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 1128349 B.C. LTD.
(RE: MFC DISPUTE)

April 12, 2024

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TO: THE SERVICE LIST

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PART I – OVERVIEW[1]

Summary of Argument

1. 1128349 B.C. Ltd ("**1128349**") is Tacora's landlord by virtue of the Wabush Lease. Tacora mines non-renewable minerals from 1128349's land for which 1128349 receives rent in the form of the Royalty.

2. The crux of this case is whether Tacora has met its contractual guarantee under the Wabush Lease to pay the Royalty based upon fair market value transactions in respect of its sales of Iron Ore Products under the Offtake Agreement to Cargill Intl.

3. In addition to Tacora's strategic and outright refusal to pay the Royalty at all in respect of $15,443,190.80 in unpaid Pre-Filing Royalty, 1128349 argues that Tacora has defaulted on its foundational guarantee not to erode the Royalty by providing Cargill Intl, its effective joint-venture partner, a non-arm's length discount on its purchase of Iron Ore Products.

4. The operation of clause (j)(ii) of the Wabush Lease arising from Tacora's and Cargill Intl's non-arm's length transactions since 2019 renders clause (j)(i) of the Wabush Lease, which refers to bona fide arm's length contracts, inoperable. In the result, Tacora's sale of Iron Ore Products to Cargill Intl have always been non-arm's length transactions, which engages clause (j)(ii) of the Wabush Lease.

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[1] Excepting as specifically defined herein, capitalized terms shall have the meanings ascribed thereto in the Affidavit of Samuel Morrow sworn March 26, 2024 (the "Morrow Affidavit") and the Affidavits of Joe Broking sworn October 9, 2023 (the "First Broking Affidavit"), February 2, 2024 (the "Fourth Broking Affidavit"), March 21, 2024 (the "Seventh Broking Affidavit"), and March 26, 2024 (the "Eighth Broking Affidavit") filed herein, as applicable.

5. Tacora and the Cargill Entities are non-arm's length because of:

(a) The Cargill Entities' significant influence over Tacora;

(b) Tacora's bonds of dependence with the Cargill Entities'; and/or,

(c) Tacora's related party status with Cargill Inc., which it finally admitted in 2022.

6. This influence, dependence, and related party status is indicated by:

(a) Cargill Inc's effective ownership in Tacora since inception;

(b) Cargill Inc's influence over Tacora, whether through

(i) Governance;

(ii) Management;

(iii) The Cargill Entities' status as effective joint-venture partners, with the Cargill Entities acting as Tacora's marketing arm in exchange for profit sharing from their common project at the Scully Mine;

(c) Cargill Inc's actual ownership interest in Tacora since 2018, which predated any payments of the Royalty to 1128349;

(d) Cargill Inc.'s ownership interest by virtue of its convertible preferred shares equity to 1.5% of Tacora's common shares;

(e) Tacora's admission that it is related to Cargill Inc under IFRS;

(f) Cargill Intl's ownership interest by virtue of warrants entitling it to 35% of Tacora's common shares;

(g) The Cargill Entities' status as financier to Tacora since inception;

(h) Thirteen amendments to the Offtake Agreement in a contracted period, including price protection arrangements, which the Wabush Lease signifies as connoting non-arm's length dealings; and

(i) Various Cargill supports to Tacora pre-CCAA, before their relationship began to deteriorate in these proceedings.

7. Independent expert evidence, which Tacora only challenges through self-serving evidence of its Chief Executive Officer, values the erosion of the Royalty to be $4,699,103.46, which is properly payable to 1128349 under the clause (j)(ii) of the Wabush Lease.

Introduction

8. 1128349 files this factum in objection to Tacora's motion seeking a declaration that Tacora is not required to pay 1128349's Pre-Filing Royalty.

9. The Pre-Filing Royalty which is payable to 1128349 is comprised of:

(a) unpaid Royalty amounts admitted by Tacora ($15,443,190.80), and

(b) $4,699,103.46 representing Royalty for the period Q1 2020 – Q3 2023 which Tacora has underpaid by failing to calculate the Royalty on the basis of non-arm's length Net Revenues.

10. 1128349 also claims an unquantified amount of underpaid Royalty from Q4 2023 to date.

11. Tacora's non-arm's length relationship with Cargill is evidenced by:

(a) the Cargill Entities' ownership interest in Tacora,

(b) Cargill Inc.'s representation on the Board of Directors of Tacora,

(c) the Tacora-Cargill Inc. "related party" classification under IFRS,

(d) Cargill Inc.'s employees serving as "technical and business advisors to Tacora in addition to serving as the acting general manager of operations of Tacora" for no compensation,

(e) Cargill's financing of and price protection measures with Tacora, and,

(f) Tacora's and the Cargill Entities' common project in exploiting the Scully Mine, particularly the Cargill Entities' role as promoter and marketer in exchange for profit sharing, which amounts to a discount on the purchase price of Iron Ore Products to 1128349's detriment in calculating the Royalty.

12. Tacora's sales of its premium iron ore concentrate to Cargill Intl under the Offtake Agreement constitute non-arm's length transactions, requiring the Royalty to be calculated using

the non-arm's length definition of Net Revenues in clause (j)(ii) of the Wabush Lease. Tacora failed to calculate the Royalty on this basis.

13. 1128349 asks this Honourable Court to grant an order:

(a) dismissing Tacora's motion seeking a declaration that Tacora is not required to pay the Pre-Filing Royalty;

(b) requiring that Tacora pay the Pre-Filing Royalty, as well as the unquantified Royalty amount from Q4, 2003 to date;

(c) requiring Tacora to pay 1128349's costs of this motion on a substantial indemnity basis; and

(d) for such further and other relief as this Honourable Court deems just.

PART II – FACTS

Wabush Lease and Royalty

14. Tacora operates an iron ore mine, the Scully Mine, located at Wabush, Newfoundland, and Labrador, pursuant to rights granted to it as lessee under the Amendment and Restatement of Consolidation of Mining Leases, 2017, made between 0778539 B.C. Ltd. and Tacora (the "**Wabush Lease**").[2]

15. Tacora, as lessee under the Wabush Lease, is obliged to pay the "Earned Royalties" which are payable thereunder to 1128349 (the "**Royalty**").[3]

16. The Royalty is payable quarterly in "an amount equal to seven percent (7%) of the Net Revenues from Iron Ore Products produced or derived from the Demised Premises".[4]

17. The term "Iron Ore Products" is defined as follows:

> *(e) "Iron Ore Products" shall mean and include iron ore, crude iron bearing material including Iron Ore Concentrate, and any other metal, material, or composition produced from iron ore or crude iron bearing material or otherwise.*[5]

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[2] Morrow Affidavit, Exhibit "E".

[3] Morrow Affidavit, Exhibit "E", clause A(1).

[4] Morrow Affidavit, Exhibit "E", clause A(1).

[5] Morrow Affidavit, Exhibit "E", clause (e).

18. “Net Revenues" is defined alternatively in relation to arm’s length and non-arm’s length sales of Iron Ore Products:

> (a) for sales of Iron Ore Products *“under an arm's length, bona fide contract of sale",* Net Revenues are to be based on the sales proceeds, that is:
>
> > *the amount per Metric Ton (weight determined by vessel draft survey) actually received by or otherwise payable or credited to the account of the Lessee and its affiliates calculated f.o.b. Pointe Noire Québec or such other applicable port on the St. Lawrence seaway from which such Iron Ore Products is shipped to the Lessee's customers (“Port”)…*[6]
>
> (b) for sales of Iron Ore Products “in a non-arm’s length transaction”, Net Revenues are to be computed according to published industry-standard pricing, that is:
>
> > *… the amount per Metric Ton 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 or purchased at a specific point of delivery (“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 of equivalent types are being sold and purchased, calculated at f.o.b. Port.*[7]

19. 1128349's Royalty constitutes an interest in the Wabush Lease lands and minerals.[8]

20. Clause C(4) entitles 1128349 as lessor to terminate the Wabush Lease upon 60 days’ notice in the event of a default in payment of the Royalty by a lessee such as Tacora. On August 25, 2023, 1128349 delivered to Tacora a 60-day notice of termination of the Wabush Lease,[9] which termination was stayed by the Initial Order in this proceeding.

21. Had Tacora not been granted the Initial Order on October 10, 2023, the Wabush Lease would have terminated on October 25, 2023.

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[6] Morrow Affidavit, Exhibit “E”, clause (j)(i).

[7] Morrow Affidavit, Exhibit “E”, clause (j)(ii).

[8] Morrow Affidavit, Exhibit “E”, clause A(12).

[9] Morrow Affidavit, para. 25.

Tacora's Non-Payment of Royalty in Q2, Q3 and Q4, 2023

22. Tacora failed to pay the second quarter 2023 Royalty, which Tacora stated to be in the amount of CDN $5,865,004.23.[10]

23. Tacora failed to pay the third quarter 2023 Royalty, which Tacora stated to be in the amount of CDN $7,962,729.76.[11]

24. Tacora failed to pay the Royalty for October 1-9, 2023, which it stated to be in the amount of $1,614,456.81.[12]

25. Tacora confirms in its Factum that it does not dispute the Royalty amounts it calculated for Q2, 2023 and Q3, 2023 and the stub period of Q4, 2023.[13]

Cargill Offtake Agreement Revenues are the Basis for Tacora's Royalty Calculation

26. Tacora's CEO Joe Broking confirmed that the intent of clause (j) of the Wabush Lease is that the Royalty is to be calculated and paid based on the market value of Tacora's iron ore concentrate.[14]

27. Tacora first paid Royalty to 1128349 following attainment of commercial production from the Scully Mine in 2019.[15]

28. At and since that time, Tacora has sold 100% of the iron ore it has produced under the November 9, 2018 Iron Ore Sale and Purchase Contract made between Tacora and Cargill International Trading Pte Ltd. ("**Cargill Intl**"). That Contract is described on its face page as "RESTATEMENT 1 DATED 30TH OCTOBER 2018 SHOWING ALL AMENDMENTS SINCE 5TH APRIL 2017". It has been amended and supplemented from time to time, including via 13 side letters to change the pricing mechanism under the Offtake Agreement to mitigate the risk to

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[10] Morrow Affidavit, para. 25.

[11] Morrow Affidavit, para. 35 and Exhibit "OO".

[12] Morrow Affidavit, para. 38 and Exhibit "RR".

[13] Tacora Factum, paras. 22 and 23 ("**Tacora Factum**").

[14] Transcript of Cross-Examination of Joe Broking held on April 4, 2024 ("Broking Cross-Examination) at Q. 342.

[15] Morrow Affidavit, paras. 4 and 13.

Tacora of iron ore price fluctuations.[16] This Contract, together with its side letter amendments, will be referred to herein as the "Offtake Agreement".

29. Cargill Intl is a wholly-owned subsidiary of Cargill Inc., a global commodities enterprise. Cargill Intl and Cargill Inc. will be sometimes hereinafter referred to collectively as the "Cargill Entities".

Cargill-Tacora Non-Arm's Length Relationship

30. The genesis of Cargill Inc.'s relationship with Tacora is its 2011 business dealings with Magnetation Inc., an iron ore company majority owned by Larry Lehtinen, who would become Tacora's CEO.[17]

31. MagGlobal LLC, an affiliate of Magnetation LLC and a company also controlled by Larry Lehtinen, incorporated MagGlobal CA Inc. in January, 2017 for the purpose of submitting a bid for the Scully Mine. MagGlobal CA Inc. later changed its name to Tacora.[18]

Cargill Inc.'s passive investment in Proterra at the time of the Scully Mine acquisition

32. At the time of Tacora's acquisition of the Scully Mine in July 2017, Tacora's majority shareholder was Proterra M&M MGCA B.V. ("**Proterra Holding**").[19]

33. Proterra Holding's sole shareholder was in July, 2017, as it is now, Proterra M&M MGCA Cooperatief ("**Proterra Cooperatief**").[20]

34. Tacora undertook an initial public offering in May of 2018, which was later withdrawn.[21] The disclosure language in the prospectus described Cargill Inc.'s history with and continuing investment in funds managed by Proterra Investment Partners:

> *Proterra is indirectly controlled and majority-owned by funds managed by an entity managed by Proterra Investment Partners LP, an investment advisor ("Proterra Investment Partners"). Proterra Investment Partners was formed as an independent investment firm in connection with a spin-off from Cargill effective in January 2016. Torben Thorsden, one of our directors, is a partner at Proterra*

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[16] Fourth Broking Affidavit, para. 63. As to the audits referenced in paragraphs 5 and 20 of the Tacora Factum, Mr. Broking confirmed that the audit process was limited to Tacora's calculations. See Broking Cross-Examination at Q. 177.

[17] Broking Cross-Examination at Qs. 142 and 146.

[18] Seventh Broking Affidavit, paras. 19-20 and Confidential Exhibit No. 8 to Broking Cross-Examination.

[19] Seventh Broking Affidavit, para. 29; Exhibit "B" to the First Broking Affidavit.

[20] Seventh Broking Affidavit, para. 35.

[21] Broking Cross-Examination, Qs. 66 and 67.

> *Investment Partners, serves as a member of its Management Committee and is also an investor in one of the said funds managed by Proterra Investment Partners. David Durrett, one of our directors, controls Aequor Holdings LLC, which is an indirect minority co-investor in Proterra. Each of Mr. Thorsden and Mr. Durrett expressly disclaims beneficial ownership of the Common Shares held by Proterra.* ***Cargill remains a passive minority investor in funds managed by Proterra****.*[22] *(emphasis added)*

35. Mr. Broking stated that this referred to Cargill Inc.'s "passive investment in Proterra Investment Partners".[23]

36. Two of the funds managed by Proterra Investment Partners were Black River Capital Partners Fund (Metals and Mining A) LP and Black River Capital Partners Fund (Metals and Mining B) LP (collectively "**Black River Capital**"). In June, 2017, the Black River Capital funds were described in an affidavit sworn by Larry Lehtinen, then Tacora's CEO, to be "two private investment funds controlled by Proterra Investment Partners LP" ("**Proterra Investment Partners**").[24] Mr. Lehtinen deposed that the Black River Capital funds had given a commitment for an equity subscription which would be invested in Tacora to fund the purchase price for the Scully Mine assets.

37. The Black River Capital funds were formerly a division of Cargill Inc., but were spun out of Cargill Inc. in 2016 to form, *inter alia,* Proterra Investment Partners.[25] It was reported that Proterra Investment Partners would retain all of its fund commitments and limited partners, including Cargill Inc.[26] More than $30 million (U.S.) was contributed by Black River Capital to Tacora at the time of Tacora's acquisition of the Scully Mine assets.[27]

38. As at March 31, 2021, these Black River Capital funds held the majority (57.7%) of the equity in Proterra Cooperatief.[28]

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[22] Broking Cross-Examination, Exhibit No. 2.
[23] Broking Cross-Examination at Q. 74.
[24] Morrow Affidavit, Exhibit "L" at para 5.
[25] Morrow Affidavit, Exhibits "O" and "Q".
[26] Morrow Affidavit, Exhibit "O".
[27] Broking Cross-Examination, Exhibit No. 4.
[28] Broking Cross-Examination, Exhibit No. 2.

39. Therefore, through its passive investment in Black River Capital managed by Proterra Investment Partners, Cargill Inc. appears to have acquired an indirect equity interest in Tacora and the Scully Mine when it was acquired 2017.

Cargill Inc.'s November 2018 $20 million (U.S.) investment

40. In November of 2018, Cargill Inc. made a substantial (approximately $20 million U.S.) investment in Tacora. This was in response to an "equity cash call" by Tacora to fund the Scully Mine commissioning work.[29] Conditions of Cargill Inc.'s funding included:

(a) a change to the pricing formula in the Offtake Agreement, and

(b) the extension of the term of the Offtake Agreement to 2033.[30]

41. Tacora contends that at the time the Tacora board approved the November 9, 2018 amendment to the Offtake Agreement, Cargill had no interest in Tacora. This is not correct. It ignores the specific linkage in the Tacora October 31, 2018 Tacora board meeting minutes between the equity cash call and the Offtake Agreement amendment "with execution simultaneous with the equity call".[31] Mr. Broking specifically confirmed that the Offtake Agreement amendment was a condition of the financing.[32] It also ignores Cargill Inc.'s indirect equity investment that it acquired in 2017 through its interest in Black River Capital.

42. Mr. Broking confirmed that it was a condition of this financing that Phil Mulvihill, a Cargill Inc. employee, be appointed to the Tacora Board.[33]

43. As at March 31, 2021, Cargill's $20 million (U.S.) investment in Tacora represented a 16.3% interest in Proterra Cooperatief, which was the 100% owner of Proterra Holding.[34] Proterra Holding has been the majority owner of Tacora from inception.

44. In September, 2018, just prior to Cargill's $20 million (U.S.) investment in Tacora, Proterra Holding owned 82.22% of the common shares of Tacora.[35] Cargill Inc.'s 16.3% interest in Proterra

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[29] Broking Cross-Examination at Qs. 23-26.
[30] Seventh Broking Affidavit, para. 31.
[31] Broking Cross-Examination, Exhibit No. 1.
[32] Broking Cross-Examination, at Q. 87.
[33] Broking Cross-Examination, Q. 91.
[34] Broking Cross-Examination at Qs. 37-42.
[35] Broking Cross-Examination, Confidential Exhibit No. 3.

Cooperatief acquired in November 2018 correlates with a 14.4% indirect interest in Tacora at that time (and not the 10-11% interest stated in the Seventh Broking Affidavit).

December 17, 2019 Stockpile Agreement

45. Approximately a year after the October, 2018 equity cash call and Cargill Inc.'s $20 million (U.S.) investment, Tacora experienced further financial challenges. Again, Cargill Intl stepped up, agreeing to early payment to Tacora for the Scully Mine concentrate under the December 17, 2019 Stockpile Agreement. Under the Stockpile Agreement, Cargill Intl paid Tacora for the Scully Mine concentrate when it was delivered to the stockpile at the port, rather than at the time of shipment for ocean voyage. Title to the concentrate under the Stockpile Agreement passed to Cargill Intl at the point of delivery to the stockpile.[36] The effect of the Stockpile Agreement was to advance the time of payment for the Scully Mine concentrate, and to function as a working capital facility for Tacora.[37] Mr. Broking explained that "it allowed us to collect receivables sooner".[38]

March, 2020 $10 million (U.S.) cash call

46. Tacora's next financial challenge occurred within a year of the Stockpile Agreement. This involved another cash call in around March, 2020, this time for $10 million (US). This amount was partially funded by Cargill Inc.[39] It seems likely that this increased Cargill Inc.'s interest in Proterra Cooperatief. Cargill Inc. was ultimately shown to have a 16.60% indirect interest in Tacora.[40]

47. It was a condition of the March 2020 cash call financing that Cargill Inc. was granted the option to extend the Offtake Agreement to a life of mine term.[41] It is the life of mine term of the Offtake Agreement which Mr. Broking identifies as a key factor causing the Offtake Agreement to be off market.[42]

Tacora and Cargill were "related parties" under IFRS

48. By April, 2021, Cargill Inc. personnel and Tacora's CEO Joe Broking recognized the increased proximity of relationship of Tacora and the Cargill Entities, and that this would require

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[36] Broking Cross-Examination at Q. 96.
[37] Broking Cross-Examination at Q. 97.
[38] Broking Cross-Examination at Q. 100.
[39] Seventh Broking Affidavit, para. 40(a).
[40] Broking Cross-Examination, Confidential Exhibit No. 8.
[41] Seventh Broking Affidavit, para. 32. Broking Cross-Examination at Q. 110.
[42] Broking Cross-Examination at Qs. 210 and 211.

disclosure to investors.[43] Tacora's May, 2021 Offering Memorandum identified Tacora's transactions with the Cargill Entities in disclosing transactions with its direct and indirect shareholders.[44]

49. Tacora's Consolidated Financial Statements for 2021/2022 formally stated that Cargill Inc. was a related party, as follows:

> *Cargill*
>
> *As a result of the $15 million preferred share investment described in Note 25, Cargill is a related party as of December 31, 2022.*[45]

50. This "related party" statement was made to comply with International Financial Reporting Standards ("**IFRS**"). IFRS provides that:

> *…an entity is related to a reporting entity if, among other circumstances, it is a parent, subsidiary, fellow subsidiary, associate or joint venture of the reporting entity, or is controlled, jointly controlled or significantly influenced by a person who is a related party.*[46]

51. Asked if a classification of "related party" equated to a non-arm's length relationship, Tacora's CEO Joe Broking allowed that this could be the case. He agreed that "related party" could be non-arm's length depending on the details of the transaction.[47]

Cargill Inc.'s acquisition of $15 million (U.S.) preferred shares in Tacora

52. Tacora's financial challenges continued into 2022. In November of 2022, Cargill invested $15 million (U.S.) in Tacora to acquire convertible preferred shares which carried a 15% accretion right. As a condition of this investment, Cargill Inc. acquired the right to appoint a Tacora board member.[48]

January 3, 2023 Advance Payments Facility

53. In early 2023, in the context of "severe liquidity challenges", Cargill Intl stepped up yet again – when other stakeholders declined.[49] Tacora and Cargill Intl entered into a $30 million

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[43] Broking Cross-Examination, Confidential Exhibit No. 2.
[44] Morrow Affidavit, Exhibit "J", Responding Motion Record p. 299.
[45] Morrow Affidavit, Exhibit "Z", Responding Motion Record p. 734.
[46] Morrow Affidavit, Exhibit "LL".
[47] Broking Cross-Examination at Q. 130.
[48] Seventh Broking Affidavit, para. 39.
[49] Exhibit No. 7 to Broking Cross-Examination.

(U.S.) Advance Payments Facility, which was subsequently amended. This arrangement provided advance funding for the purchase of Scully Mine concentrate and guaranteed a Tacora [redacted].[50]

54. The initial advance of $15,000,000 (U.S.) was retained by Cargill Intl for entering into the Advance Payments Facility and guaranteeing a [redacted] for concentrate shipped from January to May, 2023.[51]

55. It was a condition of this financing arrangement that the Offtake Agreement was further amended, this time to formalize the life of mine term of the Offtake Agreement.[52]

Side Letter price protection arrangements

56. The [redacted] in the Advance Payments Facility was one of numerous price protection arrangements entered into by Tacora and Cargill Intl during the term of the Offtake Agreement. Mr. Broking stated that there were 13 side letter amendments to the Offtake Agreement.[53]

57. An example of one such price protection arrangement is found in the September 14, 2021 Side Letter to the Offtake Agreement which set a [redacted]. The purpose of the Side Letter was expressed to be as follows:

> *The purpose of this letter is to change the pricing provisions of the Offtake as they apply to certain weights of Ore shipped at certain times from a floating to a fixed price as a method of Buyer providing to Seller a degree of insulation from anticipated iron ore market price movements.*[54]

58. There were other, similar fixed price side letters entered into by Tacora and Cargill Intl to provide Tacora with fixed prices. The intent was to supplement and provide risk-sharing arrangements for certain transactions under the Offtake Agreement.[55]

59. Mr. Broking agreed that these side letters constituted price protection arrangements.[56] Notwithstanding this admission, Mr. Broking was of the view that clause A(13) of the Wabush

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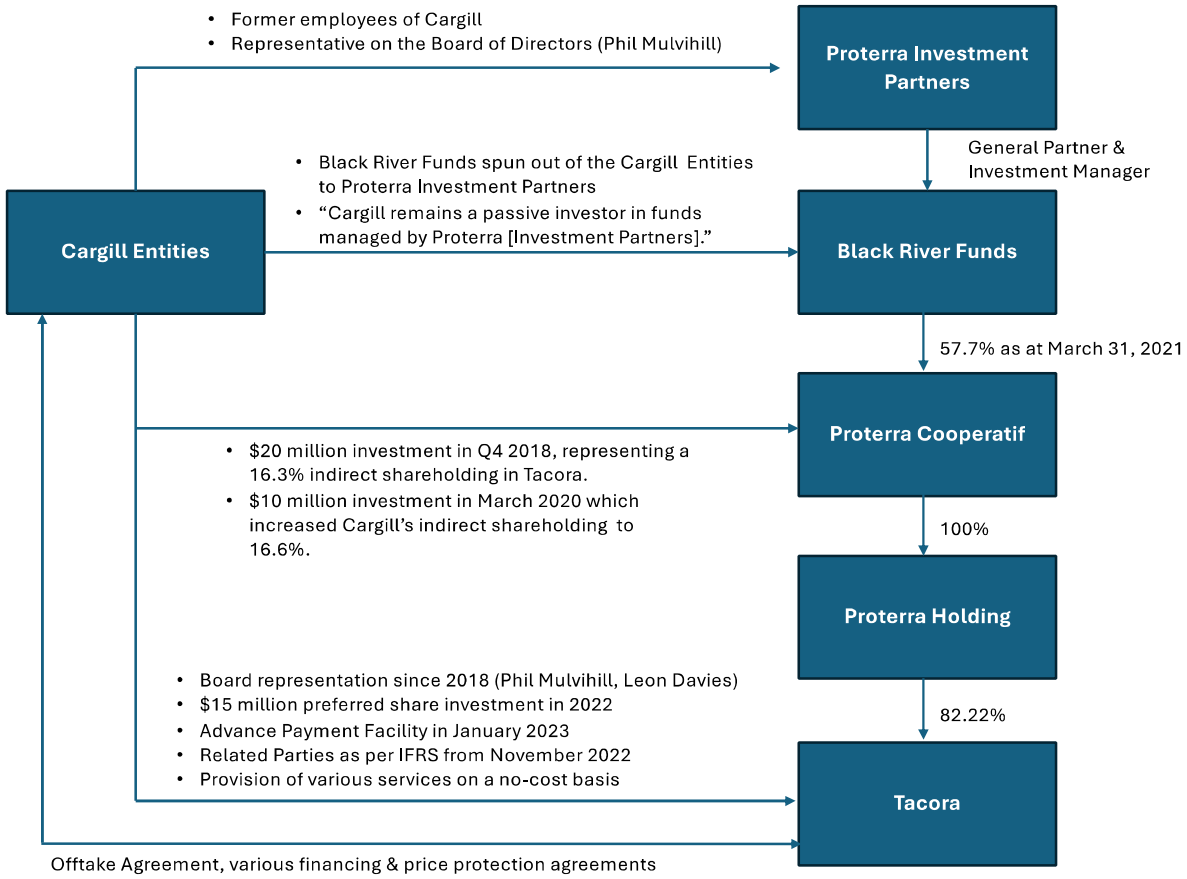
[50] Seventh Broking Affidavit, para. 40; First Broking Affidavit, para. 82.
[51] First Broking Affidavit, para. 82.
[52] Broking Cross-Examination at Q. 199 and Confidential Exhibit No. 6.
[53] Fourth Broking Affidavit, para. 63.
[54] Morrow Affidavit, Confidential Exhibit “BB”.
[55] Broking Cross-Examination at Qs. 161-164.
[56] Broking Cross-Examination at Q. 164.

Lease, which prescribes the use of (j)(ii) to calculate Net Revenues in cases of, *inter alia*, price protection arrangements, was not applicable.[57]

Cargill Inc. support pre-CCAA

60. Prior to Tacora's entry into CCAA protection, Cargill Inc. had been actively involved in supporting Tacora's operations on a no-cost basis. This support included Cargill Inc.'s provision of two consultants. The first was Andrew Kirby, who assisted with interim general manager duties from Q1, 2023. The second was Timothy Sylow, who focused on capital investment and capital projects-related improvements at the Scully Mine.[58]

61. A graphic description of the various relationships which, together, constitute the Cargill Entities as non-arm's length counterparties to Tacora is as follows:



[57] Broking Cross-Examination at Qs. 174-178.

[58] Broking Cross-Examination at Qs. 240-242.

Tacora Underpaid the Royalty from Q1, 2020 to Q3, 2023

62. Based on the foregoing, Cargill Intl has been non-arm's length to Tacora since at least 2018, prior to any payment of the Royalty. Cargill Intl's purchases of Iron Ore Products from Tacora have been non-arm's length transactions under clause (j)(ii) of the Wabush Lease.

63. Notwithstanding these Tacora-Cargill Intl non-arm's length transactions, Tacora has failed to calculate and pay the Royalty on the basis of clause (j)(ii) non-arm's length Net Revenues.

64. 1128349's iron ore industry expert, David Persampieri, calculates that Tacora has underpaid the Royalty by $4,699,103.46 by failing to employ the clause (j)(ii) non-arm's length Net Revenues as the revenue base for the Royalty.

PART III – ISSUES

65. The issues to be determined on this motion are:

(a) Should the payable Royalty be calculated by reference to the Offtake Agreement Net Revenues or by non-arm's length Net Revenues under clause (j)(ii) of the Wabush Lease?

(b) What is the quantum of the Royalty which is payable by Tacora to 1128349?

PART IV – LAW AND ANALYSIS

A. 1128349 IS ENTITLED TO BE PAID THE ROYALTY CALCULATED ON NON-ARM'S LENGTH NET REVENUES

66. 1128349 says that at all material times, Tacora was non-arm's length to the Cargill Entities. The Cargill Entities' non-arm's length relationship with Tacora is evidenced by their ownership interests in Tacora, their financing bonds with Tacora and their governance influence over Tacora.

Interpretation of "non-arm's length" in contractual context

67. Clause (j)(ii) requires Tacora, for sales of Iron Ore Products "in a non-arm's length transaction" to employ Net Revenues which are to be computed according to published industry standard pricing. Tacora's factum critically omits any discussion of the impact of clause (j)(ii) – contrary to Tacora's submission, it is not a simple question of whether the 2017 version of the Offtake Agreement was arm's length; instead, whatever the answer to that question, this Court must also consider whether any **transactions** triggered clause (j)(ii).

68. The relevant **transactions** are Tacora's sales of Iron Ore Products to Cargill Intl. It is uncontroversial that these sales occur at the port under the Stockpile Agreement, which operates in conjunction with the Offtake Agreement.

69. The Wabush Lease does not define the term "non-arm's length". The seminal Supreme Court of Canada decision of *Sattva Capital Corp. v. Creston Moly Corp* obligates this Honourable Court to arrive at the meaning of "non-arm's length" through principles of contractual interpretation with careful regard to the contract's surrounding circumstances.[59]

70. The overriding concern in a post-*Sattva* contractual interpretation analysis is to "determine the intent of the parties and the scope of their understanding".[60]

71. The Wabush Lease and evidence disclose the following surrounding circumstances as they relate to the parties' objective expectations:

(a) Tacora's operations are impossible without the benefit of the Wabush Lease.

(b) Tacora and 1128349 are not related parties in any manner whatsoever. 1128349 is "hands off" and, therefore, has limited means to monitor whether an offtake agreement is, or becomes, a non-arm's length agreement.

(c) Tacora requires 1128349 to operate its mine, whereas 1128349 accepts fair-market rent, in the form of Royalty, in exchange for Tacora exploiting its land.

(d) Tacora extracts valuable non-renewable natural resources from 1128349's land, meaning 1128349 is irreparably harmed when said resources are extracted therefrom without valuable fair-market consideration.

(e) Two possible Net Revenues calculations exist under the Wabush Lease: (1) arm's length transactions and (2) non-arm's length transactions. Taking both in context, they are both aimed at the same goal: that computation of the Royalty is done with reference to fair market value. It bears repeating that Mr. Broking confirmed this to be the intent of clause (j) of the Wabush Lease.

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[59] *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 (CanLII), [2014] 2 SCR 633 [Tab 1].
[60] *Sattva* at 47.

(f) When the Royalty is calculated under the arm's length definition, it is done on the assumption that the Lessee and any customer are dealing independently of one another to such an extent that the Royalty cannot be compromised. Stated plainly, the Wabush Lease demands a computation of the Royalty that regardless of whether or not the Lessee sells the Iron Ore Products to an arm's length party at a fair market price, 1128349 will be paid the Royalty on the basis that it did.

(g) In the administration of the Wabush Lease, the Lessee relies upon the Lessor's duty of good faith in contractual relations to disclose any non-arm's length dealings.

(h) Where non-arm's length transactions occur, the Royalty is computed by reference to standard industry benchmarks.

72. Mr. Broking confirmed that the intent of clause (j) of the Wabush Lease is that the Royalty is to be calculated and paid based on the market value of Tacora's iron ore concentrate.[61]

73. The definition of "non-arm's length" is therefore flexible and arrived through the prism of the Iron Ore Products' fair market value.

74. Tacora's contention that the determination of whether an offtake agreement is arm's length or not crystallizes at the formation of the offtake agreement, and then alone, is not consistent with the parties' objective intention to guarantee fair market value.

75. Such a contention produces absurd results. Taken to its logical conclusion, this would mean that Tacora could enter into an offtake agreement and subsequently negotiate collateral agreements with non-arm's length offtakers affecting the price of Iron Ore Products, without any effect on the Royalty payable to 1128349 whatsoever.

76. Furthermore, this argument, if successful could result in a scenario in which Tacora could be acquired by the Cargill Entities and sell its future iron ore production under the Offtake Agreement at below-market, non-arm's length prices without any changes to the calculation of the Net Revenues definition of the Wabush Lease.

77. Rather than forcing 1128349 to forensically audit any and all complex commercial interactions between Tacora, its affiliates, and any given offtaker or customer to compare the

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[61] Broking Cross-Examination at Q.342.

realized price to the fair market value of Iron Ore Products, the Wabush Lease simplifies that process: either (i) individual sales transactions are done at arm's length, which engages one calculation of the Royalty, or (ii) they are not, which engages another.

78. The onus in the Wabush Lease was not intended to be on 1128349 to prove that Tacora was selling the Iron Ore Products in any given transaction at an undervalue to a related, non-arm's length party; rather, the Net Revenues definition was intended to automatically adjust such that the Royalty is calculated on public index market pricing rather than Tacora's realized revenues.

79. The proper definition of Net Revenues therefore comprises a continuum, forever dependent upon whether individual sales of Iron Ore Products are done at fair market value, determined by either bona fide arm's length transactions or by reference to standard industry benchmarks.

Test for "non-arm's length"

80. There is a dearth of jurisprudence in respect of a post-*Satvva* determination of the meaning of "non-arm's length" in the contractual interpretation context.

81. Within that jurisprudential vacuum, the legal test for the term of art "non-arm's length" is paradoxical—it is readily understood yet not easily stated.

82. The jurisprudence reveals two approaches dependent upon factual matrices: (1) the strict approach and (2) the flexible approach.

83. There is ample jurisprudence under the *Income Tax Act*, the *Bankruptcy and Insolvency Act*, and related statutes. Even within those contexts, the underlying factual matrix is so determinative in the analysis that the jurisprudence describes the test differently depending on the legal context in which the issue arises.

84. The test's fact-based intensity is revealed in *McLarty*, the leading decision on the term in the *Income Tax Act* context, which applied the strict approach. For the purposes of the *Income Tax Act*, related persons shall be deemed not to deal with each other at arm's length; and, it is a

question of fact whether persons not related to each other were at a particular time dealing with each other at arm's length.[62]

85. The issue of relevance for the purposes of this analysis in *McLarty* was whether a tax debtor was arm's length to an entity he had invested in. If he was arm's length, then the tax payer was deemed to have made the acquisition at fair market value. If he was not at arm's length, then his tax deduction for investment was to be calculated based upon actual market value.

86. The facts arising in *McLarty* may be summarized as follows:

(a) McLarty purchased an interest in proprietary seismic data from Compton Resource Corporation (**"CRC"**) as part of an oil and gas joint venture.

(b) McLarty acquired a 1.57% interest in the data for $100,000, with $85,000.00 of which becoming payable by virtue of the maturation of a promissory note.

(c) The principal and interest was to be paid from 60% of the cash proceeds received from any future sales or licensing of the seismic data and 20% of the production cash flow generated from petroleum rights from drilling programs.

(d) Upon default, a trustee was to be appointed to sell the seismic data with the proceeds of sale being allocated 60% in reduction of the amounts owing under the note and 40% owing to McLarty.

(e) McLarty and CRC eventually agreed to extend the maturation date of the promissory note to December 31, 2002.

(f) On filing his income tax return for 1992, which was 10 years prior to the eventual maturation date, McLarty treated his purchase of seismic data as an exploration expense, resulting in a deduction of the personal income for which he was required to pay income tax.

(g) The Minister of Finance reassessed McLarty on the basis that the seismic data had a fair market value of $32,182, not $100,000.

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[62] *Income Tax Act*, RSC 1986, c 1(5th Supp) at s. 251 [Attached at Schedule B hereto]

87. In *McLarty*, the Supreme Court of Canada spoke approvingly of the trial judge's decision to consider the entirety of the transactions by which the taxpayer bound himself as it was for the trial judge to draw inferences in those facts. Justice Rothstein ruled for the majority that the Federal Court of Appeal had erred in that case in interfering with the factual conclusions of the trial judge on the largely fact dependent issue of non-arm's length.[63]

88. Justice Rothstein set out that the main concern in non-arm's length transactions is that "there is no assurance that the transaction 'will reflect ordinary commercial dealing between parties acting in their separate interests'".[64] However, the main inquiry by the Supreme Court of Canada in that case, as well as the judiciary generally in *Income Tax Act* cases, is "to preclude artificial transactions from conferring tax benefits on one or more of the parties (emphasis added)."

89. In assessing whether there were artificial transactions designed to confer unlawful tax benefits in breach of public statute warranting severe penal public law remedies, *McLarty* applied the Canada Revenue Agency Income Tax Interpretation Bulletin IT-419R2 "Meaning of Arm's Length", while noting that "each case will depend on its own facts", stating the test as follows:

> (a) Was there a common mind which directs the bargaining for both parties to a transaction;
>
> (b) Were the parties to a transaction acting in concert without separate interests; and,
>
> (c) Was there de facto control.[65]

90. In applying the strict approach, Justice Rothstein concluded in agreement with the trial judge that this onerous test was not met because "there was no collusion to inflate the price of the Venture Data because the Appellant had accepted the terms of the Memorandum which limited the purchase price to not higher than the lowest valuation". [66]

91. While its application of high-level principles is relevant, *McLarty* is distinguishable in several respects:

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[63] *Canada v McLarty,* 2008 SCC 26 at 43 ["**McLarty**" at Tab 2].
[64] *Canada v McLarty,* 2008 SCC 26 at 43 [Tab 2].
[65] *Canada v McLarty,* 2008 SCC 26 at 62 [Tab 2].
[66] *Canada v McLarty,* 2008 SCC 26 at 68-72 [Tab 2].

(a) The parties in *McLarty* had turned their minds to the fair market valuation of the investment at the outset and the investment value adhered to that mechanism of determining fair market value. In the instant case, 1128349 relied upon Tacora's representation that it was arm's length to the Cargill entities.

(b) In *McLarty,* the parties were not related beyond a less than 2% ownership interest – here, 1128349 says they were, and as of 2022, Tacora admits it was a Related Party as defined by IFRS to the Cargill Entities.

(c) This case concerns the meaning of non-arm's length in the contractual context complete with the factual matrix underlying said contract – it is not an *Income Tax Act* case.

(d) The question, in this case, is whether the individual transactions which underlie the Offtake Agreement are bona fide arm's length contracts of sale that achieve the parties' objective expectation under the Wabush Lease to ensure the Royalty is payable based upon fair market value transactions – it is not a question of whether the Offtake Agreement was an act of collusion.

(e) Even if the threshold for non-arm's length transactions in this contractual context was one of collusion, 1128349 did not accept any terms which placed a maximum on the purchase price of Iron Ore Products; to the contrary, 1128349 insisted upon a Minimum Royalty and otherwise insisted upon a definition of Net Revenues that guaranteed the Royalty was computed in accordance with fair-market value transactions between Tacora and whoever it so chooses to sell the Iron Ore Products to.

92. The leading case in the non-tax context in Canada is *Re Tremblay*, which applies the flexible approach.[67] 1128349 respectfully submits that the flexible approach is more appropriate where civil monetary interests are at stake, whether it be for breach of contract, fraudulent preferences, etc.

93. In *Re Tremblay,* a fraudulent conveyance case in the bankruptcy context, the Court emphasized the analysis turns on questions as to whether the parties are related; whether there

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[67] *Gingras, Robitaille, Marcoux Ltée v Beaudry,* 1980 CarswellQue 59 36 CBR (NS) 111 ["***Tremblay, Re***" at Tab 3].

is "influence"; whether there are "bonds of dependence"; or, "leverage sufficient to diminish or influence the free decision-making of the other":

> *The meaning of "otherwise at arm's length," is, however, elusive. The concept has its source in the Income Tax Act, but the case law, as it relates to bankruptcy is practically non-existent. The doctrine provides that the court has wide discretion to say whether or not persons who are not related were dealing at arm's length when a particular transaction took place.* ***In the absence of a better definition, a transaction at arm's length could be considered to be a transaction between persons between whom there are no bonds of dependence, control or influence, in the sense that neither of the two co-contracting parties has available any moral or psychological leverage sufficient to diminish or possibly influence the free decision-making of the other.***
>
> ***Conversely, the transaction is not at arm's length where one of the co-contracting parties is in a situation where he may exercise a control, influence, or moral pressure on the free will of the other. Where one of the co-contracting parties is, by reason of his influence or superiority, in a position to pervert the ordinary rule of supply and demand and force the other to transact for a consideration which is substantially different than adequate, normal, or fair market value, the transaction in question is not at arm's length.***[68] *(emphasis added)*

94. The Ontario Court of Appeal followed a similar passage in *Goldfinger*, while also considering the *McLarty* test in the bankruptcy and insolvency context:

> *[66] Section 4(4) of the BIA states: "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." As a result, absent a palpable and overriding error, the trial judge's finding on this issue is entitled to deference.*
>
> *[67] The trial judge considered the dicta in Abou-Rached (Re), 2002 BCSC 1022, 35 C.B.R. (4th) 165, at para. 46:*
>
> > *[A] transaction at arm's length could be considered to be a transaction between persons between whom there are no bonds of dependence, control or influence, in the sense that neither of the two co-contracting parties has available any moral or psychological leverage sufficient to diminish or possibly influence the free decision-making of the other. Inversely, the transaction is not at arm's length where one of the co-contracting parties is in a situation where he may exercise a control, influence or moral pressure on the free will of the other. Where one of the co-contracting parties is, by reasons of his influence or superiority, in a position to pervert the ordinary rule of supply and demand and force the other to transact for a consideration which is substantially different than adequate,*

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[68] *Tremblay, Re* at 21-25; see also its English language headnote.

> *normal or fair market value, the transaction in question is not at arm's length.*[69] *(emphasis added)*

95. *Goldfinger* involved a failed relationship between Goldfinger, a real estate developer, Kimel, and several of Kimel's companies that had been subject to bankruptcy proceedings. Farber was the Trustee in bankruptcy for five companies, all of which were companies owned by Kimel and his spouse, except one, the Appellant, Montor.

96. Farber sought to set aside certain transactions that settled disputes between Goldfinger, Kimel and some of Kimel's companies – these transactions comprised of payments totaling $2.5 million to Goldfinger from one Kimel entity and mortgages granted to Goldfinger by other of Kimel's entities.

97. At issue in *Goldfinger* was whether these transactions were undervalued, unjust preferences, or fraudulent conveyances under the *Bankruptcy and Insolvency Act* or otherwise oppressive under the *Ontario Business Corporations Act* or unjust enrichment.

98. Section 96 of the *Bankruptcy and Insolvency Act* required the Court to answer whether certain transactions between Goldfinger and certain Kimel entities were at arm's length. One of the controversial Kimel entities had been "Annopol". The memorandum of settlement between Annopol and Goldfinger deemed Goldfinger to be a shareholder of Annopol – the trial judge determined this was "simply a technical device that was probably tax-driven".[70] Goldfinger had not been involved in the operation of any of Kimel's companies and had quite limited information about their affairs – the trial judge had found that the parties were transacting at arm's length.

99. In so doing, the trial judge applied the flexible approach in determining that the facts did not disclose bonds of "dependence, control or influence" – which the Court of Appeal said "are generally necessary in order to find that two parties are not acting at arm's length".[71]

100. Farber appealed. The Court of Appeal quoted with approval the trial judge's identification of the following passage from *Abou-Rached (Re),* which borrows from the flexible approach cited in *Tremblay, Re*:

> *[A] transaction at arm's length could be considered to be a transaction between persons between whom there are no bonds of dependence, control or influence,*

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[69] *Montor Business Corporation v Goldfinger,* 2016 ONCA 406 at 66-67 [Tab 4].

[70] *Goldfinger* at 41.

[71] *Goldfinger* at 43.

> *in the sense that neither of the two co-contracting parties has available any moral or psychological leverage sufficient to diminish or possibly influence the free decision-making of the other. Inversely, the transaction is not at arm's length where one of the co-contracting parties is in a situation where he may exercise a control, influence or moral pressure on the free will of the other. Where one of the co-contracting parties is, by reasons of his influence or superiority, in a position to pervert the ordinary rule of supply and demand and force the other to transact for a consideration which is substantially different than adequate, normal or fair market value, the transaction in question is not at arm's length.*[72]

101. The Court of Appeal ultimately determined Goldfinger was arm's length in deference to the trial judge's factual determination largely because Goldfinger "was never involved in the operation of the companies, had little information about their operation or finances, discovered Kimel had misled him and then threatened to sue".[73]

102. On the facts, the present case is distinguishable from *Goldfinger* for similar reasons that it is distinguishable from *McLarty*, but also:

(a) Cargill Inc. assisted in management of Tacora on a day-to-day basis in conjunction with the management of the Scully Mine by way of management through a full-time operational consultant and two capital project consultants at no cost to Tacora;[74]

(b) The Cargill Entities knew every detail of Tacora's business in its various capacities in direct/indirect ownership, financing, and governance as set out in the Affidavit of Samuel Morrow sworn March 26, 2024.

103. This Court recently considered *McLarty* and *Goldfinger* in *Doyle Salewski Inc*, where Justice Gomery rejected the argument that Tacora attempts in this case "that the bar to establish a non-arm's length relationship is very high" such that a Court must adopt the strict approach in finding that "a common mind directed the bargaining of both parties to the transaction, or that the parties acted in concert without separate interests, or that there was de facto control of one party by the other."[75]

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[72] *Goldfinger* at 67.

[73] *Goldfinger* at 70.

[74] Morrow Affidavit, at 31(b); First Broking Affidavit, at 136.

[75] *Doyle Salewski Inc v Scott*, 2019 ONSC 5108 at 206, ("*Doyle Salewski*") [Tab 5] reversed in 2022 ONCA 590 on other grounds, leave to appeal to Supreme Court of Canada granted on March 30, 2023, judgment reserved by Supreme Court of Canada on December 5, 2023. On the arm's length issue, the Court of Appeal stated at para. 32, "I see no error in the trial judge's conclusion that Mr. Scott and Golden Oaks were not acting at arm's length for the purposes of s. 95(1)(b) of the BIA"

104. Justice Gomery correctly interpreted *Goldfinger* to be consistent with what 1128349 states to be the flexible approach. In so doing, he stated that those *McLarty* factors, which were derived from a Canada Revenue Agency guide, were a "useful starting point" but that a Court "must ultimately determine, by reviewing all of the relevant evidence, whether they show an independence of thought and purpose, and the adverse economic interest and *bona fide* negotiating that characterizes ordinary commercial transactions."[76] In so doing, Justice Gomery followed *Goldfinger* and commented on the "fact-driven nature of the Court's analysis".[77]

105. In *Doyle Salewski Inc*., the trustee in bankruptcy was charged with sorting out the aftermath of a collapsed Ponzi scheme relating to an entity known as Golden Oaks. Golden Oaks bought homes that were undervalued, renovated them, and then rented them to prospective buyers who would make a down payment and pay a slightly inflated rent in exchange for a non-binding option to purchase the property three or five years later.[78]

106. Behind the scenes, Golden Oaks issued 504 promissory notes to 153 investors, who were really short-term lenders – they would advance funds for a short period of time in exchange for a promissory note entitling them to interest at a high interest rate.[79]

107. From March 1, 2012 to February 28, 2013, only 3% of the monies deposited into Golden Oaks' bank accounts were rental payments by prospective home-buyers. Over 90% of the money it collected came from investors.[80] This effectively meant that Golden Oaks was insolvent and was being used to further a fraud – it never had enough money to fund its operations or pay what it owed to legitimate creditors.

108. The court considered the meaning of "arm's length" in consideration of s. 95(1)(a) of the *Bankruptcy and Insolvency Act*, which allows a trustee to attack payments made by an insolvent person prior to the bankruptcy on the basis that such payments amounted to unlawful preferences; that is, "in favour of a creditor who is dealing at arm's length with the insolvent person…".[81]

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[76] *Doyle Salewski* at 207.
[77] *Doyle Salewski* at 210.
[78] *Doyle Salewski* at 3.
[79] *Doyle Salewski* at 4.
[80] *Doyle Salewski* at 6.
[81] *Doyle Salewski* at 111 and 115.

109. Justice Gomery concluded applied the flexible approach to two individuals were acting non-arm's length to Golden Oaks, Ho and Scott:

(a) In the case of Ho, Justice Gomery found he was not dealing at arm's length when balancing the following facts:[82]

(i) Facts in favour of arm's length finding:

(A) Ho sometimes acted independently;

(B) Ho acted in his own self-interest when he kept portions of funds received from Golden Oaks

(ii) Facts in favour of non-arm's length finding:

(A) Ho was a senior employee of Golden Oaks during the entire period, acting in concert with a common venture directed by Golden Oakes;

(B) Ho and Golden Oaks shared interest in persuading investors to lend the company more money so that existing investors could be paid;

(C) While Ho acted in his own self-interest, the existence of some measure of self-interest did not mean Ho's interests were adverse to Golden Oaks' interests – Ho and Golden Oaks "did not bargain as strangers with independence of thought and purpose".

(D) Ho was deeply involved in the operations of Golden Oaks.

(b) In the case of Scott, Justice Gomery found he was not dealing at arm's length when balancing the following facts:[83]

(i) Facts in favour of arm's length finding:

(A) Scott did not have detailed insight into Golden Oaks' finances;

(ii) Facts in favour of non-arm's length finding:

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[82] *Doyle Salewski* at 211-220.

[83] *Doyle Salewski* at 335-367.

(A) Scott was heavily engaged in the promotion/marketing of investment in Golden Oaks;

(B) Scott's long-term profits were contingent on the success of the Golden Oaks scheme as a whole;

(C) Scott was loyal to Golden Oaks notwithstanding its financial problems; and

(D) Scott and the proprietor behind Golden Oaks, Lacasse, were acting in concert to ensure the continued operation of the Ponzi scheme.

110. Ultimately, a Ponzi scheme case is of limited assistance to this Court in terms of factual comparisons. *Doyle Salewski* is most relevant in terms of the manner with which the Court assessed the facts before it.

111. Having said that, Justice Gomery's analysis of the facts surrounding Ho are notable in that self-interested bargaining or independent thinking does not, in and of itself, demonstrate arm's length dealings. A broader consideration of whether there are any elements of a "common project" are required.

112. Moreover, in finding that Scott was dealing at non-arm's length with Golden Oaks, the Court placed considerable weight on the fact that he was directly involved in obtaining significant investment for the company and actively promoted the company.[84] Here, the Cargill Entities have always been major investors in and been promoters of Tacora.

113. Further, Justice Gomery found that another party, Laframboise, had only engaged in "self-interested bargaining" and there was a lack "of any evidence of a common project", thus the Court found Laframboise was in fact dealing arm's length from the Company. Here, while Tacora and the Cargill Entities engaged in some self-interested bargaining, there is substantial evidence of "a common project" in the affidavits of Samuel Morrow for 1128349 and Joe Broking for Tacora. For example, the former co-founder and a senior executive of Tacora and presently the Customer Manager Americas for Cargill Inc., summarized the financial, operational and advisory role which the Cargill Entities have performed since the inception of Tacora as follows:

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[84] *Doyle Salewski* at 275.

> *Cargill has been a key partner and important source of financial support for Tacora since its inception. Cargill is Tacora's offtake and technical marketing provider under the Offtake Agreement (as defined below) that was negotiated in April of 2017. Cargill is or has also been party to other key related agreements and arrangements with Tacora including: (i) multiple working capital facilities to optimize Tacora's operations, working capital, cash flow and liquidity (including under the APF, the Stockpile Agreement and the Wetcon Agreement (all as defined below)), (ii) as provider of a hedging program in a cost efficient and beneficial manner for Tacora, and (iii) as provider of operational expertise and assistance at the Scully Mine. As part of Tacora's CCAA proceedings, Cargill has also provided debtor-in-possession financing to Tacora. Cargill also (directly and/or indirectly) holds common shares and preferred shares of Tacora, and, until recently, Cargill employees served as technical and business advisors to Tacora in addition to serving as the acting general manager of operations of Tacora.*[85]

114. Based upon the foregoing authorities on the meaning of non-arm's length in both the *Income Tax Act* and *Bankruptcy and Insolvency Act*, together with the unique layer of law of contract including *Sattva* in this case*,* 1128349 respectfully submits that this Honourable Court should adopt the flexible balancing approach in considering whether there exist the hallmarks of a non-arm's length relationship between Tacora and the Cargill Entities; those are, whether:

(a) The contracting parties are related;

(b) There are bonds of dependence or influence; or,

(c) There exists the ability of one party to exercise control, influence or moral pressure on the other party's will.

115. Where such facts weigh in favour of a non-arm's length relationship, that is dispositive of the result. 1128349 need not prove that the relation, bonds of dependence, influence or moral pressure *caused* the non-market nature of the Offtake Agreement – to the contrary, the definition of Net Revenues is automatic once Tacora sells Iron Ore Products in a non-arm's length transaction.

Broking admissions evidencing the Cargill Entities' non-arm's length relationship with Tacora

116. Tacora takes pains to point to the fact that none of the Cargill Entities had any indirect interest in Tacora during the original negotiations pertaining to the Offtake Agreement. This

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[85] Morrow Affidavit at 31, see also Exhibit "VV" of Morrow Affidavit, March 1, 2024 Affidavit of Matthew Lehtinen, para. 7.

argument ignores Tacora's admission that Tacora's majority shareholder at the time, Proterra Holding, was the result of a Cargill Inc. spinoff, as admitted by Tacora's affiant, Joe Broking.[86]

117. Mr. Broking further admitted that the Cargill Entities' spinoff entities, the Black River Capital funds, provided approximately $30 million in equity funding to Tacora in July of 2017. The exhibit indicates it had done so on behalf of Proterra.[87] Mr. Broking confirmed it was a condition of this financing that Phil Mulvihill, a Cargill Inc. employee, be appointed to the Tacora board.[88]

118. Tacora also ignores that, as admitted by Mr. Broking, the principals of Tacora had a relationship with the Cargill Entities spanning back to 2011, wherein Cargill Inc. had contracted with Magnetation Inc., a related entity to MagGlobal CA Inc., which eventually became Tacora.[89]

119. In any event, the 2017 timeframe is not the only material time. The parties amended and restated the Offtake Agreement in 2018 before production and any payments of the Royalty, which amendment Broking admitted was a condition of Cargill Inc's $20 million investment in Proterra Cooperatief.[90] This was the first step, an extension to 2033,[91] in a progression toward the Cargill Entities securing a "life of mine" agreement – that progression was completed with a further cash infusion in Tacora from Cargill Inc in 2020.[92]

120. Tacora admits in its factum at paragraph 8 that the Offtake Agreement is a "bad deal" for it. Broking admitted in cross-examination that the introduction of a life of mine provision "jumps out" as a driving factor as to how the Offtake Agreement became a bad deal for Tacora.[93] Beyond that, however, is the fact that the Ad Hoc Bondholder group was able to obtain a comparable offtake agreement at a substantially lower cost, and that the "onerous terms of the Offtake Agreement have caused Tacora to suffer material losses over the years (in the order of hundreds of millions of dollars)."[94]

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[86] Broking Cross-Examination, Qs. 61-62
[87] Broking Cross-Examination, Exhibit 4.
[88] Broking Cross-Examination, Q. 91.
[89] Broking Cross-Examination, Qs. 141-143.
[90] Broking Cross-Examination, Qs. 28-30, 83-84 and 87-89.
[91] Broking Cross-Examination, Qs. 83-84.
[92] Broking Cross-Examination, Qs.105-110.
[93] Broking Cross-Examination, Q. 210.
[94] Factum of the Consortium Noteholders Group dated March 27, 2024, para. 13.

121. The net result of that bad deal meant that the Cargill Entities were predominantly the only game in town for Tacora in terms attracting further debt and equity post-2018. In its factum, Tacora admits that in its relationship with the Cargill Entities, it "has never bargained from a position of strength."[95]

122. Fast-forward to the year-end financial reporting to 2022, Tacora began publicly admitting that Cargill Inc was a related party under International Financial Reporting Standards to Tacora by virtue of a $15 million preferred share investment.[96]

123. In addition to Cargill Inc's direct interest that triggered the related party admission, Joe Broking admitted that the Cargill Entities presently own warrants or preferred shares entitling it up to 36.5% of Tacora's common shares.[97]

124. Beyond the Cargill Entities' substantial direct and indirect ownership interests, Tacora now admits in its factum that the Cargill Entities have always maintained a common project in the Scully Mine. In particular, Tacora admits that it has never had a marketing arm – Cargill Inc. has acted as Tacora's marketer around the globe since commercial production.[98] In exchange for providing this critical function, Cargill exacts an extortionate share of the profits,[99] which in plain terms is a discount on the purchase price, which ultimately results in a deprivation to 1128349 on the Royalty.

Concluding Summary on Non-Arm's Length Dealings

125. In the result, considering all of the foregoing, Tacora and the Cargill Entities are non-arm's length many times over through the Scully Mine common project in terms of marketing and profit sharing; through indirect ownership, and, through critical financing:

(a) **Marketing/Profit Sharing Common Project:**

(i) The bonds of dependence between Tacora and the Cargill Entities could not have been stronger. When all else failed, Tacora could always rely upon the Cargill Entities to keep their common project alive, even when no one else would, until it all fell apart in these CCAA proceedings. Every step

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[95] Tacora Factum, para. 8.
[96] Broking Cross-Examination, Q. 118-119.
[97] Broking Cross-Examination, Qs. 214-218.
[98] Broking Cross-Examination, Q. 209.
[99] Factum of Tacora dated April 8, 2024 at paras. 4 and 14.

of the way, dating back to pre-production, the Cargill Entities bargained for levers of influence and Tacora's dependence.

(ii) Marketing and promoting were a key indicia of non-arm's length dealings in *Doyle Salewski*, summarized above. While Tacora is entitled to its view that the marketing for discount exchange was a reasonable concession based upon the knowledge they had at the time, Tacora's subjective views are wholly irrelevant to the determination of the factual question of whether Tacora and the Cargill Entities were non-arm's length by virtue of the of the restated Offtake Agreement and the marketing/profit sharing bonds of dependence arising therefrom.

(b) **Indirect Ownership Since Inception:**

(i) The Black River Capital funds, resulting from Cargill Inc.'s spinoff, invested more than $30 million US at the time of Tacora's acquisition of the Scully Mine assets, meaning Cargill indirectly owned an interest in Tacora from inception;[100]

(ii) In November 2018, Cargill Inc. invested approximately $20 million U.S. investment in Tacora through Proterra Cooperatief (resulting in a 16.3% interest in Proterra Cooperatief) in response to an equity cash call correlating to a 14.4% indirect interest in Tacora, for which the Cargill Entities exacted:

(A) a change to the pricing formula in the Offtake Agreement;

(B) an extension of the term of the Offtake Agreement to 2033;

(C) influence through the appointment of Cargill Inc. employee, Phil Mulvihill, on Tacora's Board of Directors.

[100] The precise ownership interest is not known as these details were not disclosed to 1128349 in these proceedings.

(iii) Cargill Inc's response to a March 2020 cash call in which it partially funded another $10 million to Tacora, resulting in Cargill Inc's having increased its indirect ownership in Tacora to 16.60%;[101]

(iv) In November 2022, Cargill invested a further $15 million in Tacora to acquire convertible preferred shares which carried a 15% accretion right;

(v) The foregoing non-arm's length dealings forced Tacora and Cargill Inc. to admit they were related parties as defined by IFRA in disclosure to investors;

(c) **Critical Strategic Financing:**

(i) Cargill Intl entered into a Stockpile Agreement in December 2019, which was a pre-payment scheme designed as a working capital facility for Tacora.

(ii) In early 2023, in the context of severe liquidity challenges, Cargill Intl was the only one to step up when all other arm's length stakeholders declined, through which Tacora and Cargill Intl entered into $35 million (US) Advance Payments Facility, which was subsequently amended. This arrangement provided advance funding for the purchase of Scully Mine concentrate and guaranteed a Tacora [redacted];

(iii) In exchange for this critical financing, Cargill Intl obtained warrants entitling it to up to 35% of Tacora upon exercising them, which effectively gave the Cargill Entities *de jure* control when considered with its prior equity infusions and indirect ownership interests;[102]

(iv) Numerous fixed price side letters as referenced above, the effect of which was to insulate Tacora from iron ore price movements. Clause A(13) the

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[101] The arithmetic in terms of this $10 million investment resulting in only a 2.2% increase in indirect ownership in Tacora is not clear. It would appear Cargill Inc's ownership in Proterra Cooperatif must have grown as well through this investment, but the full details of these transactions have not been disclosed to 1128349 in these proceedings.

[102] 16.6% indirect ownership + 35% in Cargill warrants + 1.5% in Cargill Preferred Shares (ignoring the accretion rate) at fully diluted ownership = 53.1% known direct and indirect ownership interest as at 2023, not including the unknown Cargill Entities' longstanding effective ownership interest in the Black River Capital funds.

Wabush Lease signifies that where such arrangements occur, the value of Iron Ore Products should be made with reference to the non-arm's length calculation of Net Revenues (emphasis added):

> *The Lessee will have the right to engage in forward sales, futures trading or commodity options trading and other price hedging, price protection, derivatives, synthetic and speculative arrangements (the "Trading Activities) which may involve the possible physical delivery of Iron Ore Products. Earned Royalties will not apply to, and the Lessor will not be entitled to participate in, the profits or losses generated by the Lessee in or its affiliates in such Trading Activities. If the Lessee or its affiliates engage in Trading Activities, the Earned Royalties on the Iron Ore Products underlying such Trading Activities will be determined on the basis of the value of such Iron Ore Products without regard to the price or proceeds actually received by the Lessee or any of its affiliates for or in connection with the sale, or the manner in which a sale to a third party is made by the Lessee or any of its affiliates.* ***The aforementioned value will be determined in accordance with paragraph (ii) of the definition of "Net Revenues" herein.*** *…*[103]

(d) **In face of Cargill Entities securing a favourable Offtake Agreement, Non-Arm's Length Net Revenues Calculation Says 1123849 was Underpaid**

(i) There is evidence that the market-based Net Revenues was more generous than the Cargill Offtake Agreement Net Revenues. This is the effective admission of Hope Wilson's spreadsheet,[104] which reflected a material difference between the Royalty paid by Tacora using the Offtake Agreement Net Revenues base, and the clause (j)(ii) approach. It is Sam Morrow's evidence that the spreadsheet prepared by Ms. Wilson, who was Tacora's Chief Accounting Officer, indicated that at least $2,781,625 (U.S.) (CDN$3,727,377.55) more in Royalty would have been paid to 1128349 if

[103] Morrow Affidavit, Exhibit "E".

[104] Morrow Affidavit, Exhibit "JJ".

Tacora had employed the non-arm's length Net Revenues method of calculation in clause (j)(ii).[105]

(ii) David Persampieri's report confirms that the Offtake Agreement Net Revenues did not achieve the market-based "Net Revenues" provided for in clause (j)(ii).

(iii) Tacora admits that the proposed Javelin off-take agreement is more favourable to Tacora than the Offtake Agreement. Tacora admits the Cargill Offtake Agreement is a "bad deal".

B. QUANTUM OF ROYALTY PAYABLE

126. 1128349 claims the adjusted total amount of CDN$20,141,294.26 on account of unpaid and underpaid Royalty.

127. Of this total amount of outstanding Royalty, there are three underlying amounts totalling CDN$15,443,190.80 which have been confirmed by Tacora, namely:

(a) unpaid Q2 2023 Royalty, confirmed by Tacora in its July 24, 2023 letter to 1128349 to be in the aggregate amount of CDN $5,865,004.23;[106]

(b) unpaid Q3 2023 Royalty, confirmed by Tacora in its October 24, 2023 letter to 1128349 to be in the aggregate amount of CDN $7,962,729.76;[107] and

(c) partially unpaid Q4 2023 Royalty, confirmed by Tacora in its January 24, 2024 letter to 1128349 to be in the aggregate amount of CDN $1,614,456.81.[108]

128. The CDN$4,699,103.46 balance of 1128349's total claim is made up of Royalty which has been underpaid by reason of Tacora's failure to utilize the non-arm's length Net Revenues definition to calculate the Royalty under clause (j)(ii) of the Wabush Lease. This amount is supported by the January 4, 2024 report of 1128349's iron ore industry expert, David Persampieri which has been delivered and filed in this proceeding (the "Persampieri Report").[109]

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[105] Morrow Affidavit, para. 42.
[106] Morrow Affidavit, para. 25.
[107] Morrow Affidavit, para. 35 and Exhibit "OO".
[108] Morrow Affidavit, para. 38 and Exhibit "RR".
[109] Affidavit of David Persampieri Sworn March 18, 2024 (the "Persampieri Affidavit"), Exhibit "A".

Persampieri Report and Opinion

129. 1128349's iron ore expert, David Persampieri, is a vice-president and leader of the Metals and Mining practice at Charles River Associates, an economics and management consulting firm.

130. David Persampieri is an expert in iron ore pricing and contracting issues. His extensive experience as an expert who has been qualified in legal disputes in these areas is detailed in Appendix A to the Persampieri Report.

131. Tacora does not question Mr. Persampieri's expertise. Nor do they challenge the analysis in the Persampieri Report. They contend that Mr. Persampieri failed to make appropriate deductions.

132. Mr. Persampieri's mandate is expressed in paragraph 4 of the Persampieri Report, as follows:

> *I have been asked by counsel for the Plaintiff, 1128349 B.C. Ltd. ("1128349"), to provide my expert opinion as to the amount of Earned Royalties (as defined in the Wabush Lease) which would have been paid to 1128349 by utilizing the non-arm's length Net Revenues method in paragraph (j)(ii) of the Wabush Lease and to compare that amount to the Earned Royalties reflected to have been paid or owed by Tacora Resources Inc. ("Tacora") to 1128349 in the Royalty Statements, and state the difference.*[110]

133. Mr. Persampieri's analysis was accordingly based on clause j(ii) of the Wabush Lease which provides for the calculation of non-arm's length Net Revenues. For ease of reference, this clause is re-stated here:

> *(j) Net Revenues shall mean:*
>
> *…*
>
> *(ii) in the event that the Lessee otherwise sells Iron Ore Products, including without limitation, in an 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 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.*[111]

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[110] Persampieri Report, para. 4.

[111] Morrow Affidavit, Exhibit "E", clause (j)(ii).

134. Mr. Persampieri stated of clause (j)(ii):

> *I interpret this as requiring the determination of the market price of Tacora's Iron Ore Products, FOB Sept-Îles Port.*[112]

135. Mr. Persampieri calculated Net Revenues under clause (j)(ii) as follows:

(a) He determined the price of Tacora's iron ore concentrate by employing the well-established Platts 65% high grade iron ore fines index as the Industry Service and then adjusting for Tacora's premium (in excess of 65%) iron ore content. Tacora agrees with this approach.[113]

(b) He calculated the freight costs which were necessary to deduct to achieve the price of the iron ore concentrate free on board the port. In doing so, he employed a 24% increase to the conventional published benchmark Tubarao, Brazil to Qingdao, China freight rate. Tacora's Chief Accounting Officer, Hope Wilson, used the same 24% increase in her alternate Royalty calculation.[114] Mr. Broking does not agree, and says that the 24% increase is understated by reason of winter freight rates.[115]

(c) Mr. Persampieri priced Tacora's iron ore concentrate for the quarter in which Iron Ore Products were shipped. He did so based on the direction in clause (j)(ii) that the non-arm's length Net Revenues be "calculated at f.o.b. the Port". Mr. Broking disagrees with this calculation timing.[116]

(d) He applied his derived market price to the quantities of iron ore concentrate as stated in the Royalty Statements, adjusting for moisture content.

136. Mr. Persampieri summarized his steps to determine the value of Tacora's iron ore concentrate as follows:

> *So I basically took the industry --- the quoted prices, and used the industry standard approach to determine the value at a given port by making adjustments*

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[112] Persampieri Report, para. 28.
[113] Eighth Broking Affidavit, para. 19.
[114] Morrow Affidavit, Exhibit "II".
[115] Eighth Broking Affidavit, paras. 22-24.
[116] Eighth Broking Affidavit, para. 6(a).

> *for iron and freight from the published price, which is for that product delivered to a port in China.*[117]

137. This approach provided the basis for Mr. Persampieri's determination of the market price of Tacora's iron ore concentrate free on board Sept-Îles. This allowed him to calculate Net Revenues, in US dollars, based on the shipment amounts recorded in the Royalty Statements. He multiplied the amount per metric tonne, or market price, by the tonnes shipped in each quarter.[118]

138. Mr. Persampieri then calculated the Royalty based on such Net Revenues in $US and converted this value to $CDN.[119] He determined that for the period Q1 2020 up to and including Q3 2023, the Royalty Statements documented a total Royalty paid by Tacora of $120,859,936.81 ($CDN). Using the (j)(ii) definition of Net Revenues, he calculated the payable Royalty to be the higher amount of $128,153,190.54 for this same period.

139. Finally, Mr. Persampieri compared his calculation of the Royalty calculated under clause (j)(ii) with the Royalty which had been paid by Tacora as documented in the Royalty Statements. This comparison yielded an underpayment amount of $7,295,253.73 (CDN) for the period Q1, 2020 – Q3, 2023.

140. In his cross-examination, Mr. Persampieri corrected and adjusted this amount to reflect a credit or deduction for the Knoll Lake royalty which is payable by 1128349 under the Wabush Lease.[120]

141. The credit for Knoll Lake royalty is in the amount of $2,596,150.27 (CDN), leaving the balance of $4,699,103.46 (CDN) as the amount of Royalty underpaid by reason of Tacora's failure to utilize the non-arm's length Net Revenues base to calculate the Royalty.

Broking Criticism of the Persampieri Report

142. In his March 28, 2024 Affidavit, Tacora's CEO, Joe Broking, critiqued the basis for Mr. Persampieri's report. He challenged Mr. Persampieri's analysis on six grounds:

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[117] Transcript of cross-examination of David Persampieri held on April 5, 2024 ("Persampieri Cross-Examination") at Q. 125.

[118] Persampieri Cross-Examination at Qs. 130-134.

[119] Persampieri Report, para. 41.

[120] Persampieri Cross-Examination at Qs. 156-162.

(a) the timing of Mr. Persampieri's analysis;

(b) Mr. Persampieri's failure to credit the Knoll Lake royalty;

(c) Mr. Persampieri's failure to deduct Deductible Expenses as defined in the Wabush Lease;

(d) Mr. Persampieri's overstatement of the value of Tacora's iron ore concentrate;

(e) Mr. Persampieri's failure to account for winter freight costs; and

(f) Mr. Persampieri's failure to account for Tacora's marketing costs.

143. Of Mr. Broking's criticisms, only paragraph (b) has merit. 1128349's adjusted claim reflects a credit, or reduction, in the amount of CDN$2,596,150.27 to account for the Knoll Lake royalty which is payable by 1128349.

144. Tacora suggests that Mr. Persampieri concedes that there is nothing in the Offtake Agreement pricing terms which demonstrate it to be a non-arm's length agreement.[121] This assertion misconceives the nature of Mr. Persampieri's mandate. He was not asked, as he clarified, for his assessment of whether or not the Offtake Agreement was non-arm's length.[122] His comments were limited to the inclusion of a profit-sharing mechanism in an offtake agreement.[123] Mr. Persampieri did volunteer that "equity ownership of the offtaker in the supplier could be an indication of a non-arm's-length situation".[124]

Mr. Broking's timing objection

145. In paragraph 6(a) of his March 28, 2024 Affidavit, Mr. Broking objects to Mr. Persampieri's calculation, using the Platts 65% industry standard index, of the price of iron ore concentrate in the quarter that it is shipped.

146. This objection is answered by the clause (j)(ii) definition. It states that the non-arm's length Net Revenues are to be "calculated at f.o.b. the Port". The Port is defined to be the shipping port

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[121] Tacora Factum, para. 38.
[122] Persampieri Cross-Examination at Q. 254.
[123] Persampieri Cross-Examination at Q. 113.
[124] Persampieri Cross-Examination at Q. 255.

in clause (j)(i), i.e. "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**")".

147. The Wabush Lease accordingly contemplates that the calculation of the Industry Service-based Net Revenues under clause (j)(ii) will be made at the shipment port. This is consistent with Tacora's arrangements with Cargill Intl. As is apparent from the record, Tacora sells and transfers title to the Iron Ore Products to Cargill Intl at the Port pursuant to the Stockpile Agreement.

148. Mr. Persampieri further opined that the use of the "current-quarter" quotation period is in his experience most common for iron ore product sales under long-term contracts.[125]

Mr. Broking's "Deductible Expenses" objection

149. Mr. Broking contends that "Deductible Expenses" require to be deducted from the calculation of Net Revenues in clause (j)(ii). This is not correct. There is no provision for the deduction of Deductible Expenses in the language of the definition.

150. The clause (j)(ii) definition simply adopts the alternative of an industry-standard publication or service for the calculation of Net Revenues. This is a simple and clear method of calculating the Net Revenues for non-arm's length transactions.

151. Mr. Persampieri has confirmed that this is conventional. Responding to Mr. Broking's objection that he failed to deduct Deductible Expenses in his clause (j)(ii) calculation, Mr. Persampieri said of non-arm's length calculations in North American royalty agreements:

> *Q. Okay, so under your interpretation, in J(ii) these deductible expenses are going to become Tacora's problem whereas, under J(i), they would be shared between Tacora and 112. Is that right?*
>
> *A. I believe that is correct. Yes.*
>
> *Q. Ok. And – okay.*
>
> *A. But, you know, I think if you look at the way royalty agreements – the ones I have seen and which are quite a few – are structured, there is a bunch of different ways that the value is determined, particularly when a royalty is based on the value of the product removed, as it is in this case.*
>
> *And there are two basic flavours, and we see them a lot in North America in royalty agreements: one is it is based on actual realized revenues, which would be the case of J(i). And in those cases, there can be but there are not always adjustments*

[125] Persampieri Report, para. 27.

> *made for certain types of costs that get credited to the mining company as opposed to the royalty holder.*
>
> *And the other way that they are done, which is particularly the case where there is an expectation of significant non-arm's length sales in the case of say equity ownership of the mine by the steel mill, for example. Then --*
>
> *Q. Sorry, can you give me that again? Non-arm's…*
>
> *A. So, not when there is a – when there is an expectation or the possibility or likelihood of significant non-arm's-length sales, for example, when a steel mill has an equity ownership stake in the mine itself, so there is just a transfer not a sale, then the royalty is often based on some indication of the market value of the product.*
>
> *And in those cases, there typically isn't any kind of adjustment for cost; they are simply using the market value as published or as determined appropriately.*
>
> *So, given that background, it wasn't surprising to me to not have deductible – to not see the deductible expenses referenced the J(ii) non-arm's-length section.*[126]

152. The difference in the treatment of Deductible Expenses in clause (j)(i) and clause (j)(ii) may be explained as an incentive to the Lessee, Tacora, to engage in *bona fide* arm's length transactions for the Iron Ore Products.

Mr. Broking's [redacted] objection

153. Mr. Broking objects to Mr. Persampieri's valuation of Tacora's iron ore concentrate using the Platts 65% index price, suggesting that it is overstated.

154. This is confusing, as Mr. Broking appears to agree with Mr. Persampieri's methodology, stating:

> *I do not disagree with using the Platts 65% index and adjusting the price upward to account for the Fe content. The use of a high-grade index and further upward adjustment acknowledges that Tacora's iron ore concentrate is in many respects a premium product.*[127]

155. Mr. Broking suggests a [redacted] from the Platts 65% index price. His submissions for this discounted price for Tacora's concentrate are not supportable.

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[126] Persampieri Cross-Examination at Q. 250.

[127] Eighth Broking Affidavit, para. 19.

156. In paragraph 19(a) he suggests that Tacora's Iron Ore Concentrate "is high in manganese, which is considered an impurity in the steelmaking process". This is contradicted by Tacora's own statements, including the following:

(a) In the section of its website entitled "Our Product", Tacora says, *inter alia*, the following of its Iron Concentrate:

> *High Quality*
> *65% Fe*
>
> *Low Impurity*
> *Low silica and manganese content*[128]

(b) Tacora's May 5, 2021 Offering Memorandum states:

> *Appropriate manganese levels. The mine has historically produced a higher Mn content ore which our customers can become accustomed with in their steelmaking processing. Through the restart of the operations, we installed new technology for Mn reduction circuits to address the Mn content that had caused problems for past owners of the operation.* ***To date, none of our end customers have indicated issues with the Mn levels in our product as Mn is added in steel making alloys and we have not realized any discount to sales price because of it. Some of the most reputable steel making companies in Europe, Middle-East, North Africa and Asia form our customer base.***[129] *(emphasis added)*

157. As to Mr. Broking's suggestion in his Affidavit that Tacora receives a discounted price for the Tacora iron ore concentrate, this is flatly contradicted by the May 5, 2021 Offering Memorandum. It states at page 2:

> ***Our concentrate has commanded a premium to the Platts 65% Fe benchmark in most instances because of quality specifications highlighted above.*** *As the below graphic demonstrates, we significantly outperform the standard benchmark specifications in all key areas.*[130] *(emphasis added)*

158. To a similar effect is Tacora's February 2022 Investor Presentation, which states in part:

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[128] Exhibit No. 10 to Broking Cross-Examination.

[129] Morrow Affidavit, Exhibit "J", Responding Motion Record p. 226.

[130] Morrow Affidavit, Exhibit "J", Responding Motion Record p. 226.

> *Coking coal prices have remained high through 2021 compared to historical averages, resulting in a strong Platts IO 65% Fe CFR China Index ("P65") premium for the year.*[131]

159. Tacora has not adduced any documentary evidence from, e.g., any third party purchaser of its concentrate to support the assertion that it was paid less than a premium price above the Platts 65% index price.

Mr. Broking's winter freight costs objection

160. Mr. Broking contends that Mr. Persampieri should have adjusted for winter freight costs in computing the freight charges utilized in his opinion.

161. Mr. Persampieri disagrees. It is relevant that Hope Wilson, Tacora's Chief Accounting Officer who Mr. Broking confirmed to be knowledgeable of freight costs of relevance to the Tacora Iron Ore Products,[132] used the same 24% increase over the Tubarao-Qingdao benchmark freight cost as did Mr. Persampieri in his opinion.

162. Contrary to Tacora's submission that Mr. Persampieri borrowed the 24% premium from Tacora's Chief Accounting Officer Hope Wilson,[133] Mr. Persampieri confirmed that he had not relied on Ms. Wilson's alternate royalty calculations but independently calculated the 24% freight premium.[134]

163. As to the basis of the 24% freight cost increase, Mr. Persampieri testified:

> *Q. And that is based on the difference in nautical miles, 14,000, as opposed to 11,000 nautical miles?*
>
> *A. Yeah. Well, that is obviously part of it. It is an overarching average adjustment for that, to arrive at the price in Eastern Canada.*[135]
>
> *…*
>
> *Q. I see. But you didn't actually have the numbers to indicate whether that accurately captured the winter freight premium?*
>
> *A. Well, other than looking at other seaborne contracts for shipments from Eastern Canada and the freight adjustments that are used in those pricing formulas, the 24*

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[131] Morrow Affidavit, Exhibit "X", Responding Motion Record p. 658.

[132] Broking Cross-Examination at Q. 326.

[133] Tacora Factum, para. 75.

[134] Persampieri Cross-Examination at Q. 50.

[135] Persampieri Cross-Examination, at Q. 173.

> *per cent is pretty reasonable. I have seen many, if – not many, several other contracts that in fact have an adjustment with a cap. So they say that the additional freight is "x" per cent of C3, not to exceed $3.50 or $4.00, or something like that.*
>
> *So, looking across that, that is I think a pretty fair estimate of the overall average freight premium across the year.*[136]

Mr. Broking's marketing costs objection

164. Finally, Mr. Broking suggests that Net Revenues should be calculated by deducting marketing costs.

165. There is no basis for this argument.

166. The definition of non-arm's length Net Revenues in clause (j)(ii) does not provide for any deduction in relation to marketing costs.

167. Not even the more specific provision for Deductible Expenses, which is relevant to the calculation of Net Revenues under clause (j)(i), provides for the deduction of marketing costs.

Conclusion on Broking objections

168. For the above reasons, the only adjustments to the amount claimed by 1128349 pursuant to Mr. Persampieri's opinion is the credit for Knoll Lake Royalty, being in the amount of CDN$2,596,150.27.

169. This leaves a balance payable on the basis of Mr. Persampieri's report of CDN$4,699,103.46.

Summary of quantum

170. The aggregate total unpaid and underpaid Royalty is CDN$20,141,294.26.

171. There must be added to this Royalty claim the unquantified amount of Royalty underpayment by reason of Tacora's failure to employ the non-arm's length Net Revenues definition from Q4 2023 to current date. 1128349 is scheduled to be paid the Q1 2024 Royalty on April 25, 2024.

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[136] Persampieri Cross-Examination at Q. 183.

PART V – ORDER SOUGHT

172. 1128349 respectfully requests that this Honourable Court grant an order:

(a) dismissing Tacora's motion seeking a declaration that Tacora is not required to pay the Pre-Filing Royalty;

(b) requiring that Tacora pay the Pre-Filing Royalty, as well as the unquantified Royalty amount from Q4, 2023 to date;

(c) requiring Tacora to pay 1128349's costs of this motion on a substantial indemnity basis; and

(d) for such further and other relief as this Honourable Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of April, 2024.

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SCHEDULE A
LIST OF AUTHORITIES

Tab	Description
1	*Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 (CanLII), [2014] 2 SCR 633
2	*Canada v McLarty,* 2008 SCC 26 at 43
3	*Gingras, Robitaille, Marcoux Ltée v Beaudry*, 1980 CarswellQue 59 36 CBR (NS) 111
4	*Montor Business Corporation v Goldfinger*, 2016 ONCA
5	*Doyle Salewski Inc v Scott*, 2019 ONSC 5108

SCHEDULE B
RELEVANT STATUTES

Income Tax Act, RSC 1986, c 1(5th Supp) at s. 251.

Arm's length

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.

Definition of *related persons*

(2) For the purpose of this Act, ***related persons***, or persons related to each other, are

(a) individuals connected by blood relationship, marriage or common-law partnership or adoption;

(b) a corporation and

(i) a person who controls the corporation, if it is controlled by one person,

(ii) a person who is a member of a related group that controls the corporation, or

(iii) any person related to a person described in subparagraph 251(2)(b)(i) or 251(2)(b)(ii); and

(c) any two corporations

(i) if they are controlled by the same person or group of persons,

(ii) if each of the corporations is controlled by one person and the person who controls one of the corporations is related to the person who controls the other corporation,

(iii) if one of the corporations is controlled by one person and that person is related to any member of a related group that controls the other corporation,

(iv) if one of the corporations is controlled by one person and that person is related to each member of an unrelated group that controls the other corporation,

(v) if any member of a related group that controls one of the corporations is related to each member of an unrelated group that controls the other corporation, or

(vi) if each member of an unrelated group that controls one of the corporations is related to at least one member of an unrelated group that controls the other corporation.

Corporations related through a third corporation

(3) Where two corporations are related to the same corporation within the meaning of subsection 251(2), they shall, for the purposes of subsections 251(1) and 251(2), be deemed to be related to each other.

Relation where amalgamation or merger

(3.1) Where there has been an amalgamation or merger of two or more corporations and the new corporation formed as a result of the amalgamation or merger and any predecessor corporation would have been related immediately before the amalgamation or merger if the new corporation were in existence at that time, and if the persons who were the shareholders of the new corporation immediately after the amalgamation or merger were the shareholders of the new corporation at that time, the new corporation and any such predecessor corporation shall be deemed to have been related persons.

Amalgamation of related corporations

(3.2) Where there has been an amalgamation or merger of 2 or more corporations each of which was related (otherwise than because of a right referred to in paragraph 251(5)(b)) to each other immediately before the amalgamation or merger, the new corporation formed as a result of the amalgamation or merger and each of the predecessor corporations is deemed to have been related to each other.

Definitions concerning groups

(4) In this Act,

related group means a group of persons each member of which is related to every other member of the group; (*groupe lié*)

unrelated group means a group of persons that is not a related group. (*groupe non lié*)

Control by related groups, options, etc.

(5) For the purposes of subsection 251(2) and the definition ***Canadian-controlled private corporation*** in subsection 125(7),

(a) where a related group is in a position to control a corporation, it shall be deemed to be a related group that controls the corporation whether or not it is part of a larger group by which the corporation is in fact controlled;

(b) where at any time a person has a right under a contract, in equity or otherwise, either immediately or in the future and either absolutely or contingently,

(i) to, or to acquire, shares of the capital stock of a corporation or to control the voting rights of such shares, the person shall, except where the right is not exercisable at that time because the exercise thereof is contingent on the death, bankruptcy or permanent disability of an individual, be deemed to have the same position in relation to the control of the corporation as if the person owned the shares at that time,

(ii) to cause a corporation to redeem, acquire or cancel any shares of its capital stock owned by other shareholders of the corporation, the person shall, except where the right is not exercisable at that time because the exercise thereof is contingent on the death, bankruptcy or permanent disability of an individual, be deemed to have the same position in relation to the control of the corporation as if the shares were so redeemed, acquired or cancelled by the corporation at that time;

(iii) to, or to acquire or control, voting rights in respect of shares of the capital stock of a corporation, the person is, except where the right is not exercisable at that time because its exercise is contingent on the death, bankruptcy or permanent disability of an individual, deemed to have the same position in relation to the control of the corporation as if the person could exercise the voting rights at that time, or

(iv) to cause the reduction of voting rights in respect of shares, owned by other shareholders, of the capital stock of a corporation, the person is, except where the right is not exercisable at that time because its exercise is contingent on the death, bankruptcy or permanent disability of an individual, deemed to have the same position in relation to the control of the corporation as if the voting rights were so reduced at that time; and

(c) where a person owns shares in two or more corporations, the person shall as shareholder of one of the corporations be deemed to be related to himself, herself or itself as shareholder of each of the other corporations.

Blood relationship, etc.

(6) For the purposes of this Act, persons are connected by

(a) blood relationship if one is the child or other descendant of the other or one is the brother or sister of the other;

(b) marriage if one is married to the other or to a person who is so connected by blood relationship to the other;

(b.1) common-law partnership if one is in a common-law partnership with the other or with a person who is connected by blood relationship to the other; and

(c) adoption if one has been adopted, either legally or in fact, as the child of the other or as the child of a person who is so connected by blood relationship (otherwise than as a brother or sister) to the other.

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

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

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

ACTION COMMENCED AT TORONTO

FACTUM OF 1128349 B.C. LTD.
(RE: MFC DISPUTE)

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