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)

FACTUM OF THE APPLICANT (RE: MFC DISPUTE)

April 8, 2024

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TO: THE SERVICE LIST

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PART I - OVERVIEW

1. Tacora Resources Inc. ("**Tacora**") has brought a motion seeking approval of a sale transaction through a reverse vesting order ("**RVO**") that will be heard on April 10, 2024. If granted, that order will give effect to a transaction that is the culmination of the Court-approved solicitation process and facilitate the emergence of Tacora from these *CCAA* Proceedings. Tacora's motion seeking approval of the transaction is vehemently opposed by Cargill, Incorporated and Cargill International Trading PTE Ltd. (together, "**Cargill**").

2. If the order is granted over Cargill's objection and the transaction proceeds, then Tacora will pay approved cure costs to certain parties for various pre-filing liabilities, representing significant recovery for Tacora's trade suppliers and other contractual counterparties. 1128349 B.C. Ltd. ("**112 Ltd.**"), which is an affiliate of the lessor under the Scully Mine Lease, 0778539 B.C. Ltd. ("**077 Ltd.**", together with 112 Ltd., "**MFC**"), has sought payment not only of its approved cure costs provided for under the transaction but over $7.2 million in additional alleged royalty underpayments dating back to Q1 2020.

3. On this motion, Tacora seeks a determination by the Court that no such amounts are payable to MFC. Specifically, it asks the Court to confirm the validity of the interpretation of the royalty provisions of the Scully Mine Lease that the parties have used since inception.

4. The royalty is calculated based on Tacora's "Net Revenues" derived from the sale of "Iron Ore Products" from the Scully Mine. The manner of calculating Net Revenues depends in part on whether Tacora sells the Iron Ore Products under an "arm's length, *bona fide* contract of

sale". Tacora sells 100% of its Iron Ore Products to Cargill pursuant to an Offtake Agreement whereby Cargill markets and sells the product to third party buyers in exchange for a portion of the profits.

5. Tacora has been properly calculating MFC's royalty since production at the Scully Mine resumed in 2019. Two audit reports commissioned by MFC confirm this. MFC, however, demands more.

6. To make its claim, MFC is trying something new. Six years into the life of the Scully Mine Lease – and only after Tacora missed a royalty payment date due to liquidity constraints – MFC has alleged for the first time that Tacora has never sold its Iron Ore Products through an arm's length, *bona fide*, contract of sale. MFC now takes the position that Tacora and Cargill have been non-arm's length since April 2017 when the Offtake Agreement was first entered into. MFC demands not only its approved cure costs but a full re-calculation of the royalty back to the beginning of 2020.

7. As is obvious from the course of these *CCAA* Proceedings, Tacora and Cargill are arm's length entities that act independently of one another. They have always been at arm's length, and they have never acted with a common mind, in concert, or by one exercising *de facto* control over the other. At the point that Tacora entered into the Offtake Agreement with Cargill, there was no meaningful connection between them whatsoever. The Offtake Agreement was heavily negotiated over the course of months. Any suggestion to the contrary is completely unfounded – and MFC admits that it has no direct knowledge of any material link between Tacora and Cargill at the time. MFC and their affiant were wholly uninvolved in the process of negotiating the Offtake Agreement.

8. There are many legitimate reasons to enter into an offtake agreement, and there is nothing in the form of agreement that was reached between Tacora and Cargill that indicates that it is non-arm's length. With hindsight, it is now known that Tacora struck a bad deal – and one that has become worse as Tacora's financial situation has deteriorated. Tacora has never bargained from a position of strength. At the time that Cargill and Tacora entered into the

Offtake Agreement in April 2017, the owner of the Scully Mine was in *CCAA* protection, operations were on care and maintenance, and the mine required capital investment to restart operations. Tacora acknowledges that the Offtake Agreement is now off-market, uneconomic, prohibitive and inferior to potential alternatives, including the marketing agreement with Javelin under the proposed sale transaction. That does not mean that it is not an arm's length, *bona fide* contract of sale. Many contracts negotiated at arm's length turn out to be bad deals in hindsight, as MFC's own expert concedes. MFC's claim is nothing more than a brazen attempt to extract money from Tacora and its stakeholders in these *CCAA* Proceedings.

9. There are two issues on this motion: first, are there amounts owed to MFC under the Scully Mine Lease beyond those provided for as cure costs in the proposed transaction? Second, if there are additional amounts owing, is Tacora required to pay those in connection with the proposed transaction? In that respect, Tacora seeks the following declarations:

(a) The only amounts owed by Tacora to MFC with respect to the MFC Royalty (as defined below) are the Q2, Q3, and pre-filing Q4 2023 royalty payments based on the arm's length calculation method in the Scully Mine Lease;

(b) In the alternative, if the MFC Royalty should be calculated pursuant to the alternative calculation method set out in the Scully Mine Lease – which is denied by Tacora – there are no additional or incremental amounts owed to MFC; and

(c) In the further alternative, even if there are incremental amounts are owed to MFC, the Court should not require those to be paid in connection with the proposed transaction.

PART II - FACTS

10. A timeline of the relevant events is attached to this factum as Appendix "A".

A. The Scully Mine Lease

11. Tacora, as lessee, and 077 Ltd., as lessor, are parties to an amendment and restatement of consolidation of mining leases dated November 17, 2017 (the "**Scully Mine Lease**"). Pursuant to the Scully Mine Lease, Tacora is required to pay "Earned Royalties" of 7% of its "Net Revenues" (less certain expenses and taking into account certain credits) derived from the sale of "Iron Ore Products" from the Scully Mine and paid on a quarterly basis (the "**MFC Royalty**").[1] Payments of the MFC Royalty are to be made to 112 Ltd.[2]

12. The Scully Mine Lease sets out two methods for determining the "amount per Metric Tonne" to be used in the calculation of Net Revenues:[3]

> (j) "Net Revenues" shall mean:
>
> <u>(i) in the event that the Lessee sells Iron Ore Products under an arm's length, bona fide contract of sale, the amount per Metric Tonne (weight determined by vessel draft survey) actually received</u> by or otherwise payable or credited to the account of the Lessee and its affiliates calculated f.o.b. Pointe Noire, Québec or such other applicable port on the St. Lawrence seaway from which such Iron Ore Products is shipped to the Lessee's customers (the "**Port**"), or in the case of sales ex-mine gate or ex-rail, calculated at the point of actual sale, including, without limitation, all payments, incentives, bonuses, allowances, profit sharing or other consideration received by, credited or payable to the Lessee and/or its affiliates in respect thereof, less: (A) the Deductible Expenses; and (B) any royalties or overriding royalties measured by production of Iron Ore Products that are imposed on the Lessee under applicable laws by the Province of Newfoundland …; and
>
> <u>(ii) in the event that the Lessee otherwise sells Iron Ore Products, including, without limitation, in a non-arm's length transaction, the amount per Metric Tonne by reference to a standard industry publication or service containing prices or quotations of the prices at which Iron Ore Products of equivalent types and qualities are being sold</u> or purchased at a specific point of delivery (an "**Industry Service**") or, if such Industry Service is unavailable, then by such other means, in accordance with mining industry practice, as may establish such prices or quotations of the prices at which Iron Ore Products or equivalent types are being sold and purchased, calculated at f.o.b. the Port. [Emphasis added]

13. The first method is to be used when Tacora sells the Iron Ore Products under an "arm's length, *bona fide* contract of sale". Tacora has always used the "arm's length method" to

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[1] Affidavit of Joe Broking sworn March 21, 2024 ("**Broking Affidavit**"), Exhibit "A", Amendment and Restatement of Consolidation of Mining Leases – 2017 ("**Scully Mine Lease**"), s. A. 1.
[2] Scully Mine Lease, s. A. 11.
[3] Scully Mine Lease, definition (j).

calculate the MFC Royalty as it has always sold its product under an arm's length, *bona fide* contract of sale.[4]

B. The Offtake Agreement

14. Tacora sells 100% of the iron ore concentrate produced at the Scully Mine to Cargill pursuant to an offtake agreement dated April 5, 2017 (as restated on November 9, 2018, and amended from time to time, the "**Offtake Agreement**"), between Tacora, as seller, and Cargill, as buyer.[5] Cargill markets the Iron Ore Products globally, selling them to third party buyers. As described further below, Cargill receives a portion of the profits of sale for its services and pays the balance to Tacora. Effectively, Cargill serves as an intermediary akin to a sales and marketing agent.[6] MFC concedes that it has no reason to believe that Cargill hasn't been selling Tacora's products to third parties at the highest possible price.[7]

15. Offtake agreements are a standard feature of the mining market that allow producers to focus on mining instead of sales, provide them with security of demand, and help them tap into new markets.[8] In this case, Tacora entered into the Offtake Agreement in April 2017, two months before being selected as the winning bidder of the Scully Mine in the prior *CCAA* sales process.[9] Tacora entered into the Offtake Agreement prior to acquiring the Scully Mine in order to demonstrate a viable business plan to the market and the Court.[10]

16. Only a few companies offer the offtake services that would be needed for the technical marketing, distribution, and sale of the iron ore concentrate of the Scully Mine.[11] In preparing its

[4] Broking Affidavit at para 7.
[5] Broking Affidavit at para 9.
[6] Transcript of the Cross-Examination of Joe Broking held on April 4, 2024 ("**Broking Transcript**"), Q. 179, p. 71.
[7] Transcript of the Cross-Examination of Samuel Morrow held on April 5, 2024 ("**Morrow Transcrip**t"), Q. 286, p. 83.
[8] Transcript of the Cross-Examination of David Persampieri ("**Persampieri Transcript**"), Qs. 260-261, pp. 74-75; **see also** Broking Affidavit at para 12.
[9] Broking Affidavit at paras 19 and 29.
[10] Broking Affidavit at paras 19 and 21.
[11] Broking Affidavit at para 21.

bid for the Scully Mine, Tacora reached out to two such companies. One company was not interested in pursuing a deal. The other company was Cargill.[12]

17. Tacora and Cargill were unaffiliated and independent entities that negotiated the Offtake Agreement at arm's length. Ultimately, the parties reached an agreement that the amount Tacora would receive from Cargill for its iron ore concentrate would be determined by the market commodity price (as determined by a market index), less freight costs, and plus a share of the profits derived from Cargill's sale of the iron ore concentrate to third parties above the market index (the "**Purchase Price**"). While such profit-sharing arrangements may be rare in sea-borne long-term iron ore contracts, they do feature in offtake agreements – and Cargill has included them in other iron ore offtake agreements with arm's length third parties.[13]

18. The Offtake Agreement has remained in place since April 2017. While Cargill and Tacora restated the agreement in 2018 and have amended it from time to time, none of the subsequent changes have had a material impact on the Purchase Price to be paid to Tacora.[14]

C. Royalty Calculation Dispute

19. When Tacora acquired the Scully Mine in July 2017, it was assigned (as lessee) the consolidated leases for the mine.[15] In November of 2017, the parties agreed on an amendment and restatement of the leases and executed the Scully Mine Lease.[16] Tacora disclosed the offtake arrangement with Cargill to MFC during the restatement negotiations and the Scully Mine Lease references the Offtake Agreement in relation to the calculation of Net Revenues.[17]

20. Up until 2023, MFC accepted that revenue received through the Offtake Agreement was arm's length revenue for the purpose of calculating the MFC Royalty.[18] In late 2021 and early 2022, MFC twice exercised its audit rights under the Scully Mine Lease and completed forensic

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[12] Broking Affidavit at para 21; **see also** Broking Transcript at Q. 133, p. 53.
[13] Persampieri Transcript at Q. 110, p. 33.
[14] Broking Affidavit at para 30.
[15] Morrow Transcript, Exhibit "A", Scully Royalty Ltd. Form 20-F for fiscal year ended December 31, 2021, p. 19.
[16] Broking Affidavit at para 42.
[17] Broking Affidavit at para 44.
[18] Broking Affidavit at para 8.

audits of Tacora's royalty records.[19] MFC initially refused to provide these audit results to Tacora in relation to this motion. It was not until today (April 8, 2024) that MFC's counsel produced copies of audit reports dated December 17, 2021 and February 4, 2022, which confirmed Tacora's calculations.[20] MFC has continued to withhold relevant correspondence related to each of these reports and refused to allow cross-examination in relation to them. Still, it is abundantly clear that the auditor confirmed – in both instances – that Tacora has properly calculated the MFC Royalty amounts.

21. At the end of April 2023, Tacora advised MFC of its intention to defer payment of the Q1 2023 MFC Royalty payment (as permitted by the terms of the Scully Mine Lease) due to certain liquidity challenges the company was experiencing.[21] To apply pressure, MFC demanded – for the very first time – that the MFC Royalty payments dating back to 2019 ought to be re-calculated in accordance with the definition of "Net Revenues" in subparagraph (j)(ii) of the Scully Mine Lease, on the basis that the Offtake Agreement was not an "arm's length, *bona fide* contract of sale".[22]

22. Tacora subsequently paid the Q1 2023 MFC Royalty payment but again relied on the contractual grace period for the Q2 2023 payment. On August 22, 2023, MFC commenced arbitration proceedings alleging that the MFC Royalty was underpaid. At the time Tacora commenced the *CCAA* Proceedings, the Q2 and Q3 2023 MFC Royalty payments remained outstanding. The MFC Royalty payment for the stub period of Q4 2023 prior to the *CCAA* filing also remains outstanding.[23] Tacora does not dispute these amounts, to the extent calculated under the "arm's length, *bona fide* contract of sale" method and consistent with past practice.

23. As the Court is aware, Tacora and a consortium of the ad hoc group of noteholders and certain other investors (the together, the "**Investors**") entered into a subscription agreement on

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[19] Broking Affidavit at para 47.
[20] Due to the date of disclosure by MFC's counsel the audit reports are not in evidence. However, Exhibit "C" to the Morrow Transcript is a public filing of MFC's parent company that states that preliminary audit findings appear to confirm Tacora's calculations (p. 4).
[21] Broking Affidavit at para 8.
[22] Broking Affidavit at para 9.
[23] Broking Affidavit at para 9.

January 29, 2024 (the "**Subscription Agreement**").[24] The Subscription Agreement contemplates the payment in full of the MFC Royalty payments to MFC for the Q2 2023, Q3 2023 and the stub Q4 2023 period, calculated on the basis that the Offtake Agreement is an arm's length *bona fide* contract of sale.

24. All other pre-filing claims of MFC, including those related to the alleged underpaid MFC Royalty, constitute "Excluded Liabilities" under the Subscription Agreement.[25]

PART III - ISSUES

25. This factum addresses the following issues that need to be decided by the Court:

(a) Is the Offtake Agreement an arm's length, *bona fide* contract of sale within the meaning of the Scully Mine Lease?

(b) If the Offtake Agreement is not an arm's length, *bona fide contract* of sale, what is the proper method for calculating the MFC Royalty?

(c) In the alternative, if amounts are owing to MFC, are those amounts required to be paid in connection with the proposed transaction?

PART IV - LAW AND ANALYSIS

A. The Offtake Agreement is an arm's length, *bona fide* contract of sale

(i) The factual matrix supports Tacora's position

26. The object of contractual interpretation is to ascertain the objective intentions and reasonable expectations of the parties with respect to the meaning of a contractual provision.[26] The text of an agreement must be read as a whole, in conjunction with the surrounding

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[24] Broking Affidavit at para 49.
[25] Broking Affidavit at para 50.
[26] *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 ("***Sattva***") at para 55; **see also** *Ledcor Construction Ltd v Northbridge Indemnity Insurance Co*, 2016 SCC 37 at para 65.

circumstances and factual matrix, and in a manner that achieves commercial efficacy.[27] To interpret the Scully Mine Lease in the context of this motion, it is critical to understand that Tacora had disclosed the Offtake Agreement to MFC during the negotiations of the lease.[28]

27. MFC and Tacora negotiated the Scully Mine Lease on the understanding that Cargill would be handling the marketing of Tacora's iron ore concentrate in exchange for a share of the profits, and that these profits would not form part of Tacora's Net Revenues.[29] This arrangement made sense at the time. MFC's own expert, David Persampieri, opines that offtake arrangements can help smaller producers market their products and access foreign markets.[30] In this case, Tacora had no in-house marketing or sales capability; its product was new and untested. As Mr. Broking stated on cross-examination:

> … Tacora at the time [April 2017] was a start-up with a product, a product that was not well received in the U.S. and Canadian pellet market, when Cliff's was operating the mine. So there was a significant amount of technical marketing and investment that needed to be made by Cargill in order to establish the Scully Mine or the Tacora Scully product, what we refer to as Tacora premium concentrate, in the market. So, initially, there did need to be significant investment to establish the product in the market. And we felt like that, to a contract, was a market contract.[31]

28. It is clear from the terms of the Scully Mine Lease that the parties intended for the Offtake Agreement to be considered an "arm's length, *bona fide* contract of sale" under j(i) of the Scully Mine Lease. The parties made reference in section A.(h) of the Scully Mine Lease to the timing and provisional payment mechanics under the Offtake Agreement (and the need for retroactive payment determination) – none of which could have any application if the "amount per Metric tonne" were simply calculated by reference to a standard industry publication under j(ii) of the lease dealing with non-arm's length contracts.

29. While MFC now takes the position that Tacora intentionally and in bad faith withheld the nature of its relationship with Cargill from MFC in negotiating the Scully Mine Lease, there is no evidence that supports this position.

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[27] *Sattva*, *supra* at para 55.
[28] Broking Affidavit at para 44.
[29] Affidavit of Joe Broking sworn March 28, 2024 ("**Broking Affidavit #2**") at para 28.
[30] Affidavit of David Persampieri sworn March 18, 2024, Exhibit "A", Opinion of David Persampieri dated January 4, 2024 at Q. 265, pp. 75-76.
[31] Broking Transcript, Q. 209, pp. 81-84.

(ii) There are accepted interpretations of "arm's length" and "bona fide"

30. If the Court does not accept that the parties to the Scully Mine Lease intended the Offtake Agreement to be treated as an "arm's length, *bona fide* contract of sale", then it is necessary to consider the meaning of those terms. The terms "arm's length" and "*bona fide*" are not defined in the Scully Mine but have fairly well-accepted definitions in other contexts.

31. The leading case on the concept of whether parties are at arm's length is the Supreme Court of Canada's decision in *Canada v McLarty*.[32] While the Supreme Court in *McLarty* was interpreting and applying provisions of the *Income Tax Act* (Canada),[33] the same principles have been applied to non-tax contexts and should guide the interpretation of the Scully Mine Lease.[34] In *McLarty*, the Supreme Court noted the importance of considering "all the relevant circumstances" and articulated the following criteria for determining whether an agreement was entered into on a "non-arm's length" basis:

(a) Was there a common mind which directs the bargaining for both parties to the transaction? In other words, is the person directing the bargaining for one party to the transaction is the same person directing the bargaining for the other?[35]

(b) Were the parties to the transaction acting in concert without separate interests? Were the parties are acting for their individual benefits, or for the benefit of someone else?[36]

(c) Was there *de facto* control?[37]

32. The last of these criteria, the exercise of *de facto* control by one party over the other, is the most nuanced, as there are no specific factors to consider in assessing whether *de facto* control exists. Rather, the facts must demonstrate that the decision-making power over one

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[32] *Canada v McLarty*, 2008 SCC 26 at para 62.
[33] *Income Tax Act Income Tax Act*, RSC 1985, c 1 (5th Supp), s. 251(1).
[34] See, for example, *Piikani Energy Corporation (Re)*, 2013 ABCA 293; **see also** *1085372 Ontario Limited v. Kulawick*, 2019 ONSC 2344 at para 48;
[35] *Damis Properties Inc v The Queen*, 2021 TCC 24 at para 164.
[36] *Poulin c R*, 2016 TCC 154 at para 66.
[37] *McLarty*, *supra* at para 62.

party does not lie with those who have *de jure* control over said party, being those who have the majority control of a party's board of directors (most often the majority shareholder).[38]

33. Ultimately, in determining whether parties are at arm's length, the Court should consider the following overarching question: does one party to a transaction exercise influence over the other party that precludes the other party's free participation in the transaction in an independent manner?[39]

34. In respect of the phrase "*bona fide*", it has been interpreted to mean "honestly", "genuinely" or "in good faith".[40] In *Bank of Montreal v. Wheeler*[41], referencing an earlier decision in *The City of North Bay*,[42] the Court accepted the following interpretation of *bona fide*:

> Bona fide is the key word. Reputable dictionaries, whether general (such as Oxford and Webster) or legal (such as Black), regularly define the expression in one or several of the following terms, vis. honesty, in good faith, sincere, without fraud or deceit, unfaned, without simulation or pretence, genuine. These terms connote motive and a subjective standard, thus a person may honestly believe that something is proper or right even though objectively, his belief may be quite unfounded and unreasonable... Although it is essential that a limitation be enacted or imposed honestly or with sincere intentions, it must in addition be supported in fact and reason based on the practical reality of the workaday world and of life.

35. In *Ludmer c. Ministre du Revenu national*, the Supreme Court of Canada held that the term "*bona fide*" would assist a court in determining "whether the transaction at issue was a mere sham or window dressing."[43]

36. The inclusion of the terms "arm's length" and "*bona fide*" protects MFC from the possibility that Tacora could enter into sham transactions in bad faith to avoid paying royalties that would otherwise be due to MFC – or that there could be a structural change pursuant to which Tacora is wholly acquired by a steel mill and begins selling at *de minimus* transfer prices for the benefit of the mill. Given that Tacora has paid MFC $121 million in royalties since Q1 2020 (and that the alleged underpayment is only approximately 5% of that amount), that is clearly not the case here.

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[38] *Transport ML Couture Inc v R*, 2004 FCA 23 at para 24.
[39] *Gestion Yvan Drouin Inc c R*, 2000 CanLII 407 at para 74.
[40] *Extendicare Health Services Inc v Canada (Minister of National Health & Welfare)*, 1987 CanLII 8977 (FC).
[41] *Bank of Montreal v Wheeler*, 1980 CarswellNat 654.
[42] *Re Ontario Human Rights Commission and City of North Bay*, 1977 CanLII 1253 (ON CA).
[43] *Ludco Enterprises Ltd v Canada*, 2001 SCC 62.

37. The structure of the Net Revenues definition does not ensure that Tacora will receive the price for its iron ore that maximizes the amount of royalty payable, or even that it receives the same amount as a market index for similar ore. It only requires that Tacora deal in good faith and at arm's length for the sale of iron ore in a manner not intentionally designed to defeat MFC's royalty.

(iii) The Offtake Agreement was entered into at arm's length (April 2017)

38. MFC's own expert concedes there is nothing in the pricing terms of the Offtake Agreement that demonstrates it is a non-arm's length agreement.[44] Such a determination requires an understanding of the facts and circumstances as they existed at the time. In this case, the negotiation of the Offtake Agreement in the months leading up to April 2017 is an unremarkable case of unrelated parties seeking to enter into a commercial transaction in order to advance their respective business interests.

39. During the negotiation of the Offtake Agreement, Cargill and Tacora were unaffiliated and had separate management.[45] Tacora's sole shareholder was MagGlobal LLC and that company's CEO (who was a founding director of Tacora) had ultimate decision-making authority over whether Tacora would enter into an offtake arrangement with Cargill.[46] MagGlobal LLC is a privately-held corporation, unaffiliated with Cargill.[47] Cargill had no means to exercise *de facto* control over Tacora, nor is there any evidence it even attempted to do so.

40. Accordingly, Tacora approached negotiations seeking to advance its own objective: to secure an offtake arrangement with an established offtake provider who would be able to promote and sell a fledgling brand of iron ore concentrate.[48] Among other things,

(a) Cargill and Tacora each conducted due diligence review of the other;[49]

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[44] Persampieri Transcript at Q. 113-115, p. 34.
[45] Broking Affidavit at para 19.
[46] Broking Affidavit at paras 24 and 29.
[47] Broking Affidavit at para 19.
[48] Broking Affidavit at para 22.
[49] Broking Affidavit at para 22.

(b) Cargill and Tacora performed their own analyses of transaction economics;[50]

(c) Cargill and Tacora were advised by separate counsel and advisory teams in the process;[51] and

(d) Cargill and Tacora exchanged offers and counters for a proposed offtake arrangement and profit share structure.[52]

41. In his affidavit of March 21, 2024, Mr. Broking has attached as exhibits several draft term sheets and agreements that were exchanged between the parties in the course of negotiating the offtake arrangement.[53] These draft transaction documents and the negotiations they evidence are fundamentally at odds with any allegation that the parties were acting in concert and without separate interests.

42. In the absence of any direct connection between Tacora and Cargill, MFC has put forward a theory that Tacora could have been controlled by Cargill through the involvement of a private equity fund manager named Proterra Investment Partners ("**Proterra Investment**"). At the time that the Offtake Agreement was entered into in April 2017, Tacora had obtained a commitment from Proterra Investment that it would make an investment through funds under its management. That equity funding wasn't received until July 2017, months after the Offtake Agreement was executed.[54] The only evidence of Proterra Investment's involvement with Tacora at this time is that, in anticipation of making an investment, it provided limited support to Tacora in negotiating <u>against</u> Cargill, reviewing a draft agreement and helping extract better pricing terms from Cargill. [55]

43. There is simply no evidence of a meaningful link between Cargill and Proterra Investment. While MFC's affiant, Samuel Morrow, alleges in his affidavit that in 2017, Cargill

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[50] Broking Affidavit at para 22.
[51] Broking Affidavit at para 22.
[52] See Broking Affidavit at paras 23-24 for a detailed description of the arm's length negotiations between Tacora and Cargill.
[53] Broking Affidavit at para 23; **see also** Broking Affidavit, Exhibits "D", "E", "G" to "J".
[54] Broking Affidavit at paras 26 and 29.
[55] Broking Affidavit at para 28.

held a “substantial ownership interest in Proterra Investment”,[56] he conceded on cross-examination that he has no factual basis for that statement, and he actually has no knowledge whatsoever of the relationship between Proterra Investment and Cargill.[57] Mr. Morrow ultimately admitted on cross-examination that, to his knowledge, Cargill had no ownership interest in Proterra Investment in 2017.[58] As Proterra Investment was 100% “employee owned” in April 2017, it does not appear that Cargill had any ownership interest in or control over it whatsoever.[59]

44. Proterra Investment was founded in or around January 2016. It was created to manage certain private equity investment funds that were spun out of an independently managed Cargill subsidiary (Black River Asset Management).[60] It appears that Cargill retained a passive, minority investment in certain of the funds that were spun-out.[61] Mr. Morrow admitted that “the extent of the relationship between Cargill and Proterra in 2017 was that Cargill was an investor in some funds managed by Proterra”.[62] However, Mr. Morrow admitted that he had no personal knowledge of, or details about, this investment; did not know the amount of the investment; and did not know whether the funds in which Cargill had an investment had anything to do with Tacora or mining and metals.[63]

45. Accordingly, at the time that the Offtake Agreement was entered into, the only connection between Cargill and Tacora was that Proterra Investment had committed to make an investment in Tacora – and Cargill still had passive investments in funds managed by Proterra Investment.

46. It was not until July 2017 – after the Offtake Agreement was entered into – that Proterra Investment’s financing came through. Certain funds managed by Proterra Investment were

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[56] Affidavit of Samuel Morrow sworn March 26, 2024 (“**Morrow Affidavit**”) at para 30.
[57] Morrow Transcript, Qs. 138, 175; pp. 41, 55.
[58] Morrow Transcript, Q. 179 et seq., p. 57.
[59] Morrow Transcript Q.162 - Q170, Q175, pp. 51-53, 55.
[60] Broking Affidavit at para 27.
[61] Broking Transcript, Exhibit 2.
[62] Morrow Transcript, Q. 196, p. 61.
[63] Morrow Transcript, Qs. 197-200, pp. 61-62; **see also** Broking Transcript, Qs. 69-70, p. 71, where Mr. Broking similarly states that he has no knowledge of such relationship.

ultimately invested in a company ("**Proterra Cooperatif**") that held shares in another company ("**Proterra Holdings**") that became the majority shareholder of Tacora at that time. MagGlobal LLC retained a minority interest. While MFC's witness, Mr. Morrow, swore in his affidavit that "Cargill maintains management and advisory connections with respect to those funds", he conceded on cross-examination that he doesn't actually have any such knowledge of that relationship.[64]

(iv) Amendments to the Offtake Were Negotiated at Arm's Length and Are Not Material to this Dispute (November 2018 and March 2020)

47. Since being executed on April 5, 2017, the Offtake Agreement has been restated once and amended from time to time. Two amendments are of note.

48. The first amendment was in November 2018. It extended the term of the Offtake Agreement from 2023 to 2033 but made no substantive change to the Purchase Price structure.[65] At the time it was approved by Tacora's Board of Directors in October of 2018, Cargill had no interest in Tacora. No one from Cargill sat on Tacora's Board.[66] There is no evidence that Cargill was involved in any way with Tacora's decision making.

49. In conjunction with the extension of the term of the Offtake Agreement, Tacora received US$20 million in equity financing from a Cargill entity and Cargill acquired an indirect interest in Tacora.[67] Specifically, Cargill acquired a membership interest in Proterra Cooperatif, which gave it an approximately 10% interest in Tacora on a look-through basis.[68] November 2018 was the first time that Cargill acquired a direct or indirect interest in Tacora.

50. Cargill did not, and does not, exercise control of Tacora through this 2018 interest in the Proterra holding companies. Beyond the fact that its interest has always fallen substantially short of a majority interest, it is also not allowed to participate in Proterra offtake discussions. The member and contribution agreement of Proterra Cooperatif states as follows:

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[64] Morrow Transcript, Q. 221, p. 68.
[65] Broking Affidavit at para 31(c).
[66] Broking Affidavit at paras 38 and 39.
[67] Broking Affidavit at para 36.
[68] Broking Affidavit at para 37.

> Cargill agrees that, for so long as Cargill or an Affiliate (as defined below) of Cargill is negotiating an off-take or similar agreement with Tacora or such an agreement is binding as between Cargill (or an Affiliate of Cargill) and Tacora, its nominee on the board of managing directors of [Proterra Cooperatif] and the board of managing directors of [Proterra Holding] must recuse himself or herself from, and will not be entitled to vote or otherwise participate in any board meetings of [Proterra Cooperatif] or [Proterra Holdings] in respect of (i) off-take, sales or marketing of Tacora products …[69] [Emphasis added]

In other words, when Tacora's majority shareholder deliberates about Tacora's Offtake Agreement, Cargill is not allowed to participate in the discussion.

51. The second notable amendment to the Offtake Agreement was in March 2020. This amendment extended the term of the agreement from 2033 to "life of mine".[70] At the time that Tacora elected to proceed with the second amendment, its ownership remained as described above. A Cargill employee, Phil Mulvihill, was on Tacora's Board as one of Proterra Holding's representatives at the time. However, he abstained from voting on offtake-related matters.[71] At the time the 2020 amendment was approved, Mr. Mulvihill was only one director of seven.[72]

52. In the case of both amendments to the Offtake Agreement, they were negotiated at arm's length. Tacora and Cargill engaged in back-and-forth regarding the length of the prospective term extension, Cargill's consideration, and other key terms.[73] In both cases, the amendment was brought to Tacora's Board for review and approval.[74] Again, there is no evidence that the Board was controlled by Cargill.

53. The substantive impact of the amendments was an extension of the Offtake Agreement's term. However, the extensions had no impact on the pre-filing amounts now in dispute between the parties.[75] Neither of the two amendments made materials changes to the Purchase Price and did not affect the amount of royalties ultimately received by MFC.[76]

54. Mr. Broking's evidence is that the extension of the Offtake Agreement is the principal reason that Tacora now considers the Offtake Agreement to be an off-market agreement that

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[69] Morrow Affidavit, Exhibit "XX", s. 1.7.
[70] Broking Affidavit at para 32.
[71] Broking Affidavit at para 38.
[72] Broking Transcript, Exhibit 9.
[73] Broking Affidavit at para 33.
[74] Broking Affidavit at para 33.
[75] Broking Affidavit, Exhibit "K", s. 35.
[76] Broking Affidavit at para 30.

inhibits the company's ability to raise capital.[77] Tacora had originally hoped to renegotiate the terms of the Offtake Agreement at the end of its term. However, the financial situation of the company was hurt by delays in resuming mine production and ramp-up, so the 2018 and 2020 amendments were entered into for a valid commercial purpose of obtaining working capital and equity financing.[78] Tacora negotiated the amendments in its own self-interest.

55. MFC's own expert states that he is aware of numerous cases where a valid offtake arrangement became unfavourable over time:

> Q. Okay. So it is possible for a producer to enter into an offtake agreement for valid reasons, and have it ultimately turn out to be a bad deal. That can happen. Right?
>
> A. Yes.
>
> Q. Right. And it may initially appear to be a good deal, but becomes less attractive over time. That can happen as well. Right?
>
> A. Yes. And, unfortunately, I am aware of a lot of those […].[79]

56. An uneconomic deal is not sufficient to prove a non-arm's length transaction, and the fact that years later a company views a prior deal as off-market and uneconomic is of little, if any, value in assessing whether the agreement was *bona fide* and entered into at arm's length.

(v) Cargill and Tacora are arm's length parties

57. In an attempt to bolster its claim, MFC and its affiant, Mr. Morrow, reference certain financing and other arrangements that Tacora and Cargill have entered into in the time since the Offtake Agreement was entered into. Control over an entity cannot be retroactively prescribed and these later arrangements are wholly irrelevant to whether the Offtake Agreement was an "arm's length, *bona fide* contract of sale" when it was executed. The question this Court must answer is whether the Offtake Agreement is an arm's length, *bona fide* agreement and not whether Tacora and Cargill have ever been not at arm's length.

58. Regardless, Tacora and Cargill have always been at arm's length. None of the later arrangements have resulted in Cargill exercising control over, or acting in concert with, Tacora.

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[77] Broking Transcript, Qs. 209-210, pp. 81-84.
[78] Broking Affidavit at paras 32 and 36; **see also** Broking Transcript at Q. 209, p. 83.
[79] Persampieri Transcript at Qs. 267-268, p. 76.

These arrangements have included Cargill acquiring non-voting preferred shares and warrants and becoming a creditor of Tacora.[80] Beginning in 2023, Cargill also provided two employees to Tacora to help with operational matters and capital expenditure planning.[81] That said, Cargill's actual influence over governance and management has always been constrained:

(a) Cargill has never directly held outstanding common shares in Tacora and has never converted its preferred shares nor exercised its warrants.[82].

(b) Cargill's indirect ownership of Tacora on a look-through basis has never exceeded around 11%.[83]

(c) Cargill has never had more than one representative on the Tacora Board of Directors and has never exercised control over the board.[84]

(d) Cargill has never held the majority of Tacora's debt.[85]

59. The only first-hand knowledge of the circumstances in which the Offtake Agreement and any other agreements or arrangements with Cargill comes from Mr. Broking, who stated in his cross-examination that these agreements were all negotiated at arm's length with separate counsel advising Cargill and Tacora during the negotiations.[86]

60. The fact that Tacora and Cargill do not act with common mind or in concert is most obviously evidenced by the fact that the two entities are presently adverse in interest in Tacora's *CCAA* Proceedings.

B. MFC Claimed Amount is Overstated under the "Non-Arm's Length" Method

61. In the alternative, to the extent that it is determined that the non-arm's length calculation method of Net Revenues should be used, which is denied by Tacora, the amounts claimed by MFC are overstated.

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[80] Broking Affidavit at paras 40-41.
[81] Broking Transcript at Q. 240, pp. 95-96.
[82] Broking Affidavit at para 34.
[83] Broking Affidavit at para 37.
[84] Broking Affidavit at paras 34 and 38-39.
[85] Broking Affidavit at para 34.
[86] Broking Transcript at Qs. 356-360, pp. 150-151.

(i) MFC's failure to credit the Knoll Lake Royalty

62. Section 1(d) of the Scully Mine Lease states that Tacora shall have credit for any royalty payments made under the "Nalco Lease" when it pays the MFC Royalty.[87] These royalty payments are referred as the "Knoll Lake Royalty" and Tacora pays this royalty every quarter.[88]

63. MFC's expert admitted in cross-examination that Tacora's payments of the Knoll Lake Royalty should have been deducted from his calculation.[89] He further admitted that he believed Tacora's calculation of this deduction to be correct.[90] Accordingly, Tacora and MFC's expert agree that Tacora must receive credit for the Knoll Lake Royalty and that the amount allegedly owed by Tacora ($7,295,293.54) should be reduced by $2,596,150.

(ii) MFC's failure to deduct Deductible Expenses

64. Net Revenues are generally defined as gross sales less associated costs. In defining "Net Revenues" in subparagraph (j), the Scully Mine Lease therefore makes reference to "Deductible Expenses". Deductible Expenses is defined as the reasonable *bona fide* vessel loading and dock handling costs up to an adjusted cap of $2.50 per gross ton.[91] These are amounts paid to third parties as costs of sales.[92]

65. Subparagraph j(ii) of the Net Revenues definition, which sets out the adjustment for a non-arm's length contract of sale, does not mention Deductible Expenses. This is because both subparagraphs of the "Net Revenues" definition must be read together for the proper meaning to be conveyed.

66. Read cohesively, subparagraph j(i) of the "Net Revenues" definition establishes the principal method for calculating Net Revenues: "amount per Metric Tonne" less Deductible Expenses less government-imposed royalties. Subparagraph j(ii) of the definition then specifies that when the transaction is not an arm's length *bona fide* contract of sale the "amount per

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[87] Scully Mine Lease, s. A(1)(d).
[88] Broking Affidavit #2 at para 13.
[89] Persampieri Transcript, Q. 159, pp. 46-47.
[90] Persampieri Transcript, Q. 160, p. 47.
[91] Scully Mine Lease, definition (c).
[92] Persampieri Transcript, Qs. 235- 239, pp. 67-68.

Metric Tonne" will be replaced by a substitute metric determined with reference to market index Subparagraph j(ii) does not operate on its own and the deductions in subparagraph j(i) are to still be applied. The following factors support a cohesive reading of paragraph (j):

(a) Paragraph j(i) and j(ii) are separated by an "and" instead of an "or", requiring the two to be read together;

(b) If j(ii) is used in isolation then no deduction is being made at all under its calculation method, yet the defined term "Net Revenues" (and not "Gross Revenues") implies that certain costs are to be deducted; and

(c) Tacora would incur port-related costs and government-imposed royalties regardless of whether the sale of its iron ore concentrate was arm's length or not.

67. A contract must be read as a whole, and it is not sensible or appropriate to look at a sub-paragraph of a definition in isolation.[93] The sub-paragraphs of the Net Revenues definition operate together, and Deductible Expenses are to be deducted regardless of whether or not the contract was entered into at arm's length. The deduction of the Deductible Expenses decreases the amount allegedly owed by Tacora by $2,397,189.85.[94]

(iii) MFC's Expert Makes Insufficient Adjustments to Index Rates

68. The non-arm's length calculation method set out at subparagraph j(ii) is open-ended. It requires the parties to calculate the value of the Iron Ore Products "by reference to a standard industry publication" on an "f.o.b. the Port basis" but is otherwise silent on the details of the calculation. The subsection therefore requires two different variables to be determined: 1) the market price of the iron ore and 2) the costs of freight (f.o.b. the Port). However, the inclusion of the words "by reference" gives the parties considerable latitude to tailor the standard industry publication to the facts in order to best approximate the market value of Tacora's products.

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[93] *Sattva*, *supra* at para 47.
[94] Broking Affidavit #2 at para 16.

69. The parties agree that Platts 65% is an appropriate index to reference for market price and that standard published indices (Platts or Baltic Exchange) are appropriate indices to reference for freight cost. The parties further agree that adjustments need to be made to these index values in order to take into account the circumstances in which Tacora is selling.

70. For instance, MFC's expert adjusts the price of the Platts 65% up with a Fe adjustment to account for the fact that Tacora offers a high-grade iron ore product. Tacora does not disagree with this adjustment. However, if the index price is adjusted upward for the strengths of Tacora's products, it must also be adjusted downward for its deficiencies. While Tacora offers a premium product, it has deficiencies that harm its sales price. For instance, the particle size distribution of Tacora's iron ore concentrate is finer than proper sinter feed but courser than pellet feed or filter cake, which makes it less attractive to some purchasers.[95]

71. More broadly, Tacora has only been selling its iron ore concentrate since 2019 and does not have the same trusted brand recognition of other products.[96] As MFC's expert explains, the Platts 65% index primarily uses the sales price of Vale contracts to determine the market price.[97] Vale is one of the largest producers of iron ore in the world and its bargaining power would be entirely different from that of Tacora, even with Cargill's marketing assistance.

72. Tacora can precisely quantify the impact of negative marketing attributes as it knows the price at which Cargill has sold the product to third party buyers. There is no allegation that Cargill is doing anything other than trying to maximize the sales price to third parties. Yet, the price that Cargill has been able to obtain from the sale of Tacora's iron ore concentrate is typically below the Platts 65% index price, [redacted]

[redacted].[98]

73. Accordingly, if the only adjustment applied to the Platts 65% index is an upward adjustment for Fe content then that the resulting market price proxy does not actually match the

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[95] Broking Affidavit #2 at para 19(b).
[96] Broking Affidavit #2 at para 19(c).
[97] Persampieri Transcript at Q. 217, pp. 86-87.
[98] Broking Affidavit #2 at para 20.

known market price. The proxy fails at its sole purpose. This is not the fault of MFC's expert, Mr. Persampieri – who was not provided with access to the historic sales data needed to complete such an analysis[99] – but it needs to be corrected for a proper subparagraph j(ii) calculation. Adjustments to the index price to match Tacora's circumstances (which again both parties have done in their analysis) are consistent with the language of subparagraph j(ii), which requires the price to be determined "by reference" to an index but does not require the exact index figure be used.

74. The objective of subparagraph j(ii) is to arrive at an accurate estimate of the market price. Mr. Broking, who has reviewed the sales data and understands the strengths and limitations of Tacora's product, states that the most appropriate discount to apply is [redacted] and the Court should require such a discount be made.[100]

75. Likewise, an additional deduction needs to be made to MFC's expert's freight cost calculations. Mr. Persampieri arrived at the freight cost by using an index rate for the cost of shipping between Brazil and China and then adding a 24% premium to account for the Quebec to Brazil portion. He borrows the 24% premium from Tacora, after Tacora's Chief Accounting Officer – in the context of a preliminary exercise to compare the two different calculation methods – informed MFC that 24% was an appropriate estimate of Quebec to Brazil costs.[101]

76. Tacora agrees that, for most of the year, 24% is an appropriate estimate. However, it does not account for extra costs incurred in the winter months due the dangers and costs associated with maritime shipping in the North Atlantic in temperatures below freezing.[102] This "Winter Ice Class Premium" is a freight cost and should be incorporated into the subparagraph j(ii) estimate to arrive at a more accurate proxy of the true freight cost rates. Here again, Mr. Persampieri was not provided with the data needed to arrive at a more accurate estimate.[103]

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[99] Persampieri Transcript at Qs. 191-192, pp. 56-57.
[100] Broking Affidavit #2 at para 20.
[101] Morrow Affidavit, Exhibit "II".
[102] Broking Affidavit #2 at para 23.
[103] Persampieri Transcript at Qs. 184-187, pp. 54-55.

77. Mr. Broking in his affidavit states that an accurate estimate is [redacted] [redacted][104] This Court should require such an adjustment be made.

(iv) Marketing Costs Should be Deducted

78. As MFC's expert explains, the typical case where a non-arm's length provision is employed is when the steel mill purchasing the iron ore owns the mine and can use below-market transfer pricing.[105] In those circumstances, there would be no marketing costs: the related steel mill would receive the iron ore without need to identify prospective buyers, promote the product brand, and arrange sales. Historically (pre-Tacora), this was the exact structure of the Scully Mine operations.[106] That is no longer the case.

79. As it stands, Tacora cannot sell its products without the use of an intermediary, as it has no internal capacity to sell its products.[107] By definition, that intermediary will buy the product from Tacora for less than it expects to be able to sell into the market. Accordingly, the only proceeds that Tacora can expect to realize for its products will be less than the market index. In determining the price per Metric Tonne under j(ii) of the Scully Mine Lease "by reference to a standard industry publication", the parties must take into account the fact that the only price that Tacora can realize is at a discount to the market index. Yet, here again, MFC did not provide its expert with the data comparing the index price to the realized sales prices since Q1 2020.

80. MFC and Tacora specifically constructed the MFC Royalty knowing that Cargill would be the offtaker and would be handling the marketing of Tacora's iron ore concentrate in exchange for a share of the profits. MFC was aware that an offtaker or marketing agent was necessary to the process of generating any revenue and that Cargill's portion of the profits would not be included in the revenue received by Tacora.[108] MFC did not object to this arrangement for years.

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[104] Broking Affidavit #2 at para 24.
[105] Persampieri Transcript at Qs. 250 and 253, pp. 71-73.
[106] Persampieri Transcript at Q. 256, pp. 73-74.
[107] Broking Affidavit at para 12.
[108] Broking Affidavit #2 at para 28.

81. By now demanding that the non-arm's length calculation method be used and refusing to appropriately adjust the index price, MFC is asking that this Court mandate a calculation method that was not intended to be used in the context of a non-arm's length offtaker or marketing agent. MFC is asking the Court to use a price per Metric Tonne that Tacora could possibly realize in any arm's length sale.

82. The appropriate response in calculating a price per Metric Tonne is to reflect the difference between the market index and what Tacora could expect to realize based upon sales through an intermediary. In this case, this amount is effectively equivalent to the difference between the price at which Tacora sells to Cargill and the price at which Cargill sells to third parties.

83. In the alternative, Tacora proposes that the marketing deduction be based off the cost structure of the offtake arrangement with Javelin, its proposed new marketing agent.

C. Any Incremental Amounts Owed to MFC are not Required to be Paid

84. In the alternative, even if amounts are owed to MFC, such amounts do not need to be paid in connection the contemplated transaction with the Investors, and this Court should authorize Tacora and the Investors to close the transactions without payment of any additional amounts. Cure costs are being paid in connection with the proposed transaction to provide creditors with similar treatment as they would receive in an asset sale. However, the Scully Mine Lease is not being assigned, and, accordingly, the Court is not required to engage with section 11.3 of the CCAA which provides that an agreement may only be assigned if all "monetary defaults" (commonly referred to as "cure costs") in relation to the agreement are satisfied.[109] Cure costs amounts are not necessarily payable under a RVO transaction.

85. In *Acerus*, the Court approved an RVO transaction by which a subscription agreement did not contemplate the payment of cure costs for pre-filing arrears under the retained contracts. The Court noted that the transaction permitted various stakeholders to continue to supply the

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[109] *CCAA*, s. 11.3(1).

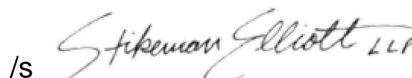
debtor post-closing and that none of the applicants' creditors would be "materially disadvantaged" relative to any other viable alternative.[110] Similarly, in *Just Energy*, the Court granted an RVO transaction by which a Transaction Agreement did not require the payment of cure costs to parties with Retained Contracts.[111]

86. MFC is receiving fair and equitable treatment under the proposed transaction even if the retroactive amounts dating back Q1 2020 are not paid. MFC will receive (a) their pre-filing arrears as calculated in accordance with arm's length method consistent with past practice, (b) payment of their royalty on a go-forward basis, and (c) a well-capitalized Tacora positioned to expand production which would significantly increase the royalty amounts payable to MFC in the future. There is no viable alternative where MFC receives the retroactive amounts they claim to be owing. There also is no viable alternative where MFC receives the benefits that accrue to them as result of the proposed transaction. Therefore, MFC will not be "materially disadvantaged" by not receiving the incremental amounts. Like most of Tacora's stakeholders, the proposed transaction provides enormous benefits to MFC. Accordingly, regardless of any additional amounts owed to MFC, the Court should authorize the parties to complete the transactions without payments to MFC beyond the agreed pre-filing arrears calculated in accordance with the arm's length method consistent with past practice.

PART V - ORDER SOUGHT

87. Tacora respectfully requests that this Court grant the declaratory relief sought and costs against MFC on a substantial indemnity basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of April, 2024.

/s 

STIKEMAN ELLIOTT LLP
Counsel for the Applicant

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[110] *Acerus Pharmaceuticals Corporation (Re)*, 2023 ONSC 3314 ("***Acerus***") at para 31.
[111] *Just Energy (Re)*, Approval and Vesting Order dated November 3, 2022 (ON SC); **see also** Affidavit of Emily Peplowski sworn September 15, 2022, Exhibit "A", Transaction Agreement dated August 4, 2022.

SCHEDULE “A”
LIST OF AUTHORITIES

1. *1085372 Ontario Limited v Kulawick*, 2019 ONSC 2344.

2. *9044 2807 Québec Inc v Canada*, 2004 FCA 23.

3. *Acerus Pharmaceuticals Corporation (Re)*, 2023 ONSC 3314

4. *Bank of Montreal v Wheeler*, 1980 CarswellNat 654.

5. *Canada v McLarty*, 2008 SCC 26.

6. *Canada v Remai*, 2009 FCA 340.

7. *Damis Properties Inc v The Queen*, 2021 TCC 24.

8. *Extendicare Health Services Inc v Canada (Minister of National Health & Welfare)*, 1987 CanLII 8977 (FC).

9. *Gestion Yvan Drouin Inc c R*, 2000 CanLII 407 (TCC).

10. *Ledcor Construction Ltd v Northbridge Indemnity Insurance Co*, 2016 SCC 37.

11. *Ludco Enterprises Ltd v Canada*, 2001 SCC 62.

12. *Peter Cundill & Associates Ltd v Canada*, 1991 CanLII 14262 (FCA).

13. *Piikani Energy Corporation (Re)*, 2013 ABCA 293.

14. *Poulin c R*, 2016 TCC 154.

15. *Re Ontario Human Rights Commission and City of North Bay*, 1977 CanLII 1253 (ON CA).

Court Materials

16. *Just Energy (Re)*, Approval and Vesting Order dated November 3, 2022 (ON SC)

17. *Just Energy (Re),* Affidavit of Emily Paplawski sworn September 15, 2022, Exhibit “A”, Transaction Agreement dated August 4, 2022

SCHEDULE "B"
RELEVANT STATUTES

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

Meaning of related and dealing at arm's length

2(2) For the purpose of this Act, section 4 of the *Bankruptcy and Insolvency Act* applies for the purpose of determining whether a person is related to or dealing at arm's length with a debtor company.

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.

***Bankruptcy and Insolvency Act*, RSC 1985, c B-3**

Question of fact

4(4) It is a question of fact whether persons not related to one another were at a particular time dealing with each other at arm's length.

***Income Tax Act*, RSC 1985, c 1 (5th Supp)**

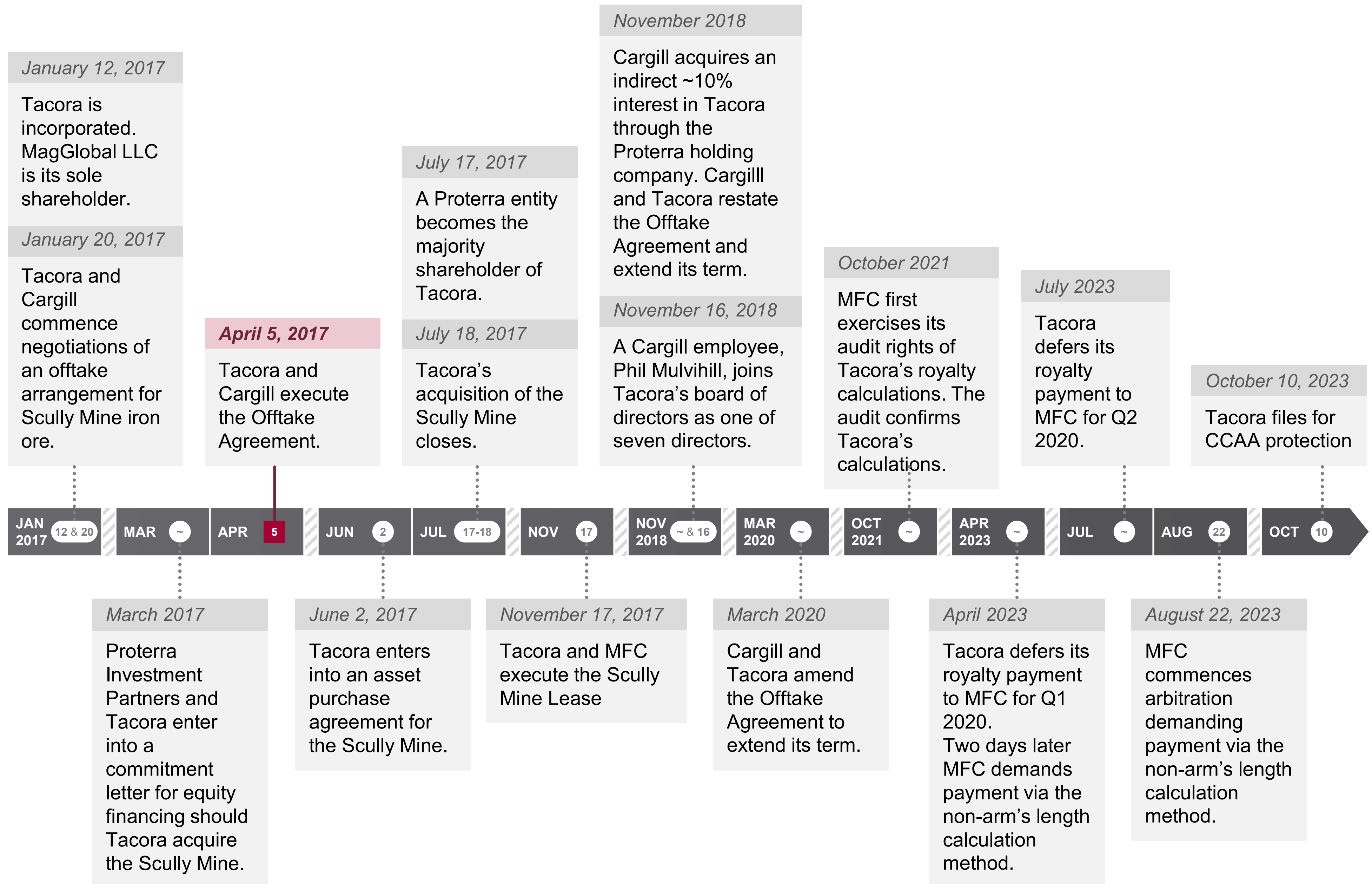
251(1) For the purposes of this Act,

(a) related persons shall be deemed not to deal with each other at arm's length;

(b) a taxpayer and a personal trust (other than a trust described in any of paragraphs (a) to (e.1) of the definition **trust** in subsection 108(1)) are deemed not to deal with each other at arm's length if the taxpayer, or any person not dealing at arm's length with the taxpayer, would be beneficially interested in the trust if subsection 248(25) were read without reference to subclauses 248(25)(b)(iii)(A)(II) to (IV); and

(c) in any other case, it is a question of fact whether persons not related to each other are, at a particular time, dealing with each other at arm's length.

Appendix "A": Timeline of Relevant Events



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

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