set out in Appendix "A" involve leading decisions on the jurisdiction to grant RVOs, including *Harte Gold, BlackRock Metals, Acerus* and *Rambler Metals.*[22] The contracts transferred to 'Residual Co.' in the cases involving the mining industry also include various agreements which are similar to the Offtake Agreement. In *BlackRock Metals*, an offtake agreement was transferred to 'Residual Co.'.[23] In *Rambler Metals*, a gold purchase and sale agreement and a purchase agreement related to metal concentrates were transferred to

[20] *Nemaska Lithium* at paras. 107-110, BOA Tab P.
[21] *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCA 1488 at para. 19.
[22] *Harte Gold*; *Blackrock Metals; Acerus*; *Rambler Metals and Mining Canada Limited, Re,* 2023 NLSC 67 [*Rambler Metals*].
[23] BOA Tab C.

'Residual Co.'.[24] These agreements are similar to the Offtake Agreement in that they involve the purchase and sale of base metals from mining companies. The fact that some of the RVO transactions listed in Appendix "A" were obtained on consent or were unopposed does not undermine the fact that the Court has jurisdiction to make the order.[25]

26. Cargill's argument that the requirements of section 11.3 should apply to the sale of Tacora's business pursuant to an RVO is clearly an attempt to create barriers to a form of transaction which Canadian courts have approved in over 50 instances – cases in which section 11.3 assignment requirements were not applied, or even considered, with respect to the transfer of contracts to Residual Co. By asking this Court to determine as a general matter that contracts with assignment restrictions cannot be transferred pursuant to an RVO, Cargill is asking this Court to overrule judges across the country that approved RVOs in these same circumstances.

(ii) RVOs Do Not Require Disclaimer of the Contract Pursuant to Section 32

27. Contrary to Cargill's assertion that in order to transfer a contract to 'Residual Co.' it is necessary to either "assign" the contract pursuant to section 11.3 or disclaim the contract pursuant to section 32, the jurisprudence on this point is clear.

28. As set out above, in *Nemaska Lithium*, the Court determined that it had jurisdiction to order the transfer of excluded contracts to 'Residual Co.' provided that the transaction was effected in furtherance of the remedial objectives of the CCAA and the subsection 36(3) criteria were met.[26] The Court in *Nemaska Lithium* also addressed Cargill's argument that the Court is required to consider whether a disclaimer was necessary to vest out 'excluded contracts'.[27] In that case, one of the grounds for objection to the granting of an RVO was that the Court should not authorize the transfer of an excluded contract to 'Residual Co.'[28] because (a) "novation cannot legally be undertaken without creditor consent… the court does not have power to order

[24] BOA Tab G.
[25] Oral Reasons of the Honourable Mr. Justice Nixon in *The Matter of a Proposed Arrangement of 12178711 Canada Inc. et al.* This decision is not publicly available. A copy of this decision is at Tab Q of the BOA; *Beatty v Schatz*, 2009 BCSC 710 at para. 25.
[26] *Nemaska Lithium* at paras. 107-108, BOA Tab P.
[27] *Nemaska Lithium* at para. 107, BOA Tab P.
[28] *Nemaska Lithium* at para. 107, BOA Tab P.

or declare such novation in absence of a plan…"[29]; and (b) the "RVO purport[s] to effectively terminate the [contract] without any court scrutiny under s. 32 [*sic*] CCAA."[30]

29. In approving the RVO, the Court reviewed its jurisdiction to grant an RVO and concluded "section 36(1) CCAA permit[s] a wide range of acts and manners of disposition, including, in part or in whole, by way of "reverse vesting" an innovative solution to be analyzed on a case-by-case basis."[31] Specifically, on transferring the contract of the objecting creditor, as set out above, the Court held that it had jurisdiction, after having satisfied itself that the criteria of subsection 36(3) of the CCAA were met, to order the transfer of a contract to 'Residual Co.', without the consent of the objecting counterparty, or any other contract counterparty in respect of a contract to be transferred.[32] There was no need to consider the disclaimer provisions in the CCAA as alleged by the objecting creditor.

30. Cargill's statement in its factum that "[i]n *Re Quest University Canada*, Justice Fitzpatrick approved a reverse vesting order with respect to liabilities under certain subleases only after the disclaimer procedure had been followed"[33] is misleading. Quest initially intended to seek approval of a sale combined with a plan of arrangement. In anticipation of presenting a plan to its creditors, Quest issued notices of disclaimer in respect of four subleases.[34] However, when Quest realized the potential magnitude of Southern Star's (the landlord's) claim resulting from the disclaimers and that Southern Star would hold an effective veto over the Plan and was unlikely to vote in favour of the Plan, Quest switched the structure of its proposed transaction to an RVO.[35]

31. Southern Star objected to certain aspects of the RVO, including the vesting of 'Excluded Liabilities' and 'Excluded Contracts' in 'Residual Co.'.[36] The Court reviewed the existing RVO

[29] Re-Modified and Restated Contestation (Objection) from Victor Cantore in *Nemaska Lithium* at para. 27. A copy of this objection to the RVO filed by Mr. Cantore is included in the BOA at Tab M.
[30] Contestation (Objection) from Mr. Cantore in *Nemaska Lithium* at para. 7(c). A copy of this objection to the RVO filed by Mr. Cantore is included in the BOA at Tab N.
[31] *Nemaska Lithium at* para. 71, BOA Tab P.
[32] *Nemaska Lithium* at para. 108, BOA Tab P.
[33] Factum of Cargill re: Preliminary Threshold Motion at para. 40.
[34] *Quest* at para. 89.
[35] *Quest* at paras. 116 and 119-121.
[36] *Quest* at para. 151.

decisions[37] and concluded that (a) the Court has jurisdiction to order an RVO, and (b) it was appropriate to exercise its discretion and approve the RVO structure.[38] Whether the Lots had been disclaimed became irrelevant in the context of an RVO. As such, the *Quest* case actually contradicts the position for which Cargill seeks to rely on it.

32. The position of Cargill, if successful, would also completely undermine the ability of debtors to use RVOs as a tool under the CCAA. If required to disclaim an agreement before the related liability could be 'left behind' in an RVO, agreements protected by subsection 32(9), including a financing agreement, could never be transferred to 'Residual Co.' to be left behind. It is fundamental to the viability of virtually every sale transaction under the CCAA that the debtor has the ability to 'leave behind' the obligations of its pre-filing credit agreements. A credit agreement is a "financing agreement if the company is the borrower" as set forth in paragraph 32(9)(c) of the CCAA and is incapable of being disclaimed.[39]

33. However, as can be seen at Appendix "A" to this Factum and Tacora's Book of Authorities, courts have routinely ordered the transfer of various financing agreements to 'Residual Co.':

(a) Notes Purchase Agreement in *Rambler Metals*;

(b) All financing agreements in *Harte Gold*;

(c) ACOA Agreement in *FIGR Group*;

(d) Demand Debenture in *Pure Gold*;

(e) Amended and Restated Promissory Note in *Acerus*;

(f) Unsecured Promissory Notes in *Aleafia*;

(g) Credit Agreement in *Trichome*;

(h) Promissory Note and Loan Agreement in *Clearbeach Resources*;

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[37] *Quest* at paras. 131-149. These decisions include: *Plasco Energy Re* (July 17, 2015), Court File No. CV-15-10869-00C (Commercial List). A copy of this decision is included in the BOA at Tab O; Stornoway Diamond Corp., Re (October 7, 2019), Court File No. 500-11-057094-191 (C.S. Que.). There is no related Endorsement for this RVO.; *Wayland Group Corp., Re* (April 21, 2020), Court File No. CV-19-00632079-00CL, Endorsement of Justice Hainey (Commercial List); *Comark Holdings Inc., Re* (July 13, 2020), Court File No. CV-20-00642013-00CL, Endorsement of Justice Hainey (Commercial List); *JMB Crushing Systems Inc., Re*, Court File No. 2001-05482 (Alta Q.B.). This decision is not publicly available online; and *Nemaska Lithium*, BOA Tab P.
[38] *Quest* at para. 172.
[39] CCAA, s. 32(9)(c).

(i) Debenture Indenture in *MPX International*; and

(j) Secured Trust Indenture and Loan Agreement in *Wayland*.[40]

34. To accept Cargill's argument would mean that every secured and unsecured creditor that has loaned money to the debtor would have a consent right on any sale transaction effected through an RVO, thereby rendering RVOs a meaningless tool. A number of courts have specifically considered efforts by objecting creditors to obtain or exercise a veto on a debtor's restructuring as a reason to approve an RVO.[41]

(iii) Section 11 Is Not Restricted by Section 11.3 or Section 32

35. Cargill argues that sections 11.3 and 32 of the CCAA have limiting language which would be rendered meaningless if courts had authority to transfer to 'Residual Co.', contracts which cannot be assigned or disclaimed under the CCAA.

36. The Supreme Court of Canada in *Canada North* addressed a similar argument. The relevant issue in *Canada North* was whether a court has the authority to grant a priming charge over the Crown's deemed trust claim pursuant to the *Income Tax Act* (Canada).[42] The Supreme Court held that a CCAA court's authority to order super-priority charges was grounded in its broad discretionary power under section 11 and also in the more specific grants of authority under sections 11.2 (interim financing), 11.4 (critical suppliers), 11.51 (director and officer charges), and 11.52 (administration charges).[43]

37. Importantly, the Supreme Court held that granting a priming charge ahead of Her Majesty's deemed trust would "fall outside the scope of the express priming charge provisions".[44] However, the Supreme Court found that the supervising court's power to grant

[40] Copies of the RVOs, excerpts from the purchase agreements showing the list of excluded contracts, and excerpts of the financing agreements (where publicly available) are included in Tacora's Book of Authorities.
[41] *Quest* at paras. 119, 148-19, and 165-170; *Nemaska Lithium* at paras. 78 and 108, BOA Tab P.
[42] *Canada North* at paras. 3-4.
[43] *Canada North* at para. 70.
[44] *Canada North* at para. 70.

such a priming charge was grounded in section 11, which "permits courts to create priming charges that are not specifically provided for in the CCAA".[45]

38. The Supreme Court explicitly disagreed with the suggestion now made by Cargill that the broad discretion conferred by section 11 is limited by the more specific provisions that follow it (in that case with respect to the grant of priming charges) and reiterated that "[t]o the contrary, this Court said in *Century Services*, that s. 11 provides a very broad jurisdiction that is not restricted by the availability of more specific orders."[46]

39. The Supreme Court also addressed an argument that priming charges could not supersede Her Majesty's deemed trust claim because they may attach *only to the property of the debtor's company*, which is a restriction for priming charges set out in sections 11.2, 11.51, and 11.52 of the CCAA.[47] (emphasis in original). The Supreme Court rejected this argument stating that "although ss. 11.2, 11.51 and 11.52 of the CCAA contain this restriction, there is no such restriction in s. 11" and "[t]here may be circumstances where it is appropriate for a court to attach charges to property that does not belong to the debtor."[48]

40. In *Blackrock Metals*, in approving an RVO, Justice Paquette cited *Canada North* for the principle that other provisions of the CCAA dealing with specific orders which the court can issue do not restrict the general language and power of section 11. In granting the RVO, Justice Paquette stated that "[e]ven if this type of transaction was not contemplated by section 36 of the CCAA, section 11 could clearly step in as a basis for the Court's jurisdiction."[49]

41. Similarly, while the CCAA contains provisions enabling a debtor to assign or disclaim a contract, there is nothing in these provisions that restricts the ability of a CCAA court to make more specific orders that "meet[s] contemporary business and social needs" to facilitate successful restructurings.[50] There is nothing in section 11.3 or section 32 limiting or otherwise restricting the Court's jurisdiction to make an order transferring uneconomic and unwanted

[45] *Canada North* at para. 70.
[46] *Canada North* at para. 70.
[47] *Canada North* at para. 71.
[48] *Canada North* at para. 71.
[49] *Blackrock Metals* at para. 94.
[50] *Callidus* at para. 48.

contracts to 'Residual Co.' pursuant to an RVO transaction. Courts have exercised their broad statutory discretion time and time again to do so. In *Nemaska Lithium*, the Court exercised its discretion to approve an RVO and transfer all 'excluded liabilities' and various contracts to a Residual Co.[51] In *Quest*, the Court vested out all 'excluded assets, claims, and liabilities' to a Residual Co.[52]

42. Similarly, in *Bellatrix Two*, in addressing a case where the debtor stopped performing an EFC that could not be disclaimed pursuant to section 32, Justice Romaine recognized "[t]he disclaimer provisions in the CCAA are not rendered meaningless by the existence of a less formal option but provide an opportunity for orderly termination and certainty to the parties to the disclaimed contract. Implying an obligation to perform an uneconomic contract that may affect the ability of the CCAA debtor to attempt to restructure would require more direct statutory language."[53] Therefore, while a CCAA debtor may choose to utilize the disclaimer provisions in the CCAA, it is not necessary to do so and a CCAA debtor can choose to leave the contract behind in a sale, including pursuant to an RVO.

C. The Offtake Agreement is Not an Agreement Protected by Subsection 32(9) of the CCAA

43. As set out above, it is not necessary for the Offtake Agreement to be disclaimed in order for it to be transferred to ResidualCo pursuant to an RVO. Nonetheless, Cargill has asserted at times in this CCAA Proceeding that the Offtake Agreement is an EFC or financing agreement that cannot be disclaimed (although it has not supported that assertion in its factum on this motion) pursuant to subsection 32(9) of the CCAA. In anticipation that Cargill may continue to assert this position, this Factum addresses the issue. The Offtake Agreement is not an EFC or a financing agreement where Tacora is a borrower.[54] At its core, the Offtake Agreement is an ordinary supply contract for the sale and purchase of iron ore.

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[51] *Nemaska Lithium*, paras. 107-109 and 125-128, BOA Tab P.
[52] *Quest* at para. 123.
[53] *Bellatrix Two* at para. 47.
[54] CCAA, s. 32(9).

(i) The Offtake Agreement is Not an EFC

(A) The EFC regime in the CCAA.

44. The meaning of "eligible financial contract" is contained in regulations issued under the CCAA (the "**Regulations**").[55] Pursuant to subsection 2(a) of the Regulations, the following kinds of "financial agreements" are prescribed as EFCs:

> (a) derivatives agreement, whether settled by payment or delivery, that:
>
> (i) trades on a futures or options exchange or board, or other regulated market, or
> (ii) is the subject of recurrent dealings in the derivatives markets or in the over- the counter- securities or commodities markets.[56]

45. Further, a "derivatives agreement" is defined in the Regulations as:

> …a financial agreement whose obligations are derived from, referenced to, or based on, one or more underlying reference items such as interest rates, indices, currencies, commodities, securities or other ownership interests, credit or guarantee obligations, debt securities, climatic variables, bandwidth, freight rates, emission rights, real property indices and inflation or other macroeconomic data and includes:
>
> (a) a contract for differences or a swap, including a total return swap, price return swap, default swap or basis swap;
>
> (b) a futures agreement;
>
> (c) a cap, collar, floor or spread;
>
> (d) an option; and
>
> (e) a spot or forward.[57] (emphasis added)

46. The Offtake Agreement meets neither of the requirements under subsection 2(a) of the Regulations. First, the Offtake Agreement is not a "derivatives agreement". Second, the Offtake Agreement does not trade on a futures or options exchange or board, or other regulated market, nor is it the subject of recurrent dealings in the derivatives markets or in the over-the-counter securities or commodities markets.

[55] *Eligible Financial Contract Regulations (Companies' Creditors Arrangement Act)*, SOR/2007-257 ("**Regulations**").
[56] Regulations, s. 2(a).
[57] Regulations, s. 1.

(B) The Offtake Agreement is a supply contract and not a derivatives agreement.

47. As described by Martin Marcone in *Eligible Financial Contracts*, the definition of "derivates agreement" under the Regulations has two elements: (a) financial agreement; and (b) obligations relating to underlying reference items.[58] Marcone defines derivatives agreements as "investment tools with values linked to the performance of some underlying item [called an underlier]…"[59] In particular:

> Derivatives are predominantly utilized to protect investments by hedging against unfavourable movements in the price, rates or values of a particular underlier or to earn income by using risk capital to speculate and take advantage of fluctuations in a particular market.[60]

48. Citing *The Law of Financial Derivatives in Canada*, the Supreme Court explained in a decision involving the interpretation of the *Mining Tax Act* that:

> Generally speaking, financial derivatives are contracts whose value is based on the value of an underlying asset, reference rate, or index. As Professors Grottenthaler and Henderson explain, there are essentially two reasons for entering into such a contract — to speculate on the movement of the underlying asset, reference rate or index, or to hedge exposure to a particular financial risk such as the risk posed by volatility in the prices of commodities…
>
> The two basic types of derivative transactions are forward contracts and options… Nevertheless, they both function as hedging tools.[61] [Emphasis added.]

49. The term "financial agreement" is not defined in the Regulations. However, the type of contract can be determined by looking at its core features. Derivatives – including various types of swaps, futures, options, and forward contracts – all have prices fixed at the time of contracting. Derivatives are used for financial purposes rather than commercial purposes, and as stated above by the Supreme Court, are used to either hedge or speculate. Such contracts are intended to transfer price risk from one party to another from the moment of contracting.[62]

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[58] Martin Marcone, *Eligible Financial Contracts* (Canada: LexisNexis Canada Inc., 2009) ("***Eligible Financial Contracts***") at p. 68 [*Marcone*], BOA Tab R
[59] Marcone at p. 65, BOA Tab R.
[60] Marcone, at p. 65, BOA Tab R. See *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20, at paras. 29-35 [*Placer Dome*].
[61] *Placer Dome*, at paras. 29-30.
[62] Brown-Hruska Affidavit, Exhibit "A", Report of Sharon Brown-Hruska (the "**Brown-Hruska Report**") at para. 33.

50. In *Androscoggin*,[63] the Court of Appeal for Ontario held that EFCs must serve a "financial purpose unrelated to the physical settlement of the contracts."[64] The Court explained that EFCs:

> …enable[e] the parties to manage the risk of a commodity that fluctuate[s] in price by allowing the counterparty to terminate the agreement in the event of an assignment in bankruptcy or a CCAA proceeding, to offset or net its obligations under the contracts to determine the value of the amount of the commodity yet to be delivered in the future, and to re-hedge its position.[65]

51. Similarly, in *Blue Range*, the Court of Appeal of Alberta explained that "[f]orward commodity contracts and other derivatives have a financial value that can readily be calculated; they are commercial hedging contracts that can be used to manage various types of risk, including changes in commodity prices, exchange rates, interest rates and market risks" (emphasis added).[66]

52. Both *Androscoggin* and *Blue Range* considered the definition of "forward commodity contract" prior to the 2007-amendments to the *CCAA*.[67] Only one case – the decision of the Alberta Court of Queen's Bench in *Bellatrix One*[68] – has considered the definition of "derivatives agreement" under the current Regulations. However, the Court in *Bellatrix One* followed *Androscoggin* and *Blue Range* in emphasizing the requirement of a financial purpose related to hedging and confirming that derivatives agreements permit parties to hedge against commercial risk.[69]

53. Offtake agreements are unlike the contracts described in the caselaw as derivative agreements. Offtake agreements are generally long-term contracts in which a producer, such as a mining concern, commits to sell substantial volumes of a commodity to a buyer or "offtaker" over a period of time. As is common in mining and other natural resource commodities, an

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[63] *Re Androscoggin Energy LLC*, 2005 CarswellOnt 589 (Ont. C.A.). [*Androscoggin*]
[64] *Ibid* at para. 15.
[65] *Ibid* at para. 15.
[66] *Enron Capital & Trade Resources Canada Corp. v. Blue Range Resource Corp.*, 2000 ABCA 239 at paras. 18 and 23 [Blue Range]. See also *Re Calpine Canada Energy Ltd.*, 2006 ABQB 153, at paras. 20-22, which followed the decisions in *Androscoggin* and *Blue Range*. [*Calpine*]
[67] The term "forward" is now listed as a specific type of "derivatives agreement" under s. 1(e) of the Regulations.
[68] *Re Bellatrix Exploration Ltd.*, 2020 CarswellAlta 350 (A.B.Q.B.). [*Bellatrix One*] This decision is not available on CanLII. A copy of this decision is at Tab S of the BOA.
[69] *Bellatrix One* at paras. 125, 158, BOA Tab S.

offtake agreement specifies that the offtaker purchases all or a substantial percentage of production.[70] In other words, the primary purpose of an offtake agreement is the purchase and sale of a natural resource commodity, and such purchase and sale transactions are physically settled for commercial reasons. Offtake agreements are not used for hedging or speculation of commodities independent from the supply of underlying product.

54. The Offtake Agreement between Tacora and Cargill does not differ from this standard description. Pursuant to the Offtake Agreement, Tacora sells 100% of the iron ore concentrate production at the Scully Mine to Cargill.[71] The Offtake Agreement is a supply contract; in that it specifies the terms and conditions under which Tacora supplies to Cargill, who subsequently transports and markets the shipments of iron ore under the terms of the Offtake Agreement.[72] Both Tacora's expert, Dr. Brown-Hruska, and Cargill's expert, Jeremy Cusimano, agree on this. Dr. Brown-Hruska opined that "[t]he Offtake Agreement is a supply contract for the sale and purchase of iron ore" and "not a 'derivative contract' as that term is commonly understood by financial market authorities, in the commodities derivatives markets, or in the commodities industry."[73]

55. On cross-examination, Mr. Cusimano, similarly admitted that the Offtake Agreement is not a derivative and is in fact, an agreement of purchase and sale:

> Q. … I take it you don't disagree with Ms. Brown-Hruska's conclusions that the Offtake Agreement is not a derivative agreement?
>
> A. When you look at the contract and its amendments in their entirety, it is not what I would consider to be a derivative.
>
> […]
>
> Q. … I take it you would characterize it as a contract of purchase and sale, buyer and seller agreement?
>
> A. Yes.

[70] Brown-Hruska Report at para. 24.
[71] Fourth Broking Affidavit at para. 57.
[72] Brown-Hruska Report at para. 22.
[73] Brown Hruska Report at para. 12 and 13.

(C) Offtake Agreement does not hedge price risk for Tacora.

56. As described above, a key feature of evaluating whether an agreement is a "derivative agreement" is evaluating whether the purpose of the agreement is to enable hedging of price risk. In *Calpine*, the court concluded that the contract at issue was not an EFC because the price under the contract, which was determined by the market price (determined by various industry measurements) could not "prudently be hedged by an off-setting contract"[74] and "demand, price and quantity of gas to be purchased is based solely upon the purchaser's needs from time to time at prices that fluctuate."[75] In *Bellatrix One*, the Alberta Court of Queen's Bench held that, though a fixed price is not required for an agreement to be a derivative agreement, the agreement must have a "price… capable of determination at the date of delivery" for hedging purposes.[76]

57. The Offtake Agreement does not hedge against any price risk. The Offtake Agreement dictates that the Final Purchase Price will be determined based on negotiation between Cargill and third-party consumers. Similar to *Calpine*, the Offtake Agreement provides for a price based on a market index with a profit share component and without hedging against commodity price risk.[77] The Offtake Agreement also fails the test outlined in *Bellatrix One* – Tacora does not know the Final Purchase Price until several months after delivery.

58. Under both the Offtake Agreement and the Stockpile Agreement, iron ore is delivered and transferred to Cargill several months before Tacora becomes aware of the Final Purchase Price of a shipment.[78] Payments by Cargill to Tacora under the Offtake Agreement proceed in three stages:

(a) first, by three business days prior to the first laycan (i.e., the first day a vessel may arrive at the terminal port to pick-up iron ore), the provisional purchase price is calculated;

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[74] *Re Calpine*, at para. 20.
[75] *Re Calpine*, at para. 22. In *Eligible Financial Contracts*, Marcone writes, at p. 79: "A commodity future can be defined as a contract to make or take delivery of a specified quantity and quality, grade or size of a commodity during a designated future time at a price agreed upon when the contract is entered into on a futures exchange. As an example, the S&P Goldman Sachs Commodity Index futures contract is traded on the Chicago Mercantile Exchange", BOA Tab R.
[76] *Bellatrix One* at paras. 158-159, BOA Tab S.
[77] Brown-Hruska Report at para. 40; Fourth Broking Affidavit at para. 62.
[78] Fourth Broking Affidavit at para. 62.

(b) second, for tonnes on the ocean, Tacora and Cargill calculate and agree on revised amounts twice a week on Monday and Wednesday based on the average of the last five pricing days for Platts 62% Index. If the revised amounts exceed certain threshold amounts, a Margin Payment is made either by Cargill or Tacora; and

(c) third, Tacora and Cargill calculate the Final Purchase Price, which is the commodity price, less freight costs plus a profit share. The commodity price is calculated using the arithmetic mean of the Platts 62% Index from the third calendar month after the vessel sails. The freight costs are calculated using the BECI-C3 index and other provisions. The formula for the profit share between Tacora and Cargill under the Offtake Agreement is based on the final sales price for the final customer over the Platts 62% Index. The final sales price which flows into the profit share is negotiated between Cargill and the final customer based on a third-party contract.[79]

59. Since the Final Purchase Price is not determined until Cargill sells to a third-party customer, Tacora remains subject to price risk until the Final Purchase Price is determined by Cargill's onward sale weeks or months after delivery to Cargill and the passage of title.[80] The recent liquidity challenges experienced by Tacora as a result of the drop in iron ore prices demonstrates this acute price risk.

60. Cargill may assert the Offtake Agreement is an EFC on the basis there were certain side letters between the parties that provided hedging in respect of the Platts 62% Index aspect of the pricing formula. The fact that side letters were entered into periodically to provide some price protection is actually further evidence that the Offtake Agreement is not itself a hedging agreement or a derivative.[81] But in any event, such side letters were separate agreements, were not always in force, and have not been in effect at all since February 1, 2024. Accordingly, only the base formula provisions in the Offtake Agreement apply with respect to the price of iron ore sold to Cargill, which does not provide any price protection, hedging, or other risk mitigation to Tacora.[82]

(D) No other hallmarks of a derivatives agreement.

61. The Offtake Agreement also does not contain the features of the types of agreements enumerated in the Regulations.

[79] *Ibid*.
[80] Brown-Hruska Report at para. 41.
[81] Brown-Hruska Report at para. 42.
[82] Fourth Broking Affidavit at para. 66.

62. ***The Offtake Agreement is not a forward contract***. As opined by Dr. Brown-Hruska, in general, a physically-settled forward contract would obligate one party to make, and the other party to take, physical delivery of a fixed quantity of a specified commodity, transacting at a fixed price determined such that the forward contract has zero value at inception, on a fixed date more than two days in the future.[83] In contrast, the Offtake Agreement does not set a fixed price for iron ore, specifies the source of iron ore consistent with a supply contract, and does not fix a specific quantity to transact on a specific future date.

63. Further, a forward contract by definition does not include transfers of cash or assets at the inception of the contract and because of this feature, a forward contract must have zero value for both parties at inception. Because of the specific sourcing requirement of the Offtake Agreement and the long and indefinite term, Tacora effectively gives up its ability to sell to third parties to hedge the risk the Offtake Agreement poses, while Cargill does not give up a similar ability to purchase iron ore from third parties and its ability to hedge the risk via its final sale of Tacora's iron ore concentrate to third parties (while earning a spread implicit in the profit share calculation). Cargill's ability to determine the ultimate destination for and sale of Tacora's iron ore concentrate implicitly created an asymmetry of basis at the inception of the Offtake Agreement. As a result of this asymmetry, the value of the Offtake Agreement is not zero at inception for both parties.[84]

64. ***The Offtake Agreement is not a swap contract***. A swap contract is a contract to exchange (or swap) a series of periodic future cash flows based on a predetermined "notional principal" at terms agreed upon at inception such that the up-front payment is zero. Also, a physically-settled swap does not involve a direct purchase of an asset or commodity, and thus, the Offtake Agreement lacks many of the key features of a swap agreement.[85]

65. In general, all swap agreements involve a two-way exchange, or "swapping", of a set of comparable cash flows and/or assets in turn based upon an agreed underlying notional principal

[83] Brown-Hruska Report at para. 35.
[84] *Ibid* at para. 47.
[85] *Ibid* at para. 48.

amount. It is commonly understood by financial market authorities and in the commodities markets that the swapping is distinct from a one-directional purchase or sale of an asset.[86] The key feature shared by all swaps including interest rate swaps, currency swaps, and commodity swaps is that in each agreement, there is a bi-directional "swapping" of assets or cash flows tied to underlying assets between both parties.[87]

66. The Offtake Agreement is an agreement for Tacora to sell, and for Cargill to purchase, iron ore. This type of direct, one-directional sale agreement does not resemble "swapping," nor would it be a feature of a "swap" as the term is traditionally understood in financial industries.[88]

67. ***The Offtake Agreement is not a futures or options contract***. In general, futures and options contracts are standardized contracts listed on an exchange that offer fixed terms and a set maturity or delivery date at the expiration of the contract. While iron ore futures with standardized features are offered on futures exchanges, the Offtake Agreement lacks many of the key features of futures contracts. Since the Offtake Agreement neither fixes a price at the time of contracting nor at the point of title transfer, it differs from contracts offered on regulated and traded markets such as futures and options markets.[89]

68. ***The future deliveries under the Offtake Agreement cannot be valued.*** In *Androscoggin*, the Court of Appeal for Ontario observed that the hallmarks of an EFC include the ability of a counterparty to "terminate the agreement in the event of an assignment in bankruptcy or a CCAA proceeding, to offset or net its obligations under the contracts to determine the value of the amount of the commodity yet to be delivered in the future, and to re-hedge its position."[90] Similarly, in *Bellatrix One*, it was an important indicia of an EFC that the contract "contemplates netting or set-off in the event of a default based on market prices

[86] *Ibid* at para. 50.
[87] *Ibid* at para. 52.
[88] *Ibid* at para. 53.
[89] *Ibid* at para. 54.
[90] *Re Androscoggin*, at para. 15.

prevailing at the date of default" and "its provisions… provide a party with certainty that, in the Event of Default, calculation of monetary damages will be possible."[91]

69. The Offtake Agreement contains no such provision and in fact, it would be impossible for the Offtake Agreement to contain such a provision. The clear evidence on this motion is that the Offtake Agreement does not have a specific value. As of January 8, 2024, Cargill indicated that its forward-looking net-present-value sensitivity analysis on the Offtake Agreement ranged from [redacted] under certain market production and discount rate assumptions, and [redacted] if varying prices of iron ore are also assumed.[92]

(E) The Offtake Agreement does not trade on exchanges and is not the subject of recurrent dealings in the derivatives markets or over-the-counter securities or commodities markets.

70. To qualify as an EFC, the "derivatives agreement" must also trade in accordance with either ss. 2(a)(i) or 2(a)(ii) of the Regulations, reproduced again below:

> (a) a derivatives agreement, whether settled by payment or delivery, that
>
> (i) trades on a futures or options exchange or board, or other regulated market, or
>
> (ii) is the subject of recurrent dealings in the derivatives markets or in the over- the counter- securities or commodities markets.

71. With respect to s. 2(a)(i), Martin Marcone in *Eligible Financial Contracts*, explains that these types of transactions are traded on a "central trading floor or through an electronic trading system and are cleared and settled centrally through the exchange's clearing house, which acts as central counterparty to all the contracts."[93] With respect to s. 2(a)(ii), the same text sets out the following explanation of its requirements:

> Subparagraph 2(a)(ii) of the Regulations can be divided into two categories. In the first category, included as EFCs are "derivatives agreements" (settled by payment or delivery), which are "the subject of recurrent dealings in the

[91] *Bellatrix One* at para 52 and 53, BOA Tab S.
[92] Cross-Examination of Matthew Lehtinen held on March 19, 2024 ("**Lehtinen Cross-Examination**") at Q 197.
[93] *Marcone*, at p. 129, citing at FN 501: Committee on Payment and Settlement Systems, *OTC Derivatives: Settlement Procedures and Counterparty Risk Management*, (September 1998), at p. 9. See online: Bank of International Settlements http://www.bis.org, BOA Tab R.

> derivatives markets". Simply put, this classification requires that the "derivatives agreement" be traded with some frequency by participants in the *derivatives markets*.
>
> In the second category, included as EFCs are "derivatives agreements (again, settled by payment or delivery), which are "the subject of recurrent dealings…in the over-the-counter securities or commodities markets". This category contains three general elements.
>
> First, the "derivatives agreement" must be traded with some frequency in the stated markets…
>
> Second, the "derivatives agreement" must be traded over-the-counter. This method involves bilateral negotiations and, unlike on-exchange transactions, customization to the preferences of the parties…
>
> Third, and finally, the "derivatives agreement" must be traded in the OTC *securities or commodities markets*.[94]

72. Again, the Offtake Agreement does not satisfy either of these requirements. Neither this Offtake Agreement, nor iron ore offtake agreements generally, trade on exchanges due to their bespoke nature. An offtake agreement is typically a long-dated contract, customized to the needs of the buyer and seller. Thus, unlike the commodities, securities, and derivatives that trade on exchanges, an offtake agreement is unique and non-standardized.[95]

73. The Offtake Agreement and iron ore offtake agreements generally are also not the subject of recurrent dealings in derivative or commodity markets because its contents reflect idiosyncratic negotiations between the buyer and seller at a specific point in time and involve unique and non-standardized terms. Such counterparty specificity and complexity makes an offtake agreement unsuitable for recurrent dealing in derivative or commodity markets or transferability generally.[96] In this case, the Offtake Agreement reflects customization or complexity related to the quantities (e.g., 100% of Scully Mine's production, specifically), quality (e.g., the customized quality provisions in the Offtake Agreement), and pricing mechanisms (e.g., the Offtake Agreement's negotiated freight rates and profit-share provision).

74. This was confirmed by Dr. Brown-Hruska who opined that:

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[94] *Marcone*, at pp. 131-133, BOA Tab R.
[95] Brown-Hruska Report at para. 58.
[96] Brown-Hruska Report at para. 61.

> "… neither the Offtake Agreement nor other iron ore offtake contracts like it are traded on a futures or options exchange, board of trade, or other regulated market. Further, the Offtake Agreement lacks key features common to standard contracts traded in commodities markets and differs from spot, forward, or other commodities contracts that are commonly traded or the subject of recurrent dealings in the derivatives or over-the-counter commodities markets."

75. Cargill and Mr. Cusimano, Cargill's expert, do not challenge this fact, and in fact Mr. Cusimano confirmed on cross-examination that the Offtake Agreement does not trade on futures or options exchanges or any other regulated markets:

> Q. And you would agree with me, I take it, that the Offtake Agreement is not traded on any futures or options exchanges or any other regulated markets?
>
> A. This specific agreement?
>
> Q. Yes.
>
> A. It is my understanding that this specific agreement is not traded on any exchange.[97]

(ii) The Offtake Agreement is Not a Financing Agreement Where Tacora is a Borrower

76. As set out above, at its core, the Offtake Agreement is a supply contract for the sale and purchase of iron ore. While the Stockpile Agreement works in tandem with the Offtake Agreement and provides Tacora with working capital through weekly cash receipts rather than payments only when vessels are loaded, neither are financing agreements where Tacora is a borrower.

77. Pursuant to the Stockpile Agreement[98], Tacora is paid by Cargill for iron ore concentrate that is loaded to the stockpile rather than when vessels are loaded. However, the important point is that all iron ore concentrate purchased by Cargill becomes Cargill's property at the moment of unloading by Tacora to the stockpile.[99]

[97] Cross-Examination of Jeremy Cusimano held on March 18, 2024, Qs. 204-205.
[98] Tacora also notes that, pursuant to the DIP Agreement, the Stockpile Agreement will expire on maturity of the DIP Facility, which matures upon completion of the Transactions. See Exhibit No. 1 to the Lehtinen Cross-Examination.
[99] First Broking Affidavit at para. 38.

78. Cargill also attempts to argue that the Offtake Agreement provides for a margining facility to Tacora. This margining facility does not change the primary purpose of the Offtake Agreement, which is to permit the purchase and sale of iron ore. In any event, the APF Agreement explicitly removed the margining facility from the Offtake Agreement and incorporated same into the APF Agreement.[100] Section 2.2(a) of the APF Amendment states, in part:

> "[I]n particular, the Seller and the Buyer agree that Section 15.3 of the Offtake Agreement shall be amended, pursuant to this clause 2.2(a) for the duration of the term of this Agreement, to (A) delete the words "and greater than $7.5 million" and (B) delete the words "less $5 million" from the second sentence of Section 15.3".[101]

79. Accordingly, Section 15.3 of the Offtake Agreement was amended to state:

> "SMA in respect of each Relevant Shipment may be either negative or positive. On each Calculation Date, all valuations of SMA for all Shipments for which the final Purchase Price has not been determined shall be netted to result in a single positive or negative value (the "Margin Amount"). If that value is positive ~~and greater than $7.5 million~~, then Buyer shall be entitled to hold margin equal to but no greater than that Margin Amount ~~less $5.0 million~~, and if that value is negative and less than -$5 million, then Seller shall be entitled to hold margin equal to but no greater than that Margin Amount. In determining which party makes a payment to the other, any Margin Amount (if any) already held by one party shall be taken into account and netted. The receiving party shall raise a debit note for the relevant amount which shall be settled by the paying party by TT within 5 Working Days."[102]

80. The effect of the amendment to Section 15.3 of the Offtake Agreement is that all margin amounts in favour of Cargill are required to settled in cash under the Offtake Agreement and the margining facility was entirely replaced by the APF Agreement. Accordingly, Cargill does not provide any margining to Tacora under the Offtake Agreement.

81. Tacora therefore does not borrow any amounts under the Offtake Agreement and the Stockpile Agreement – Cargill is simply paying for iron ore concentrate when it is loaded to the stockpile (at which point title to the iron ore concentrate transfers to Cargill) and Cargill does not

[100] Exhibit No. "I" to First Broking Affidavit.
[101] *Ibid*.
[102] Confidential Exhibit "H" to Fourth Broking Affidavit.

provide any financing to Tacora through these agreements. Tacora is certainly not a "borrower" under either of these agreements.

PART V – ORDER REQUESTED

82. Tacora respectfully requests that Cargill's "preliminary threshold motion" be dismissed and that Tacora's motion for approval of the Successful Bid be granted.

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

/s Stikeman Elliott LLP

STIKEMAN ELLIOTT LLP

Appendix "A"

Debtor	RVO Date	Agreement(s)	Assignment Restriction Provision	Outcome	Assigned[103] or Disclaimed[104]?
TribalScale	January 11, 2021	Professional Services Agreement dated April 26, 2019	**20.6 Assignment or Delegation**. Contractor may not assign or delegate this Agreement or any of its rights, duties or obligations thereunder to any other person without prior written consent of SXMCV.	All rights and benefits of TribalScale relating to the Agreement were vested in Newco pursuant to paragraph 32 of the RVO	No
FIGR Group	June 10, 2021	Contribution Agreement effective June 10, 2019	**25.1** The Recipient shall not assign the Agreement or any part thereof without the prior written consent of the Agency.	The Agreement was transferred to, assumed by and vested absolutely and exclusively in, Residual Co. pursuant to paragraph 5(e) of the RVO	No
Harte Gold	January 28, 2022	Facility Agreement dated August 28, 2020	**11.05 Assignment** Neither Party may assign any of its rights or benefits under this Agreement, or delegate any of its duties or obligations, except with the prior written consent of the other Party, provided, however, that the Lender may assign this Agreement to an Affiliate without the requirement to obtain the prior written consent of the Borrower.	The Agreement was transferred to Residual Co. pursuant to paragraph 7(b) of the RVO	No
BlackRock Metals	June 1, 2022	Offtake Agreement dated June 22, 2015	**14.6** ***Assignment:*** This Agreement shall be binding upon and enure for the benefit of the estates, personal representatives or successors of the parties. This Agreement is not assignable by the Seller. The Purchaser may assign the benefit of	Agreements vested absolutely and exclusively in ResidualCo pursuant to paragraph 31(b) of the RVO	No

[103] Pursuant to CCAA, s. 11.3.
[104] Pursuant to CCAA, s. 32.

Debtor	RVO Date	Agreement(s)	Assignment Restriction Provision	Outcome	Assigned[103] or Disclaimed[104]?
			this Agreement to its lenders and their agents.		
		Subscription Agreement for Flow-Through Shares dated June 30, 2015	**13. Assignment** The terms and provisions of this Subscription Agreement shall be binding upon and enure to the benefit of the parties hereto and their respective heirs, executors, administrators, successors and assigns; provided that, except for the assignment by a Subscriber who is acting as nominee or agent to the beneficial owner and as otherwise herein provided, this Subscription Agreement shall not be assignable by either party without prior written consent of the other party.		No
Trichome	April 6, 2023	Credit Agreement dated May 14, 2021	**30. Assignment.** No Obligor may assign or transfer its interests or rights hereunder without the Agent's prior written consent.	The Agreement was transferred to, assumed by and vested absolutely and exclusively in certain Residual Cos pursuant to paragraph 7(b)(ii) of the RVO	No
Pure Gold	May 29, 2023	Procurement Agreement dated March 27, 2020	**24.1** The Owner will have the right, upon written notice to the Supplier and without prejudicing or limiting any other rights or remedies which the Owner may have, to terminate the Contract in whole or in part by reason of any of the following: […] (c) if the Supplier has made an assignment or subcontracted any part of the Contract without the consent required under Section 11.0.	Agreements were transferred to, assumed by and vested absolutely and exclusively in Residual Co. pursuant to paragraph 26(a) of the RVO	No

Debtor	RVO Date	Agreement(s)	Assignment Restriction Provision	Outcome	Assigned[103] or Disclaimed[104]?
		Demand Debenture dated August 6, 2019	**4.10 Successors and Assigns**: The provisions of this Debenture shall be binding upon and enure to the benefit of the parties hereto and their respective successors and permitted assigns. The Chargor may not assign or otherwise transfer any of its rights under this Debenture except in accordance with the provisions of the Credit Agreement.		No
		Master Services Agreement dated May 1, 2022	**42.1 Assignment.** Neither *Party* may assign the *Master Services Agreement* or any *Contract* without the prior written consent of the other *Party,* which consent may be arbitrarily withheld. Notwithstanding the foregoing, *Owner* may assign the *Master Services Agreement* and any *Contract* to (a) any of its *Affiliates,* (b) to any third party which amalgamates or merges with *Owner* or which acquires the *Project,* or (c) any party which acquires all or substantially all of the assets of *Owner,* conditional upon the successor covenanting and agreeing to be bound to the *Contractor* by tile provisions of the *Master Services Agreement* and any applicable *Contract.* Subject to the foregoing, the *Master Services Agreement* and any *Contract* shall enure to the benefit of and be binding upon the *Parties* and their respective successors and, in the case of *Owner,* its assigns.		No

Debtor	RVO Date	Agreement(s)	Assignment Restriction Provision	Outcome	Assigned[103] or Disclaimed[104]?
			17. General. […] (f) Neither Parent nor Contractor may assign this Guarantee in whole or in part without the prior written consent of Owner. In connection with the assignment of the Master Services Agreement, Owner may assign this Guarantee in whole or in part without the prior written consent of Parent and Contractor. This Guarantee enures to the benefit of and binds the Parties and their respective successors and permitted assigns.		No
Acerus	May 30, 2023	Amended and Restated Promissory Note dated June 6, 2022	**7. Assignments.** This Note may not be sold, assigned or transferred by Maker, or, without the consent of Maker, by any Securityholder.	The Agreement was channelled to, assumed by and vested absolutely and exclusively in Residual Co. pursuant to paragraph 6(b) of the RVO	No
Rambler Metals	September 11, 2023	Notes Purchase Agreement dated October 29, 2021	**11.3** […] the Administrative Agent […] (ii) may assume that there has been no assignment or transfer by any means by the Noteholders of their rights hereunder, unless and until the Administrative Agent has received a duly completed and executed assignment in form satisfactory to it […]	The Agreements were transferred to NewCo pursuant to paragraph 7(A)(b) of the RVO	No
		Amended and Restated Purchase Agreement dated July 6, 2022	**22. Successors and Assigns** This Agreement and all its provisions shall be binding upon and ensure to the benefit of the successors and assignees of the respective parties hereto. Neither party shall assign this agreement without the written consent of the other party, such consent not to be unreasonably		No

Debtor	RVO Date	Agreement(s)	Assignment Restriction Provision	Outcome	Assigned[103] or Disclaimed[104]?
			withheld.		
Aleafia	October 30, 2023	Unsecured Promissory Note dated December 16, 2022	Neither the Lender nor the Borrower may assign this Note or any of its respective rights or obligations under this Note without the prior written consent of the other party, which consent may be withheld in the sole discretion of such party. Any such assignment of this Note must be made in accordance with applicable securities laws.	The Agreements were channeled to, assumed by and vested absolutely and exclusively in Residual Co. pursuant to paragraph 5(c) of the RVO	No
		Unsecured Promissory Note dated January 24, 2023	Neither the Lender nor the Borrower may assign this Note or any of its respective rights or obligations under this Note without the prior written consent of the other party, which consent may be withheld in the sole discretion of such party. Any such assignment of this Note must be made in accordance with applicable securities laws.		No
		Unsecured Promissory Note dated February 28, 2023	Neither the Lender nor the Borrower may assign this Note or any of its respective rights or obligations under this Note without the prior written consent of the other party, which consent may be withheld in the sole discretion of such party. Any such assignment of this Note must be made in accordance with applicable securities laws.		No

Appendix "B"

	Debtor	RVO Date	Reverse Vesting Order/Endorsement	Court
1.	Validius Power Corp et al	4-Jan-2024	Vesting Order dated January 4, 2024 Endorsement of Justice Osborne dated January 4, 2024	Ontario Superior Court of Justice (Commercial List)
2.	Ignite Holdings Inc. et al	9-Nov-23	Approval and Reverse Vesting Order - 2023-11-09 ARIO and ARVO Endorsement - 2023-11-09	Ontario Superior Court of Justice (Commercial List)
3.	Next Point Financial, Inc. et al	31-Oct-23	Reverse Vesting Order dated October 31, 2023	Supreme Court of British Columbia
4.	Aleafia Health Inc. et al	30-Oct-23	Approval and Reverse Vesting Order dated October 30, 2023 Endorsement of Justice Conway dated October 27, 2023	Ontario Superior Court of Justice (Commercial List)
5.	Woodlore International Inc. and Ébénisterie St-Urbain Ltée	27-Oct-23	EBSU Group – Approval and Reverse Vesting Order – 27-10-2023	Quebec Superior Court (Commercial Division)
6.	Rambler Metals and Mining Canada Inc. and 1948565 Ontario Inc.	11-Sep-23	Approval and Reverse Vesting Order dated September 11, 2023 Reasons for Decisions dated September 11, 2023	Supreme Court of Newfoundland and Labrador
7.	Fire & Flower Holdings Corp.	29-Aug-23	Approval and Reverse Vesting Order dated August 29, 2023 Endorsement of Justice P. Osborne dated August 30, 2023	Ontario Superior Court of Justice (Commercial List)
8.	Swarmio Media Holdings Inc. et al	25-Aug-23	Approval and Vesting Order dated August 25, 2023 Endorsement of Justice Cavanagh	Ontario Superior Court of Justice

	Debtor	RVO Date	Reverse Vesting Order/Endorsement	Court
			dated August 25, 2023	
9.	Southview Gardens BT Ltd. et al	25-Aug-23	Approval and Reverse Vesting Order dated August 25, 2023	Supreme Court of British Columbia
10.	Groupe Selection Inc. et al	5-July-23	Approval and Vesting Order dated July 5, 2023	Quebec Superior Court (Commercial Division)
11.	Dynamic Technologies Group Inc. et al	23-Jun-23	Approval and Reverse Vesting Order dated June 23, 2023	Court of King's Bench of Alberta
12.	Lightbox Enterprises Ltd.	22-Jun-23	Approval and Vesting Order – 22 Jun 2023	Supreme Court of British Columbia
13.	Canada Fluorspar (NL) Inc. and Canada Fluorspar Inc.	7-Jun-23	Approval and Reverse Vesting Order dated June 7, 2023	Supreme Court of Newfoundland and Labrador
14.	Acerus Pharmaceuticals Corporation et al	30-May-23	Approval and Reverse Vesting Order and Extension of Stay of Proceedings dated May 30, 2023 Endorsement of Justice Penny re Reverse Vesting Order and Extension of Stay of Proceedings - 30 May 2023	Ontario Superior Court of Justice (Commercial List)
15.	Trichome Financial Corp. et al	6-Apr-23	Approval and Vesting Order dated April 6, 2023 Endorsement of Justice Conway dated April 6, 2023	Ontario Superior Court of Justice (Commercial List)
16.	MJardin Group, Inc. et al	3-Apr-23	Approval and Reverse Vesting Order dated April 3, 2023 Endorsement of Justice Kimmel dated April 3, 2023	Ontario Superior Court of Justice (Commercial List)
17.	Enterra Feed Corporation et al	16-Mar-23	Approval and Reverse Vesting Order dated March 16, 2023	Court of King's Bench of

	Debtor	RVO Date	Reverse Vesting Order/Endorsement	Court
				Alberta
18.	Cannapiece Group Inc. et al	10-Feb-23	Approval and Vesting Order dated February 10, 2023	Ontario Superior Court of Justice (Commercial List)
19.	Speakeasy Cannabis Club Ltd. and 10161233 Canada Ltd.	1-Feb-23	Approval and Reverse Vesting Order dated February 1, 2023	Supreme Court of British Columbia
20.	The Flowr Canada Holdings ULC et al	16-Dec-22	Approval and Vesting Order dated December 16, 2023 Endorsement of Justice Cavanagh dated December 16, 2022	Ontario Superior Court of Justice (Commercial List)
21.	MPX International Corporation et al	15-Dec-22	Approval and Vesting Order dated December 22, 2022 Endorsement of Justice Penny dated December 15, 2022	Ontario Superior Court of Justice (Commercial List)
22.	Just Energy Group Inc.	3-Nov-22	Approval and Vesting Order dated November 3, 2022 Endorsement of Justice McEwen dated November 14, 2022	Ontario Superior Court of Justice (Commercial List)
23.	Eve & Co International Holdings Ltd. Et al	7-Oct-22	Approval and Vesting Order dated October 7, 2023 Endorsement of Justice Osborne dated October 7, 2023	Ontario Superior Court of Justice (Commercial List)
24.	Genesis Integration Inc. and 965591 Alberta Ltd.	14-Sep-22	Approval and Reverse Vesting Order dated September 14, 2022	Court of King's Bench of Alberta
25.	Port Capital Development (EV) Inc. and Evergreen House Development	22-Jul-22	Approval and Vesting Order dated July 22, 2022	Supreme Court of British Columbia

	Debtor	RVO Date	Reverse Vesting Order/Endorsement	Court
	Limited Partnership			
26.	BlackRock Metals Inc. et al	8-Jul-22	Rectified Judgment on the Amended Shareholder Bidder's Application to the extend the Phase 2 Bid Deadline and on the Debtors' Application to Approve a Vesting Order dated July 8, 2022 (rectified July 13, 2022)	Quebec Superior Court (Commercial Division)
27.	Pulse RX Inc. and Family Pharmacy Clinic Inc.	24-May-22	Restructuring Transaction Order dated May 24, 2022 Endorsement of Maximum Financial Services v/s Pulse Rx Inc. et al. dated May 24, 2022	Ontario Superior Court of Justice (Commercial List)
28.	Glenogle Energy Inc. and Glenogle Energy LP	12-May-22	Approval and Reverse Vesting Order dated May 12, 2022	Court of Queen's Bench of Alberta
29.	Jam Hospitality Inc. et al	10-May-22	Approval and Reverse Vesting Order dated May 10, 2022	Court of Queen's Bench of Alberta
30.	Balanced Energy Oilfield Services Inc. et al.	30-Mar-22	Approval and Reverse Vesting Order dated March 30, 2022	Court of Queen's Bench of Alberta
31.	Ontario Graphite, Ltd.	14-Mar-22	Approval and Vesting Order dated March 14, 2022 Endorsement of Justice Cavanagh dated March 14, 2022	Ontario Superior Court of Justice (Commercial List)
32.	Elcano Exploration Inc. et al	11-Mar-22	Transaction Approval and Reverse Vesting Order dated March 11, 2022	Court of Queen's Bench of Alberta
33.	Ayanda Cannabis Corporation	1-Mar-22	Approval and Vesting Order dated March 1, 2022	Ontario Superior Court of Justice (Commercial List)
34.	Medifocus Inc.	8-Feb-22	Reverse Vesting Order dated February	Ontario Superior Court

	Debtor	RVO Date	Reverse Vesting Order/Endorsement	Court
			8, 2022 Endorsement of Justice Conway dated February 8, 2022	of Justice (Commercial List)
35.	Harte Gold Corp.	28-Jan-22	Approval and Reverse Vesting Order dated January 28, 2022 Endorsement of Justice Penny dated February 4, 2022	Ontario Superior Court of Justice (Commercial List)
36.	Junction Craft Brewing Inc.	17-Dec-21	Approval and Vesting Order dated December 17, 2021 Endorsement of Justice Penny dated December 20, 2021	Ontario Superior Court of Justice (Commercial List)
37.	Dominion Diamond Mines ULC et al	16-Nov-21	Approval and Reverse Vesting Order dated November 16, 2021	Court of Queen's Bench of Alberta
38.	Clearbeach Resources Inc.	14-Jul-21	Approval and Vesting Order dated July 14, 2021 Court Endorsement dated August 16, 2021	Ontario Superior Court of Justice (Commercial List)
39.	North American Lithium Inc.	29-Jun-21	Approval and Vesting Order dated June 29, 2021	Quebec Superior Court (Commercial Division)
40.	Bellatrix Exploration Ltd.	22-Jun-21	Approval and Vesting Order dated June 22, 2011	Court of Queen's Bench of Alberta
41.	Port Capital Development (EV) Inc. and Evergreen House Development Limited Partnership	15-Jun-21	Approval and Vesting Order dated June 15, 2021	Supreme Court of British Columbia
43.	Salt Bush Energy Ltd.	19-May-21	Reverse Vesting Order dated May 21, 2021	Court of Queen's Bench of Alberta

	Debtor	RVO Date	Reverse Vesting Order/Endorsement	Court
44.	JMX Contracting Inc. et al	2-Feb-21	Approval and Reverse Vesting Order dated February 2, 2021	Ontario Superior Court of Justice (Commercial List)
45.	TribalScale Inc.	11-Jan-21	Sanction Order dated January 11, 2021	Ontario Superior Court of Justice (Commercial List)
46.	Tidal Health Solutions Ltd.	20-Nov-20	Approval and Vesting Order dated November 20, 2020	Quebec Superior Court (Commercial Division)
47.	Quest University Canada	16-Nov-20	Approval and Vesting Order dated November 16, 2020 Reasons for Judgment (Sale Approval) dated December 2, 2020	Supreme Court of British Columbia
48.	Green Relief Inc.	9-Nov-20	Approval and Vesting Order dated November 9, 2020	Ontario Superior Court of Justice (Commercial List)
49.	Cirque du Soleil Canada Inc.	26-Oct-20	Approval and Vesting Order dated October 26, 2020	Quebec Superior Court (Commercial Division)
50.	JMB Crushing Systems Inc. and 2161889 Alberta Ltd.	20-Oct-20	Reverse Vesting Order dated October 20, 2020	Court of Queen's Bench of Alberta
51.	Nemaska Lithium Inc. et al	15-Oct-20	Reverse Vesting Order dated October 15, 2020 (only available in French)	Quebec Superior Court (Commercial Division)
52.	Beleave Inc. et al	18-Sep-20	Approval and Vesting Order dated September 18, 2020	Ontario Superior Court of Justice

	Debtor	RVO Date	Reverse Vesting Order/Endorsement	Court
			Endorsement dated September 18, 2020	(Commercial List)
53.	Comark Holdings Inc. et al	13-Jul-20	Approval and Vesting and CCAA Termination Order dated July 13, 2020	Ontario Superior Court of Justice (Commercial List)
54.	Wayland Group Corp. et al	21-Apr-20	Approval and Vesting Order dated April 21, 2020	Ontario Superior Court of Justice (Commercial List)
55.	Stornoway Diamond Corporation	7-Oct-19	Approval and Vesting Order dated October 7, 2019	Quebec Superior Court (Commercial Division)

SCHEDULE "A"
LIST OF AUTHORITIES

Cases

1. *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 (CanLII), [2020] 1 SCR 521

2. *Canada v. Canada North Group Inc.*, 2021 SCC 30

3. *Bellatrix Exploration Ltd. (Re)*, 2020 ABQB 809

4. *Arrangement relatif à Blackrock Metals Inc.*, 2022 QCCS 2828

5. *Quest University (Re)*, 2020 BCSC 1883

6. *Harte Gold Corp. (Re)*, 2022 ONSC 653

7. *Arrangement relatif à Nemaska Lithium inc.,* 2020 QCCS 321

8. *Royal Bank of Canada v Soundair Corp.*, 1991 CanLII 2727 (Ont. CA)

9. *Just Energy Group Inc. et. al. v Morgan Stanley Capital Group Inc. et. al.*, 2022 ONSC 6354

10. *Dundee Oil and Gas Limited (Re)*, 2018 ONSC 3678

11. *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCA 1488

12. *Rambler Metals and Mining Canada Limited, Re,* 2023 NLSC 67

13. *Beatty v Schatz*, 2009 BCSC 710

14. *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20

15. *Re Androscoggin Energy LLC*, 2005 CarswellOnt 589 (Ont. C.A.)

16. *Enron Capital & Trade Resources Canada Corp. v. Blue Range Resource Corp.*, 2000 ABCA 239

17. *Re Calpine Canada Energy Ltd.*, 2006 ABQB 153

18. *Re Bellatrix Exploration Ltd.*, 2020 CarswellAlta 350 (A.B.Q.B.)

Other Authorities

19. Martin Marcone, *Eligible Financial Contracts* (Canada: LexisNexis Canada Inc., 2009)

SCHEDULE "B"
RELEVANT LEGISLATION

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

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.

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.

Eligible Financial Contract Regulations (Companies' Creditors Arrangement Act), SOR/2007-257

1 The following definitions apply in these Regulations.

derivatives agreement means a financial agreement whose obligations are derived from, referenced to, or based on, one or more underlying reference items such as interest rates, indices, currencies, commodities, securities or other ownership interests, credit or guarantee obligations, debt securities, climatic variables, bandwidth, freight rates, emission rights, real property indices and inflation or other macroeconomic data and includes

(a) a contract for differences or a swap, including a total return swap, price return swap, default swap or basis swap;

(b) a futures agreement;

(c) a cap, collar, floor or spread;

(d) an option; and

(e) a spot or forward. (*contrat dérivé*)

financial intermediary means

(a) a clearing agency; or

(b) a person, including a broker, bank or trust company, that in the ordinary course of business maintains securities accounts or futures accounts for others. (*intermédiaire financier*)

2 The following kinds of financial agreements are prescribed for the purpose of the definition ***eligible financial contract*** in subsection 2(1) of the *Companies' Creditors Arrangement Act*:

(a) a derivatives agreement, whether settled by payment or delivery, that

(i) trades on a futures or options exchange or board, or other regulated market, or

(ii) is the subject of recurrent dealings in the derivatives markets or in the over-the-counter securities or commodities markets;

(b) an agreement to

(i) borrow or lend securities or commodities, including an agreement to transfer securities or commodities under which the borrower may repay the loan with other securities or commodities, cash or cash equivalents,

(ii) clear or settle securities, futures, options or derivatives transactions, or

(iii) act as a depository for securities;

(c) a repurchase, reverse repurchase or buy-sellback agreement with respect to securities or commodities;

(d) a margin loan in so far as it is in respect of a securities account or futures account maintained by a financial intermediary;

(e) any combination of agreements referred to in any of paragraphs (a) to (d);

(f) a master agreement in so far as it is in respect of an agreement referred to in any of paragraphs (a) to (e);

(g) a master agreement in so far as it is in respect of a master agreement referred to in paragraph (f);

(h) a guarantee of, or an indemnity or reimbursement obligation with respect to, the liabilities under an agreement referred to in any of paragraphs (a) to (g); and

(i) an agreement relating to financial collateral, including any form of security or security interest in collateral and a title transfer credit support agreement, with respect to an agreement referred to in any of paragraphs (a) to (h).

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.

(Applicant)

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT TORONTO

RESPONDING FACTUM OF THE APPLICANT
(Re: Preliminary Threshold Motion)

STIKEMAN ELLIOTT LLP
5300 Commerce Court West
199 Bay Street
Toronto, ON M5L 1B9

Ashley Taylor (LSO #39932E)
Tel: 416-869-5236
Email: ataylor@stikeman.com

Eliot Kolers (LSO #38304R)
Tel: 416-869-5637
Email: ekolers@stikeman.com

Lee Nicholson (LSO #66412I)
Tel: 416-869-5604
Email: leenicholson@stikeman.com

Natasha Rambaran (LSO #80200N)
Tel: 416-869-5504
Email: nrambaran@stikeman.com

Philip Yang (LSO# 82084O)
Tel: 416-869-5593
Email: pyang@stikeman.com

Counsel to Tacora Resources Inc.