

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

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

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

**(Applicant)**

**FACTUM OF THE APPLICANT  
(Re: Comeback Hearing)  
(Returnable October 24, 2023)**

October 22, 2023

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**TO: SERVICE LIST**

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**PART I - OVERVIEW<sup>1</sup>**

1. On October 10, 2023, Tacora commenced these CCAA Proceedings and the Court granted the Initial Order, which, among other things:

- (a) appointed FTI as Monitor of the Applicant;
- (b) granted a stay of proceedings in favour of the Applicant and its directors and officers until and including October 20, 2023;
- (c) approved the Cargill DIP Facility and authorized Tacora to borrow up to the Initial Advance, and granted the corresponding DIP Charge; and
- (d) granted the Administration Charge and the Directors' Charge.

2. On October 13, 2023, the Court granted the Stay Extension Order, which extended the Stay Period from October 20, 2023, to and including October 27, 2023. The Stay Extension Order facilitated a deferral of this Comeback Motion from October 19, 2023, to October 24, 2023.

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<sup>1</sup> Capitalized terms used and not defined herein have the meanings ascribed to them in the Affidavit of Joe Broking sworn October 15, 2023 (the "**Second Broking Affidavit**") and the Affidavit of Chetan Bhandari sworn October 15, 2023 (the "**Second Bhandari Affidavit**").

3. This factum is filed in support of the Comeback Motion for:
- (a) an amended and restated initial order (the “**ARIO**”) substantially in the form of the draft order at Tab 6 of the Application Record dated October 9, 2023 (the “**Application Record**”) to, among other things:
    - (i) extend the Stay Period until and including February 9, 2024;
    - (ii) authorize Tacora to borrow up to \$75,000,000 under the Cargill DIP Facility;
    - (iii) approve the Greenhill Engagement Letter and the Transaction Fee Charge;
    - (iv) approve the KERP, authorize Tacora to pay the KERP Funds to the Monitor and grant the KERP Charge;
    - (v) grant an increase to the quantum of the Directors’ Charge; and
    - (vi) grant a sealing order over the KERP;
  - (b) a solicitation order (the “**Solicitation Order**”) substantially in the form of the draft order at Tab 4 of the Supplementary Application Record dated October 15, 2023 (the “**Supplementary Application Record**”) to, among other things:
    - (i) approve the Solicitation Process in a form substantially similar to the form attached as Schedule “A” to the proposed Solicitation Order; and
    - (ii) authorize Tacora, Greenhill and the Monitor to immediately commence the Solicitation Process.
4. On October 16, 2023, the Ad Hoc Group filed a cross-motion (the “**AHG Cross-Motion**”) seeking Court approval of its own form of amended and restated initial order and the Ad Hoc Group’s DIP proposal (the “**AHG DIP Proposal**”), or, in the alternative, the imposition of certain

terms on the relief sought by the Applicant at the comeback hearing. This factum addresses the Applicant's relief set forth above. The Applicant has filed a second factum addressing the relief sought in the AHG Cross-Motion.

## **PART II - FACTS**

5. The facts with respect to this motion are more fully set out in the Factum dated October 10, 2023 (the "**Initial Order Factum**")<sup>2</sup> previously filed in support of the Initial Order, the First Broking Affidavit, the Affidavit of Joe Broking sworn October 15, 2023 (the "**Second Broking Affidavit**"), the First Bhandari Affidavit and the Affidavit of Chetan Bhandari sworn October 15, 2023 (the "**Second Bhandari Affidavit**").

## **PART III - ISSUES**

6. The issues in respect of the relief being sought at the Comeback Motion are whether this Court should grant the ARIO and the Solicitation Order.

## **PART IV - LAW AND ANALYSIS**

### **A. The ARIO Should be Granted**

#### **(i) The Stay Period Should be Extended**

7. The current Stay Period expires on October 27, 2023. Pursuant to subsections 11.02(2) and 11.02(3) of the CCAA, the Court may grant an extension of the Stay Period for "any period that the court considers necessary", where: (a) the Applicant satisfies the Court that circumstances exist that make the order appropriate; and (b) the Applicant satisfies the Court that it has acted, and is acting, in good faith and with due diligence.<sup>3</sup>

8. Tacora believes that the extension of the Stay Period to and including February 9, 2024 is appropriate in the circumstances, as:

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<sup>2</sup> [Initial Order Factum](#) dated October 10, 2023.

<sup>3</sup> CCAA, [s. 11.02\(2\) and \(3\)](#).

- (a) an extension of the Stay Period is necessary to allow Tacora to advance the proposed Solicitation Process in order to identify a value maximizing transaction for the benefit of its stakeholders;<sup>4</sup>
- (b) the requested extension of the Stay Period aligns with the proposed timelines in the Solicitation Process. The Solicitation Process provides for a Phase 2 Bid Deadline (for delivery of definitive offers by Phase 2 Qualified Bidders) by no later than January 19, 2024. Court approval in respect of the Successful Bid is to take place the week of February 5, 2024 (subject to Court availability);<sup>5</sup>
- (c) the Company has acted and continues to act in good faith and with due diligence;<sup>6</sup>
- (d) creditors of Tacora would not be materially prejudiced by the proposed extension of the Stay Period;<sup>7</sup>
- (e) as detailed in the Cash Flow Forecast, with access to the DIP Facility, the Company is expected to have sufficient liquidity to continue its operations during the contemplated extension of the Stay Period;<sup>8</sup> and
- (f) the Monitor is supportive of the requested extension of the Stay Period.<sup>9</sup>

9. Accordingly, Tacora believes the requested extension of the Stay Period to and including February 9, 2024 is necessary and appropriate in the circumstances.

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<sup>4</sup> First Broking Affidavit at paras. 11 and 139; Second Broking Affidavit at para. 8.

<sup>5</sup> First Report at para. 66.

<sup>6</sup> First Report at para. 9(f).

<sup>7</sup> [First Report of the Monitor dated October 20, 2023](#) [**First Report**] at para. 9(f).

<sup>8</sup> [Pre-Filing Report of the Proposed Monitor](#) dated October 9, 2023 [**Pre-Filing Report**] at para. 44 and Appendix "A"; **see also** First Report at para. 56.

<sup>9</sup> [First Report](#) at para. 59.

**(ii) Availability under the DIP Facility should be Increased**

10. Pursuant to the Initial Order, this Court approved the Cargill DIP Facility and authorized Tacora to borrow a maximum amount of \$15,500,000 (the “**Initial Advance**”) under the DIP Facility during the initial 10-day Stay Period, and granted the DIP Charge. The Initial Advance under the DIP Facility was sized to correspond with the required funding during the initial 10-day Stay Period.<sup>10</sup>

11. Pursuant to the ARIO, Tacora now seeks this Court’s authorization to increase the amount which it may borrow under the DIP Facility to the maximum principal amount of \$75,000,000.

12. Without access to the full amount of the DIP Facility, Tacora would, in the very near future, exhaust its available liquidity resources and be unable to pay its obligations as they become due, continue operations, maintain its assets, undertake the Solicitation Process or complete any value-maximizing transaction.<sup>11</sup> The Cash Flow Forecast demonstrates Tacora’s need for the full amount of the DIP Facility.<sup>12</sup>

13. Tacora previously addressed the factors under subsection 11.2(1) and (4) that the Court must consider in deciding whether to approve a charge in connection with interim financing in the Initial Order Factum.<sup>13</sup>

14. For the same reasons as set out in the Initial Order Factum, and the following additional reasons, Tacora submits that the requested increase to the maximum principal amount of the DIP Facility is fair and reasonable and that the criteria under subsections 11.2(1) and 11.2(4) support approval of this relief, as:

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<sup>10</sup> *Lydian International Limited (Re)*, [2019 ONSC 7473](#) at [paras. 22-26](#); First Broking Affidavit at para. 134; *In the Matter of Tacora Resources Inc.*, [Endorsement of Kimmel J.](#) dated October 10, 2023 (Court File No. CV-23-00707394-00CL) [“**Kimmel J. Endorsement**”] at para. 12(f).

<sup>11</sup> [Pre-Filing Report](#) at para. 51.

<sup>12</sup> [Pre-Filing Report](#), Appendix “A”.

<sup>13</sup> [Initial Order Factum](#) at paras. 65-68.

- (a) notice of the Comeback Motion has been given to all of Tacora's secured creditors;<sup>14</sup>
- (b) the Cargill DIP Facility represents the superior proposal available to the Company in the circumstances;<sup>15</sup> and
- (c) the Monitor supports approval of the Cargill DIP Facility and the requested increase to the maximum principal amount of the Cargill DIP Facility.<sup>16</sup>

15. The Ad Hoc Group has filed a motion opposing approval of the Cargill DIP Facility and seeking approval of the AHG DIP Proposal. The Applicant's argument with respect to the competing DIP proposals is set forth in the Applicant's other factum.

**(iii) Greenhill Engagement and Transaction Fee Charge Should be Approved**

16. Tacora seeks approval of the Greenhill Engagement Letter and the granting of the Transaction Fee Charge to secure the fees that may become payable pursuant to the Greenhill Engagement Letter.

17. Section 11 of the CCAA provides the Court with authority to allow debtor companies to enter into arrangements to facilitate a restructuring, which may include the retention of expert advisors where necessary to help with the restructuring efforts.<sup>17</sup>

18. Courts have approved the appointment of advisors in restructuring proceedings, and corresponding charges to secure such advisors' professional fees, where such advisors'

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<sup>14</sup> As demonstrated by the Affidavit of Service of Natasha Rambaran sworn October 10, 2023 and the Affidavit of Service of Philip Yang sworn October 15, 2023, each filed, all creditors who are likely to be affected by the proposed DIP Charge have been served with a copy of the Application Record and Supplementary Application Record.

<sup>15</sup> Second Bhandari Affidavit at para. 7.

<sup>16</sup> [Pre-Filing Report](#) at para. 51.

<sup>17</sup> *Victorian Order of Nurses for Canada (Re)*, [2015 ONSC 7371](#) at [para. 27](#).

knowledge and experience is critical to assisting the debtor with a successful restructuring or is necessary to assist the debtor with a liquidation sale.<sup>18</sup>

19. Tacora will benefit from the approval of Greenhill's engagement in these CCAA Proceedings. Greenhill's prior experience with the Company, including Greenhill's involvement running the Strategic Process starting in March of this year, along with its extensive experience in matters of this nature, make it well-suited to this mandate.

20. In the circumstances, the Transaction Fee Charge to secure the potential Transaction Fees is appropriate because the vast majority of Greenhill's fees are deferred to the successful closing of one or more successful transactions and it is possible that a transaction could involve a credit bid which might otherwise not provide for sufficient cash consideration to pay the Transaction Fees on closing.<sup>19</sup>

21. The Monitor recommends this Court's approval of Tacora's request for approval of the Greenhill Engagement Letter and the creation of the Transaction Fee Charge, as it is of the view that the continued engagement of Greenhill to assist the Applicants in the implementation of the Solicitation Process will be beneficial to the estate and its stakeholders generally and to the efficient completion of the CCAA Proceeding.<sup>20</sup> The Monitor has considered the fees provided for in the Greenhill Engagement Letter and is satisfied that they are within market parameters. The Monitor supports the granting of the Transaction Fee Charge.<sup>21</sup>

**(iv) Increase to Directors' Charge Should be Approved**

22. The Initial Order granted a Directors' Charge against the Property in the initial amount of \$4,600,000 in favour of Tacora's directors and officers as security for the Company's obligation

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<sup>18</sup> *Payless ShoeSource Canada Inc and Payless ShoeSource Canada GP Inc (Re)*, [2019 ONSC 1215](#) at [paras. 30 - 32](#); **see also** *Target Canada Co (Re)*, [2015 ONSC 303](#) at [para. 72](#).

<sup>19</sup> [First Report](#) at para. 38.

<sup>20</sup> [First Report](#) at para. 37.

<sup>21</sup> [First Report](#) at paras. 36 - 39.

to indemnify such directors and officers for obligations and liabilities they may incur in such capacities after the commencement of the CCAA Proceedings, including wages, salaries and applicable withholdings, certain outstanding tax liabilities and accrued vacation pay.

23. The initial amount of the Directors' Charge was "limited to projected potential uninsured obligations and to what [was] fair and reasonable for the initial 10 day period having regard to the requirements of s. 11.51 of the CCAA and the need for continuity and to keep the directors in place."<sup>22</sup> In connection with the request for the grant of the ARIO, Tacora seeks to increase the quantum of the Directors' Charge to \$5,200,000.

24. As referenced in the Initial Order Factum, this Court has jurisdiction under section 11.51 of the CCAA to grant the Directors' Charge.<sup>23</sup> For the same reasons as set out in the Initial Order Factum, Tacora submits that the proposed increase to the Directors' Charge is appropriate, as:

- (a) notice has been given to Tacora's secured creditors;
- (b) while the Company maintains D&O insurance, the exclusions and limitations thereunder create risk concerning whether sufficient coverage exists;
- (c) the proposed increase has been determined in consultation with the Monitor to reflect the increased potential scope of liability during these CCAA Proceedings;<sup>24</sup>
- (d) the indemnification obligation secured by the Directors' Charge does not apply to any obligations incurred as a result of gross negligence or wilful misconduct; and

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<sup>22</sup> [Kimmel J. Endorsement](#) at para. 12(i).

<sup>23</sup> [Initial Order Factum](#) at para. 74.

<sup>24</sup> [First Report](#) at paras. 22-23.

- (e) the requested increase to the quantum of the Directors' Charge is reasonable given that the initial amount was sized to the anticipated 10 day stay period of the Initial Order and did not include a full payroll period.<sup>25</sup>

25. The Monitor supports Tacora's request to increase the quantum of the Directors' Charge, which it believes is reasonable and justified in relation to the quantum of the Directors' estimated potential liability.<sup>26</sup>

**(v) KERP and KERP Charge Should be Approved**

26. Tacora seeks approval of the KERP and the granting of the KERP Charge. This Court has approved employee retention plans and related charges in numerous CCAA proceedings. The factors generally considered by the Court in determining whether to approve such plans include whether:

- (a) the Monitor approves of the KERP;
- (b) the beneficiaries of the KERP would consider other employment opportunities if the charge was not approved;
- (c) the beneficiaries of the KERP are crucial to the successful restructuring of the debtor company;
- (d) a replacement could be found in a timely manner; and
- (e) the board of directors exercised their business judgement in developing the KERP.<sup>27</sup>

27. Tacora submits that the KERP complies with the factors set out above as:

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<sup>25</sup> [First Report](#) at para. 23.

<sup>26</sup> [First Report](#) at para. 24.

<sup>27</sup> *Just Energy Group Inc et al*, [2021 ONSC 7630](#) [*"Just Energy"*] at [para. 7](#).

- (a) the KERP was developed by Tacora with significant input from the Monitor, and is comparable to other recent KERPs that have been approved in Canada. The Monitor supports approval of the KERP;<sup>28</sup>
- (b) if the proposed KERP is not approved, it is likely that the Key Employees would consider other employment opportunities.<sup>29</sup> Skilled labour is critical to the operation of the Scully Mine and there is a shortage of skilled labour in Wabush, Newfoundland and Labrador and the surrounding area. There are a number of other mining operations located in relatively close proximity to the Scully Mine at which skilled labour could easily secure employment.<sup>30</sup> The Key Employees with respect to corporate management are located in Grand Rapids on the western edge of the iron range in Minnesota. The area contains significant expertise in the areas of iron ore beneficiation and the majority of the corporate team has experience at competing iron ore miners;<sup>31</sup>
- (c) the Key Employees have distinct and critical roles at Tacora and will allow the Company to continue operating in the ordinary course while also advancing the Solicitation Process. Finding qualified individuals to replace the Key Employees would be challenging, disruptive, costly and time consuming;<sup>32</sup>
- (d) the KERP will facilitate and encourage the continued participation of Key Employees during these CCAA Proceedings. The KERP provides for the payment of up to \$3,035,000 to 34 Key Employees, including seven corporate personnel (the executive team and the corporate finance team) and 27 Scully

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<sup>28</sup> Second Broking Affidavit at para. 18; [First Report](#) at paras. 51 and 53.

<sup>29</sup> Second Broking Affidavit at para. 22; [First Report](#) at para. 43.

<sup>30</sup> Second Broking Affidavit at para. 22; [First Report](#) at para. 43.

<sup>31</sup> Cross-Examination Transcript of Joe Broking taken October 19, 2023, response to Q49, p. 16 at lines 6-15.

<sup>32</sup> Second Broking Affidavit at paras. 24-27; [First Report](#) at para. 46.

Mine personnel. Individual bonuses for key employees range from 16% to 53% of their maximum potential annual compensation;<sup>33</sup> and

- (e) the Board of Directors exercised their good faith business judgement and unanimously approved the KERP. As a proposed beneficiary of the KERP, Mr. Broking did not participate in the vote approving the KERP.<sup>34</sup>

28. The KERP is appropriate, reasonable and justified in the circumstances, and the terms, conditions and amounts of potential payments are in line with employee retention plans approved in other CCAA proceedings.<sup>35</sup>

**(v) Sealing of Confidential Exhibit “C”**

29. The details of the KERP are set forth in Confidential Exhibit “C” to the Second Broking Affidavit. Tacora requests a sealing order in relation to the confidential exhibit in order to protect the personal compensation information contained therein.

30. The *Courts of Justice Act* (Ontario) provides this Court with discretion to order that any document filed in a civil proceeding be treated as confidential and sealed, and not form part of the public record.<sup>36</sup>

31. The test to determine if a sealing order should be granted is set out in *Sierra Club* as recast in *Sherman Estate*:

- (a) court openness poses a serious risk to an important public interest;
- (b) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and

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<sup>33</sup> Second Broking Affidavit at paras. 18 and 20; [First Report](#) at para. 41.

<sup>34</sup> Second Broking Affidavit at para. 18; First Report at para. 46.

<sup>35</sup> [First Report](#) at paras. 51 and 53.

<sup>36</sup> *Courts of Justice Act*, RSO 1990, c. C 43, [s. 137\(2\)](#).

(c) as a matter of proportionality, the benefits of the order outweigh its negative effects.<sup>37</sup>

32. The Supreme Court in *Sierra Club* and *Sherman Estate* explicitly recognized that commercial interests, such as protecting confidential information, are an “important public interest” for purposes of this test.<sup>38</sup>

33. Courts have applied the *Sierra Club* and *Sherman Estate* tests in the insolvency context and authorized sealing orders over confidential or commercially sensitive documents.<sup>39</sup> Courts have previously granted sealing orders in respect of individual compensation arrangements relating to key employee retention plans.<sup>40</sup>

34. Confidential Exhibit “C” contains individual compensation information and the amount of the proposed KERP payments for each eligible employee. Employees have a reasonable expectation that their names and salary information will be kept confidential. Protecting the sensitive personal compensation information of the employees is an important public interest that should be protected. The sealing order is necessary in order to protect the privacy rights of Tacora’s employees while permitting the Court to consider the details of the KERP. As a matter of proportionality, the benefits of sealing Confidential Exhibit “C” outweigh its negative effects.

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<sup>37</sup> *Sierra Club of Canada v Canada (Minister of Finance)*, [2002 SCC 41](#) at [para. 53](#) [**“Sierra Club”**]; *Sherman Estate v Donovan*, [2021 SCC 25](#) at [paras. 38](#) and [43](#) [**“Sherman Estate”**].

<sup>38</sup> *Sierra Club*, *supra* at [para. 55](#); *Sherman Estate*, *supra* at [paras. 41-43](#).

<sup>39</sup> See, for example, *Ontario Securities Commission v Bridging Finance Inc.*, [2021 ONSC 4347](#) at [paras. 23-28](#); see also *Re Just Energy Corp.*, [2021 ONSC 1793](#) at [paras. 123-124](#).

<sup>40</sup> *Bridging Finance*, *supra* at [paras. 23-28](#); *Golf Town Canada Holdings Inc (Re)*, [Initial Order](#) issued September 14, 2016 [Court File No. CV-16-11527-00CL] at para 64; *Acerus Pharmaceuticals Corporation et al (Re)*, [Amended and Restated Initial Order](#) issued February 3, 2023 [Court File No. CV-23-00693595-00CL]; *Just Energy*, *supra* at [paras. 123-124](#).

## **B. The Solicitation Order should be Granted**

35. The remedial nature of the CCAA confers broad powers to facilitate restructurings, including the power to approve a solicitation process prior to or in the absence of a plan of compromise and arrangement.<sup>41</sup>

36. Section 36 of the CCAA sets out certain factors to be considered by the Court in approving a sale. Section 36 does not directly address the factors a court should consider when determining whether to approve a solicitation process, however, such criteria can be evaluated in light of the considerations that will ultimately apply when seeking approval of a sale transaction, including whether the process is reasonable in the circumstances, whether the Monitor approved the process, and the extent to which the creditors were consulted.<sup>42</sup>

37. In *Walter Energy*, Justice Fitzpatrick considered the following additional factors in approving a CCAA SISP:

- (a) the fairness, transparency and integrity of the proposed process;
- (b) the commercial efficacy of the proposed process in light of the specific circumstances; and
- (c) whether the sales process will, in the circumstances, optimize the chances of securing the best possible price for the assets for sale.<sup>43</sup>

38. The *Walter Energy* factors have been cited approvingly in subsequent decisions, in the recent CCAA proceedings of Nordstrom Canada<sup>44</sup> and Bron Media Corp.<sup>45</sup>

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<sup>41</sup> *Nortel Networks Corporation (Re)*, [2009 CanLII 39492](#) at [paras. 47-48](#) [**"Nortel"**].

<sup>42</sup> *Brainhunter Inc (Re)*, [2009 CanLII 72333](#) at [para. 16](#); CCAA, s 36.

<sup>43</sup> *Walter Energy Canada Holdings, Inc*, [2016 BCSC 107](#) at [paras. 20-21](#); *CCM Master Qualified Fund v blutip Power Technologies*, [2012 ONSC 1750](#) at [para. 6](#).

<sup>44</sup> *Nordstrom Canada Retail, Inc*, [2023 ONSC 1631](#) at [para. 9](#).

<sup>45</sup> *Bron Media Corp (Re)*, [2023 BCSC 1563](#) at [para. 41](#).

39. Tacora seeks approval of the Solicitation Process to be conducted in accordance with the Solicitation Procedures. The Solicitation Procedures are attached to the draft Solicitation Order at Tab 4 to the Applicant's Supplementary Application Record and summarized in detail in the Monitor's First Report.<sup>46</sup>

40. The Solicitation Procedures were developed by Greenhill in consultation with the Monitor, and provided to the Applicant's secured creditors for feedback. In addition to utilizing a two-phase process typically used in CCAA proceedings, the Solicitation Process includes a communications protocol designed to protect the integrity of the process while allowing Bidders to have the necessary discussions to allow them to submit bids in accordance with the Solicitation Procedures. The Solicitation Process will be run by Greenhill with assistance from Stikeman and oversight of the Monitor.

41. The Monitor has recommended that this Court approve the Solicitation Process, as it believes the Solicitation Process: (a) provides for a broad, open, fair and transparent process; (b) provides for an appropriate level of independent oversight; (c) should encourage and facilitate bidding by interested parties; (d) is reasonable in the circumstances; and (e) should not discourage parties from submitting offers.<sup>47</sup>

#### **PART V - ORDER SOUGHT**

42. Tacora respectfully requests that this Court grant the ARIO substantially in the form of the order provided at Tab 6 of the Application Record and the Solicitation Order substantially in the form of the draft order provided at Tab 4 of the Supplementary Application Record.

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<sup>47</sup> [First Report](#) at para. 72.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 22<sup>nd</sup> day of October, 2023.

A handwritten signature in cursive script that reads "Stikeman Elliott LLP".

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**STIKEMAN ELLIOTT LLP**  
Counsel for the Applicant

**SCHEDULE “A”  
LIST OF AUTHORITIES**

1. *Acerus Pharmaceuticals Corporation et al (Re)*, [Amended and Restated Initial Order](#) issued February 3, 2023 [Court File No. CV-23-00693595-00CL].
2. *Brainhunter Inc (Re)*, [2009 CanLII 72333](#).
3. *Bron Media Corp (Re)*, [2023 BCSC 1563](#).
4. *CCM Master Qualified Fund v blutip Power Technologies*, [2012 ONSC 1750](#).
5. *Golf Town Canada Holdings Inc (Re)*, [Initial Order](#) issued September 14, 2016 [Court File No. CV-16-11527-00CL].
6. *Just Energy Group Inc et al*, [2021 ONSC 7630](#).
7. *Lydian International Limited (Re)*, [2019 ONSC 7473](#).
8. *Nordstrom Canada Retail, Inc*, [2023 ONSC 1631](#).
9. *Nortel Networks Corporation (Re)*, [2009 CanLII 39492](#).
10. *Ontario Securities Commission v Bridging Finance Inc*, [2021 ONSC 4347](#).
11. *Payless ShoeSource Canada Inc and Payless ShoeSource Canada GP Inc (Re)*, [2019 ONSC 1215](#).
12. *Re Just Energy Corp*, [2021 ONSC 1793](#).
13. *Sherman Estate v Donovan*, [2021 SCC 25](#).
14. *Sierra Club of Canada v Canada (Minister of Finance)*, [2002 SCC 41](#).
15. *Target Canada Co (Re)*, [2015 ONSC 303](#).
16. *Victorian Order of Nurses for Canada (Re)*, [2015 ONSC 7371](#).
17. *Walter Energy Canada Holdings, Inc*, [2016 BCSC 107](#).

## **SCHEDULE “B” RELEVANT STATUTES**

### **Courts of Justice Act, R.S.O. 1990, c. C.43**

#### **Sealing documents**

**137 (2)** A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

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

#### **General power of court**

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

[...]

#### **Stays, etc. — other than initial application**

**11.02 (2)** A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

- (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

#### **Burden of proof on application**

**11.02 (3)** The court shall not make the order unless

- (a) the applicant satisfies the court that circumstances exist that make the order appropriate; and
- (b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

#### **Interim financing**

**11.2 (1)** On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or

part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

### **Priority — secured creditors**

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

### **Priority — other orders**

**(3)** The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

### **Factors to be considered**

- (4)** In deciding whether to make an order, the court is to consider, among other things,
- (a) the period during which the company is expected to be subject to proceedings under this Act;
  - (b) how the company's business and financial affairs are to be managed during the proceedings;
  - (c) whether the company's management has the confidence of its major creditors;
  - (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
  - (e) the nature and value of the company's property;
  - (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
  - (g) the monitor's report referred to in paragraph 23(1)(b), if any.

### **Additional factor — initial application**

**(5)** When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

[...]

### **Security or charge relating to director's indemnification**

**11.51 (1)** On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

### **Priority**

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

### **Restriction — indemnification insurance**

**(3)** The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

### **Negligence, misconduct or fault**

**(4)** The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

### **Restriction on disposition of business assets**

**36 (1)** A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

### **Notice to creditors**

**(2)** A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

### **Factors to be considered**

**(3)** In deciding whether to grant the authorization, the court is to consider, among other things,

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the monitor approved the process leading to the proposed sale or disposition;
- (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

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

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

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

(Applicant)

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

PROCEEDING COMMENCED AT TORONTO

**FACTUM OF THE APPLICANT  
(Re: Comeback Hearing)**

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