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.

FACTUM OF CARGILL, INCORPORATED AND CARGILL INTERNATIONAL TRADING PTE LTD. RE: PRELIMINARY THRESHOLD MOTION

(returnable April 10-12, 2024)

March 27, 2024

Goodmans LLP
Barristers & Solicitors
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, ON M5H 2S7

Robert J. Chadwick (LSO No. 35165K)
rchadwick@goodmans.ca

Caroline Descours (LSO No. 58251A)
cdescours@goodmans.ca

Alan Mark (LSO No. 21772U)
amark@goodmans.ca

Peter Kolla (LSO No. 54608K)
pkolla@goodmans.ca

Tel: 416.979.2211

Lawyers for Cargill, Incorporated and Cargill International Trading Pte Ltd.

TABLE OF CONTENTS

PART I – OVERVIEW **1**

PART II – SUMMARY OF THE FACTS **4**

- A. The Offtake Agreement 5
- B. The RVO Motion 6

PART III – ISSUES AND THE LAW **6**

- A. Options for Addressing Unwanted Contracts Under the CCAA 6
- B. The CCAA Procedure for Disclaimer Does Not Admit of Exceptions 9
- C. The Disclaimer Requirements Must Be Observed 11

PART IV – ORDER REQUESTED **15**

Schedule A - List of Authorities

Schedule B - Excerpts of Statutes and Regulations

PART I – OVERVIEW

1. This motion concerns a threshold question: whether a reverse vesting order is available under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 (the "**CCAA**") with respect to an executory agreement which is not assignable without consent and has not been disclaimed under s. 32 of the CCAA.

2. The CCAA debtor, Tacora Resources Inc. ("**Tacora**"), in its Notice of Motion dated February 2, 2024 (the "**RVO Motion**") seeks a reverse vesting order in connection with a proposed sale of the shares of Tacora by which Tacora would emerge from this CCAA proceeding with new shareholders and with the company intact, but without the Offtake Agreement (as defined below) with Cargill International Trade PTE Ltd. ("**CITPL**", along with Cargill, Incorporated, "**Cargill**"), under which CITPL purchases from Tacora 100% of the iron ore concentrate produced at Tacora's Scully Mine.

3. As noted, the RVO Motion does not contemplate an asset sale. In an asset sale, the Offtake Agreement would remain with the debtor, Tacora, and Cargill would participate *pari passu* with other creditors in the available proceeds of sale. Neither does the RVO Motion propose a plan of arrangement to be approved by all classes of affected creditors, which would provide for a consensual compromise of any liabilities related to the Offtake Agreement.

4. Instead, Tacora's RVO Motion asks this Court to approve a share transaction with an ad hoc group of Tacora's noteholders, Resource Capital Fund VII L.P., and Javelin Global Commodities (SG) Pte. Ltd. (the "**AHG Consortium**") under a reverse vesting structure featuring the "transfer" (i.e. assignment) of the Offtake Agreement and its associated obligations to a corporation incorporated by Tacora ("**ResidualCo**").

5. ResidualCo would be unable to perform the obligations of Tacora under the Offtake Agreement, and would not have the means to compensate Cargill for its failure to perform the Offtake Agreement. The effect of the "transfer" would be to create an unsecured damages claim in favour of Cargill against ResidualCo that would not be satisfied (the "**Proposed Cargill Offtake Claim**").

6. There is no dispute that the AHG Consortium's proposed transaction with Tacora provides for the complete repayment or satisfaction of all of Tacora's secured debt and assumption of all of Tacora's pre- and post-filing trade amounts, except the Proposed Cargill Offtake Claim and limited claims of other affected creditors,[1] thus significantly prejudicing Cargill's rights as a creditor.

7. Cargill submits that the relief sought in the RVO Motion is unavailable.

8. An assignment is only available by consent or under s. 11.3 of the CCAA.

9. Tacora has neither sought nor obtained Cargill's consent to the assignment of the Offtake Agreement. Neither is assignment available under s. 11.3 of the CCAA.

10. It is clear that s. 11.3 sets out restrictions on the Court's ability to assign contracts which cannot be assigned without the consent of the counterparty, and that those restrictions would preclude the Court from approving an assignment under s. 11.3 in this case. By instead asking the Court to make an order under s. 11, invoking the Court's discretion to "make any order that it considers appropriate in the circumstances," Tacora is effectively asking the Court to ignore the

---

[1] Aide Memoire of the Consortium Noteholder Group (Case Conference – February 6, 2024), dated February 5, 2024 at para. 4.

restrictions in s. 11.3. As Tacora could not obtain an order under s. 11.3 and indeed does not seek an order under s. 11.3, the order it seeks under s. 11 is not available to it.

11. Consequently, disclaimer is the only method by which Tacora can divest itself of the Offtake Agreement. In accordance with the procedure set out in s. 32 of the CCAA, Tacora must serve a notice of disclaimer, seek the support of the Monitor and, if Cargill objects, obtain the approval of the Court, before it can disclaim the Offtake Agreement. Section 32, like s. 11.3, sets out a series of restrictions and requirements—and rights for Cargill—which must be complied with before a contract can be disclaimed.

12. But Tacora proposes that the RVO Motion be granted without it making any attempt to comply with s. 32 of the CCAA. Tacora's attempt to sidestep the requirements of the CCAA regarding the disclaimer of executory agreements through the use of s. 11 must be denied. If Tacora wishes to sell the shares of Tacora and at the same time jettison the Offtake Agreement, absent a plan adopted with Cargill's consent, it must disclaim the contract under s. 32. Alternatively, it must proceed by way of an asset sale, whereby the Offtake Agreement, and any damages claim in respect of it, remains in the Tacora estate to be dealt with in accordance with the CCAA.

13. Section 11 is a "gap-filling" provision which supplements the express powers of the Court under the CCAA. By its express terms, the Court's authority under s. 11 is made "subject to the restrictions set out in this Act". The above noted restrictions on assignments, and on resiling from contracts, preclude resort to s. 11 to effect indirectly what the CCAA says cannot be done directly.

PART II – SUMMARY OF THE FACTS

14. Cargill advised the Court in early February that the limited facts necessary to address this preliminary threshold motion were not in dispute. Tacora has filed no evidence to contradict the key facts, set out below, in Cargill's evidence. Those key facts, which are undisputed, are:

(a) The Offtake Agreement contains a restriction on assignment without Cargill's consent.

(b) Cargill has not consented to the assignment of the Offtake Agreement to another company, ResidualCo, with no assets and no ability to perform the obligations under the Offtake Agreement.

(c) Tacora has not issued a disclaimer notice pursuant to s. 32 of the CCAA.

(d) Tacora is seeking approval in the RVO Motion of a share transaction and the assignment of the Offtake Agreement to ResidualCo.

(e) The Offtake Agreement remains in place and Cargill and Tacora continue to perform their obligations under it.

15. The AHG Consortium recognized as early as December 27, 2023 that "the landscape for bidders is fundamentally shaped by whether the Cargill Documents, including the Offtake Agreement, can be disclaimed and/or assigned in Tacora's CCAA proceeding" and suggested that a motion for advice and directions be brought as soon as possible on this point.[2] But Tacora declined to bring such a motion or even begin the process of disclaiming the Offtake Agreement,

---

[2] Letter from counsel to the AHG Consortium to counsel to Tacora and the Monitor dated December 27, 2023, Exhibit 1 to the cross-examination of Michael Nessim held March 18, 2024.

and resisted scheduling this motion on a preliminary basis to obtain the Court's guidance on the necessity of proceeding by way of disclaimer.

A. The Offtake Agreement

16. Tacora sells 100% of the iron ore concentrate production at Tacora's Scully Mine to CITPL pursuant to an offtake agreement between Tacora, as seller, and CITPL, as buyer, dated April 5, 2017 and restated on November 11, 2018, and as amended from time to time, and the sale of the iron ore concentrate is also subject to a stockpile agreement between Tacora, as seller, and CITPL, as buyer, dated December 17, 2019, which works in conjunction with the offtake agreement (collectively, the "**Offtake Agreement**").[3]

17. The Offtake Agreement provides that it cannot be assigned without Cargill's consent, and contains limited termination rights that do not provide Tacora with the ability to terminate it according to its terms in the present circumstances.[4]

18. The Offtake Agreement remains in effect. Tacora has not issued any notice pursuant to the CCAA or otherwise to Cargill to disclaim or resiliate the Offtake Agreement.[5] Cargill and Tacora continue to perform their obligations under the Offtake Agreement.

---

[3] Affidavit of Brennan Caldwell sworn February 5, 2024 ("**Caldwell Affidavit**"), paras. 2-3; Motion Record for Cargill's Preliminary Threshold Motion dated February 5, 2024 ("**Cargill Threshold MR**"), Tab 2, p. 15-16.

[4] Caldwell Affidavit, paras. 4-7 and Exhibits "A" and "B" being ss. 35.3 and 38 of the offtake agreement and ss. 11.1 and 13 of the stockpile agreement; Cargill Threshold MR, Tab 2, p. 16-17, Tab 2(A), p. 23-24, and Tab 2(B), p. 29-31.

[5] Caldwell Affidavit, para. 8; Cargill Threshold MR, Tab 2, p. 17.

B. The RVO Motion

19. The RVO Motion seeks a reverse vesting order in respect of a bid by the AHG Consortium for a share transaction with Tacora.[6]

20. The RVO Motion contemplates that the Offtake Agreement and its associated obligations will be "transferred" (i.e. assigned) and vested out to ResidualCo, as part of a series of steps and transactions pursuant to which ResidualCo would be unable to perform Tacora's obligations under the Offtake Agreement. The effect of the "transfer" and vesting out would be to create the Proposed Cargill Offtake Claim, an unsecured claim in favour of Cargill against ResidualCo that will not be satisfied.[7]

21. The RVO Motion contemplates: (i) payment or satisfaction in full of all secured claims that could arise against Tacora; and (ii) payment or satisfaction of all or nearly all of the unsecured claims of Tacora (other than the Proposed Cargill Offtake Claim).[8]

PART III – ISSUES AND THE LAW

A. Options for Addressing Unwanted Contracts Under the CCAA

22. In a CCAA proceeding, the debtor may wish to preserve a contract (and possibly assign it to a purchaser in an asset sale), or not to do so. The options available (assuming the contract requires consent for assignment) are set out in the chart below.

---

[6] Caldwell Affidavit, para. 9 and Exhibits "C", "D" and "E"; Cargill Threshold MR, Tab 2, p. 17 and Tabs 2(C), 2(D) and 2(E).

[7] Caldwell Affidavit, para. 10; Cargill Threshold MR, Tab 2, p. 17-18; Exhibit "D" to Caldwell Affidavit, being draft Approval and Reverse Vesting Order , para. 7(c); Cargill Threshold MR, Tab 2(D), p. 49; Exhibit "E" to Caldwell Affidavit, being Subscription Agreement dated January 29, 2024, ss. 1.1 (def'n of "ResidualCo") and 7.2(c); Cargill Threshold MR, Tab 2(E), p. 81 and 100.

[8] Caldwell Affidavit, para. 11; Cargill Threshold MR, Tab 2, p. 18.

	Asset Sale	**Share Transaction by CCAA Plan (s. 6(2) of CCAA)**	**Share Transaction by Reverse Vesting Order (s. 11 of CCAA)**
Preservation of Contract	Assign to purchaser under s. 11.3	Assignment not required as contracts stay with debtor	Assignment not required as contracts stay with debtor
No Preservation of Contract	Disclaimer not necessarily required (purchaser chooses which assets to buy and which contracts to assume or leave behind)	Disclaimer under s. 32 required unless consensually resolved by the contract parties	Disclaimer under s. 32 required; assignment to "residualco" not possible by RVO under s. 11.3

23. The RVO Motion contemplates a transaction for Tacora's shares.[9] In a share transaction, all assets and liabilities of the debtor company remain with the company, unless they are lawfully removed.

24. The obvious way to effect a share transaction is by way of a plan of arrangement under s. 6(2) of the CCAA. In negotiating a plan of arrangement, parties may agree on the quantum and nature of any claim resulting from termination of a contract.

25. Tacora is not proposing a CCAA plan, notwithstanding that the RVO Motion contemplates payment or satisfaction in full of all of Tacora's secured debt obligations, along with material recovery to unsecured creditors except Cargill. Rather, Tacora has elected to proceed by way of

[9] Exhibit "E" to Caldwell Affidavit, being Subscription Agreement dated January 29, 2024, s. 10.3; Cargill Threshold MR, Tab 2(E), p. 108.

an assignment of the Offtake Agreement to ResidualCo using a reverse vesting order, presumably to avoid dealing with Cargill as a significant unsecured creditor in the context of a CCAA plan.

26. But a reverse vesting order is not available to “transfer” an unassignable and undisclaimed contract out of the debtor company. Assignment is restricted by the terms of the Offtake Agreement, which does not permit an assignment without Cargill’s consent. Section 11.3 of the CCAA provides that the Court may order an assignment where consent cannot be obtained. But, unsurprisingly, it is a “fundamental requirement” of s. 11.3, which a Court is required to consider pursuant to s. 11.3(3)(b), that the assignee be able to perform the contract.[10] Assignment of the Offtake Agreement to ResidualCo could not meet this fundamental requirement: there is no doubt that ResidualCo cannot supply Cargill with iron ore concentrate from Tacora’s Scully Mine.

27. It is in any event difficult to imagine how the assignment of the obligations under a contract to a party that has no intention of performing it, or ability to do so, could be appropriate as required by s. 11.3(3)(c) of the CCAA. An assignment must meet the “twin goals” of s. 11.3, namely to assist the reorganization process and treat the counterparty fairly and equitably.[11] In particular, the Court must be satisfied that the requested relief does not adversely affect the third party’s contractual rights “beyond what is absolutely required to further the reorganization process” and that such interference “does not entail an inappropriate imposition upon the third party *or an*

---

[10] *Re Dundee Oil and Gas Limited*, 2018 ONSC 3678 at paras. 27-30; *Re Donnelly Holdings Ltd*., 2024 BCSC 275, refusing to order assignment of a lease to a shelf company whose ability to perform the obligations under it was not demonstrated.

[11] *Re Veris Gold Corp*., 2015 BCSC 1204 at para. 58.

inappropriate loss of claims of the third party."[12] Here, Tacora expressly states that the Proposed Cargill Offtake Claim will be lost.

28. An assignment is not available under s. 11.3 and, indeed, Tacora has made no attempt to assign the Offtake Agreement to ResidualCo under s. 11.3. Thus, the only way for the Offtake Agreement to be removed from Tacora is through the CCAA disclaimer provisions.

B. The CCAA Procedure for Disclaimer Does Not Admit of Exceptions

29. A debtor company cannot unilaterally resile from a contract with no regard to s. 32 of the CCAA, which prescribes a mandatory process that affords protection to the counterparty and gives the Court a supervisory role.

30. The process begins at s. 32(1) with monitor approval of the disclaimer and service of a notice of disclaimer:

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

31. Tacora has not served a notice of disclaimer[13] and does not mention disclaimer in its RVO Motion.

---

[12] *Re Nexient Learning Inc.*, 2009 CanLII 72037 (ON SC) at para. 59 (emphasis added).

[13] Caldwell Affidavit, para. 8; Cargill Threshold MR, Tab 2, p. 17.

32. Once notice of the disclaimer has been delivered, s. 32(2) provides that any other party to the agreement may seek an order that it is not to be disclaimed:

> 32.(2) Within 15 days after the day on which the company gives notice under subsection (1), a party to the agreement may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement is not to be disclaimed or resiliated.

33. Alternatively, if the monitor has not approved the disclaimer, the company may apply to the Court for a disclaimer order under s. 32(3).

34. Section 32(4) lists certain factors that a Court addressing a possible disclaimer must consider:

> 32.(4) In deciding whether to make the order, the court is to consider, among other things,
>
> (a) whether the monitor approved the proposed disclaimer or resiliation;
>
> (b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
>
> (c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

35. Under s. 32(5), a disclaimer is not effective until 30 days after the day on which the company gave notice or, if a motion is made under s. 32(2) or s. 32(3), 30 days after the day on which the company gave notice or any later day fixed by the Court.

36. Certain agreements, including eligible financial contracts and financing agreements, cannot be disclaimed:

> 32. (9) This section does not apply in respect of
>
> (a) an eligible financial contract;
>
> (b) a collective agreement;

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

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

37. Fitzpatrick J. of the B.C. Supreme Court has underlined the importance of the procedural requirements in s. 32 of the CCAA, given the impact of a disclaimer on the stakeholders as a whole:

> Such an action can substantially increase the debt being faced by the estate or divest the debtor of a substantial benefit that might be realized for the benefit of the creditors. It is in that context that the *CCAA* requires that certain procedures be followed by the debtor company, with the necessary oversight by the Court's officer, the Monitor, as to whether any disclaimer will be approved or not.[14]

38. The Court noted that "s. 32 does not itself admit of any exceptions".[15]

C. The Disclaimer Requirements Must Be Observed

39. Tacora, having elected not to disclaim the Offtake Agreement, seeks to have the Court make a reverse vesting order under s. 11 (not an order under s. 11.3) assigning the contract to ResidualCo. But a reverse vesting order is not available to assign an undisclaimed contract.

40. In *Re Quest University Canada*, Fitzpatrick J. approved a reverse vesting order with respect to liabilities under certain subleases only after the disclaimer procedure had been followed. Observing that she had previously discussed the significance of disclaimers "both from the point of view of the counterparty and that of the entire stakeholder group", Fitzpatrick J. quoted her earlier decision regarding the importance of disclaimers in CCAA proceedings,[16] and observed

---

[14] *Re League Assets Corp.*, 2016 BCSC 2262 at para. 49 (emphasis added).

[15] *Re League Assets Corp.*, 2016 BCSC 2262 at para. 51.

[16] *Re Quest University Canada*, 2020 BCSC 1883 at para. 95, lv to app ref'd, 2020 BCCA 364.

that the s. 32(4)(b) factor of "enhancing the prospect of a viable restructuring" applied in the context of the transaction before her.[17]

41. The disclaimer procedure provides the Court with the discretion to balance the parties' competing interests and the prejudices to them:

> A consideration of the s. 32(4) factors requires a balancing of interests. … Ultimately, it is a discretionary decision to determine whether the disclaimer should be upheld. This discretion is exercised by weighing the competing interests and prejudice to the parties and assessing whether the disclaimer or resiliation is fair and reasonable.[18]

42. It also gives the parties to the contract the opportunity to engage in negotiations, whose importance has been recognized by Courts both before and since s. 32 was enacted:

> At its most basic level, the disclaimer or termination of a contract must be "fair, appropriate, reasonable, and must have been issued after good faith negotiations".[19]

43. Section 11 of the CCAA, though not to be read as restricted by the availability of more specific orders,[20] is expressly stated to be "subject to the restrictions set out in this Act".[21] These restrictions include the restrictions on assignment set out in s. 11.3 and the requirements of s. 32 discussed above.

---

[17] *Re Quest University Canada*, 2020 BCSC 1883 at para. 96, lv to app ref'd, 2020 BCCA 364.

[18] *Re Laurentian University of Sudbury*, 2021 ONSC 3272 at para. 44, lv to app ref'd, 2021 ONCA 448, see in particular para. 25.

[19] *Laurentian University v. Sudbury University*, 2021 ONSC 3392 at para. 26, citing *Re Allarco Entertainment Inc.*, 2009 ABQB 503 at para. 59; see also *Re Quest University Canada*, 2020 BCSC 1883 at para. 106.

[20] *Century Services Inc. v. Canada*, 2010 SCC 60 at para. 70.

[21] CCAA, Section 11.

44. Thus, for example, s. 32 does not permit the disclaimer of certain types of contracts, reflecting a clear direction from Parliament that those contracts cannot be disposed of in a CCAA proceeding without the consent of the counterparty.[22] Allowing this restriction to be overridden through the use of a reverse vesting order under s. 11 would render meaningless the statement in s. 11 that the Court's authority is "subject to the restrictions set out in this Act".

45. Similarly, s. 11.3 is clear in setting out restrictions on a Court's power to approve the assignment of a contract that cannot be assigned without consent. Again, these restrictions constrain the power of the Court under s. 11 to do otherwise.

46. Section 11 simply does not permit the Court to assign an unassignable, undisclaimed contract.

47. Finally, a Court is required to exhaust its statutory powers before turning to inherent jurisdiction to fill gaps in the legislation.[23] There is no gap here for a Court to fill through the exercise of inherent jurisdiction, but rather a comprehensive process for disclaimer of contracts, designed to ensure all stakeholders are treated equitably, that Tacora simply does not wish to follow.

48. Some Courts have approved reverse vesting structures in other circumstances without requiring that the debtor undertake the disclaimer process. However, no case has discussed this issue at any length. In *Re Quest University Canada*, one of a handful of opposed reverse vesting

---

[22] Cargill's position, which will be fully developed in its factum responding to the RVO Motion, is that the Offtake Agreement cannot be disclaimed because it is an eligible financial contract or a financing agreement and does not meet the test in s. 32(4) of the CCAA.

[23] *Century Services Inc. v. Canada*, 2010 SCC 60 at paras. 64-65.

order cases, the disclaimer process was followed. In others, the issue simply does not appear to have been addressed. Thus, the matter stands to be considered afresh.

49. As this Court has recently noted, the fact that a practice may have been adopted "does not mean that it is appropriate or the best practice to follow. It just means … that the issue has not come squarely before the court for its consideration."[24] On consideration of the authorities and the statutory language, it may become clear that the practice adopted is not justified.

50. The circumstances here cry out for a proper determination of whether a reverse vesting order can be used to assign an unassignable contract that has not been disclaimed. Cargill submits it cannot. The reverse vesting order is by its nature an "unusual or extraordinary" remedy.[25] It is of particular importance that the process leading up to the granting of a reverse vesting order be reasonable, fair, and compliant with the CCAA in all respects.

51. If Tacora were proposing a share transfer by the usual method of a consensual plan of arrangement, it would have to satisfy the Court that there had been strict compliance with all statutory requirements; nothing had been done or purported to be done that was not authorized by the CCAA; and the plan was fair and reasonable.[26] Surely nothing less than strict compliance with statutory requirements is adequate when the debtor seeks to effect a share transfer under s. 11 of the CCAA, which provides a gap-filling discretionary authority expressly made subject to restrictions in the CCAA such as those contained in the assignment and disclaimer provisions.

---

[24] *CBJ Developments Inc. v. 1180554 Ontario Limited*, 2023 ONSC 6773 at para. 50.

[25] *Re Harte Gold*, 2022 ONSC 653 at para. 38.

[26] *Re Canwest Global Communications Corp*., 2010 ONSC 4209 at para. 14.

PART IV – ORDER REQUESTED

52. Cargill respectfully requests that this Honourable Court declare that Tacora is prohibited from obtaining the relief sought on the RVO Motion as it relates to the Offtake Agreement absent a disclaimer of the Offtake Agreement in accordance with s. 32 of the CCAA.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

March 27, 2024

/s/ Goodmans LLP

Goodmans LLP

SCHEDULE A

LIST OF AUTHORITIES

1. *CBJ Developments Inc. v. 1180554 Ontario Limited*, 2023 ONSC 6773
2. *Century Services Inc. v. Canada,* 2010 SCC 60
3. *Re Allarco Entertainment Inc.,* 2009 ABQB 503
4. *Re Canwest Global Communications Corp*., 2010 ONSC 4209
5. *Re Donnelly Holdings Ltd*, 2024 BCSC 275
6. *Re Dundee Oil and Gas Limited,* 2018 ONSC 3678
7. *Re Harte Gold,* 2022 ONSC 653
8. *Re Laurentian University of Sudbury,* 2021 ONSC 3272; lv to app ref'd, 2021 ONCA 448
9. *Re League Assets Corp.,* 2016 BCSC 2262
10. *Re Nexient Learning Inc*. 2009 CanLII 72037 (ON SC)
11. *Re Quest University Canada,* 2020 BCSC 1883; lv to app ref'd, 2020 BCCA 364
12. *Re Veris Gold Corp.,* 2015 BCSC 1204

SCHEDULE B

EXCERPTS OF STATUTES AND REGULATIONS

COMPANIES' CREDITORS ARRANGEMENT ACT
R.S.C., 1985, c. C-36, as amended

General power of court

11 Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Assignment of agreements

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

Exceptions

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

(a) an agreement entered into on or after the day on which proceedings commence under this Act;

(b) an eligible financial contract; or

(c) a collective agreement.

Factors to be considered

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

(a) whether the monitor approved the proposed assignment;

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

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

Restriction

(4) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company's insolvency, the

commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

Copy of order

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

Disclaimer or resiliation of agreements

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

Court may prohibit disclaimer or resiliation

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

Court-ordered disclaimer or resiliation

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

Factors to be considered

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

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

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

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

Date of disclaimer or resiliation

(5) An agreement is disclaimed or resiliated

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

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

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

Intellectual property

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

Loss related to disclaimer or resiliation

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

Reasons for disclaimer or resiliation

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

Exceptions

(9) This section does not apply in respect of

(a) an eligible financial contract;

(b) a collective agreement;

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

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

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

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

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

FACTUM OF CARGILL, INCORPORATED AND CARGILL INTERNATIONAL TRADING PTE LTD. RE: PRELIMINARY THRESHOLD MOTION (returnable April 10-12, 2024)

Goodmans LLP
333 Bay Street, Suite 3400
Toronto, Ontario M5H 2S7

Robert J. Chadwick (LSO No. 35165K)
rchadwick@goodmans.ca

Caroline Descours (LSO No. 58251A)
cdescours@goodmans.ca

Alan Mark (LSO No. 21772U)
amark@goodmans.ca

Peter Kolla (LSO No. 54608K)
pkolla@goodmans.ca

Tel: 416.979.2211

Lawyers for Cargill, Incorporated and Cargill International Trading Pte Ltd.

1412-7350-0681