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

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

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

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

**(Applicant)**

# RESPONDING FACTUM OF THE APPLICANT
**(Re: Disclaimer Motion and Global Process Motion)**
**(Returnable June 26, 2024)**

June 24, 2024

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

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

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

**Alex Rose (LSO #49415P)**
Tel: 416-869-5261
Email: arose@stikeman.com

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

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

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

Counsel for the Applicant

**TO: SERVICE LIST**

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)**

## PART I - OVERVIEW[1]

1. On June 5, 2024, the Court approved and ratified a second sale process (the "**Sale Process**") in respect of Tacora following termination of the successful bid in the prior Solicitation Process. Tacora's need to emerge from these CCAA Proceedings pursuant to a going-concern transaction that attracts sufficient new capital to ramp-up production at the Scully Mine has become increasingly urgent. The market feedback in the Pre-Filing Strategic Process and Solicitation Process has been clear: potential third-party buyers and investors view the Offtake Agreement as an off-market agreement that is a significant impediment to investing new capital into Tacora.

2. Accordingly, on May 16, 2024, the Board of Tacora, with advice from its advisors and approval from the Monitor, determined that the disclaimer (the "**Disclaimer**") of the Offtake Agreement and the Stockpile Agreement (collectively, the "**Agreements**") was in the best interests of the Company as it would enhance Tacora's prospects of successfully identifying a going-concern transaction through the Sale Process.

3. Cargill seeks to set aside the Disclaimer. Cargill argues that (a) the Agreements are eligible financial contracts ("**EFCs**") and/or financing agreements that cannot be disclaimed under section 32(9) of the CCAA; and (b) the proposed Disclaimer would not enhance the prospects of a viable compromise or arrangement being made in respect of the Company.

4. Cargill's arguments are without merit. The Agreements are supply contracts for the sale and purchase of iron ore concentrate. While the terms of the Agreements are off-market and

[1] Capitalized terms used and not defined herein have the meanings ascribed to them in the Affidavit of Heng Vuong sworn June 14, 2024 (the "**Vuong Affidavit**") and the Affidavit of Michael Nessim sworn June 14, 2024 (the "**Nessim Affidavit**").

prohibitively expensive for the Company, neither of the Agreements are EFCs or financing agreements, which is supported by the previously served expert evidence of Dr. Sharon Brown-Hruska.

5. Cargill also argues that the Disclaimer will not enhance the prospects of a viable compromise or arrangement being made in respect of the Company. However, Cargill readily acknowledges that it will need to amend the current Offtake Agreement for Tacora to emerge from the CCAA Proceedings, and that purchasers and/or investors in the Sale Process may not assume the Offtake Agreement. Cargill's argument is simply that *now* is not the right time for the Disclaimer; and it attempts to support that conclusion based on issues of its own making such as its refusal to schedule vessel shipments in the short-term and its threats that the DIP Facility may not be available if the Disclaimer is upheld. Cargill's current arguments are inconsistent with the positions it took in its opposition to the prior successful bid, which was based in part on the fact that the Offtake Agreement had not been disclaimed.

6. Tacora no longer has the luxury of time. Tacora previously intended to address the Offtake Agreement after the Solicitation Process and the result was over three months of litigation that Tacora could not afford. As this Court has identified, "[t]ime is of the essence."[2] If the Disclaimer is upheld, it will allow Tacora to be marketed in the Sales Process "free and clear" of the Offtake Agreement which will increase the likelihood of a successful outcome and avoid significant and protracted litigation if the successful bid does not assume the Offtake Agreement.

7. The issues of stability and certainty can be addressed by the Court fixing the effective date of the Disclaimer to a later date, which is permitted by section 32(5) of the CCAA. Transitioning to a new offtake or marketing arrangement following the Sale Process will minimize disruption for both Tacora and Cargill. There also would be no prejudice to Cargill given it makes significant profits from the onward sale of iron ore that it purchases pursuant to the Offtake Agreement.

8. This factum also addresses Cargill's "global process motion" for a blanket determination from this Court as to the availability of an RVO in the context of three hypothetical assumed facts. Cargill has provided no authority whatsoever for why an RVO is unavailable, which is always highly dependent on the entire context of the CCAA proceedings and available

[2] *Tacora Resources Inc (Re)*, 2024 ONSC 2454 at para. 47.

alternatives. Contrary to Cargill's arguments, RVOs have been approved in similar circumstances to the assumed facts, including where an unsecured creditor may otherwise have a veto on a plan of compromise or arrangement. Similar to these other cases, an RVO is potentially available and the appropriate inquiry for the Court is whether it should apply its discretion in accordance with the well-established *Harte Gold* test.

## PART II - FACTS[3]

### A. Background

9. Tacora operates the Scully Mine which produces high-grade and quality iron ore products. The Company is the second largest employer in the Labrador West region, employing approximately 460 employees, and is an important part of the local and provincial economy of Newfoundland.[4] Since restarting mining operations in 2019, Tacora has (a) been attempting to ramp up production at the Scully Mine to its nameplate production capacity of approximately 6.0 Mtpa; and (b) has suffered losses of over $450 million.

10. The Company needs to implement a restructuring transaction to emerge from the CCAA Proceedings and execute upon its capital expenditure plan as soon as possible to ramp up production at the Scully Mine and stabilize operations. Without these capital investments being made in the near term and production ramping up, the high fixed-cost nature of Tacora's business will result in the Company continuing to operate at a loss.[5]

### B. Offtake Agreement and Stockpile Agreement

11. Pursuant to the Offtake Agreement, Tacora sells 100% of its iron ore concentrate to Cargill.[6] The Offtake Agreement has a "life of mine" term. Since December 2019, Tacora's sale of iron ore concentrate to Cargill has also been subject to the Stockpile Agreement, which works in conjunction with the Offtake Agreement.[7] Payments by Cargill to Tacora under the Offtake Agreement proceed in three stages:

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

---

[3] The facts with respect to this motion are more fully set out in the Vuong Affidavit and the Nessim Affidavit.
[4] Vuong Affidavit at para. 5.
[5] Vuong Affidavit at para. 10.
[6] Affidavit of Joe Broking sworn February 2, 2024 ("**Fourth Broking Affidavit**") at para. 57.
[7] Vuong Affidavit at para. 17.

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

(c) third, Tacora and Cargill calculate the Final Purchase Price, which is the commodity price, less freight costs plus a profit share. The commodity price is calculated using the arithmetic mean of the Platts 62% Index from the third calendar month after the vessel sails. The freight costs are calculated using the BECI-C3 index and other provisions. The formula for the profit share between Tacora and Cargill under the Offtake Agreement is based on the final sales price for the final customer over the Platts 62% Index. The final sales price is negotiated between Cargill and the final customer based on a third-party contract.[8]

12. The Offtake Agreement has "tremendous value" to Cargill and from approximately August 2019 to January 2024, Cargill had earned [redacted] in profit from the Offtake Agreement.[9] This profit has been earned by Cargill while every other financial stakeholder of Tacora has seen their investments lose all or a significant amount of their value.[10]

13. Cargill's Offtake Agreement is not a "market" agreement. As acknowledged internally within Cargill, it generates significantly more profit than a "market" agreement. In January 2024, Jefferies, Cargill's financial advisor, prepared an analysis for Cargill comparing a "market" offtake agreement against Cargill's Offtake Agreement and acknowledged on cross-examination that the analysis demonstrated that the Offtake Agreement is significantly more expensive for Tacora compared to a "market" agreement.[11] Based on the discount rate applied, the analysis demonstrated that the Offtake Agreement is [redacted] more expensive for Tacora compared to a "market" offtake agreement.[12]

14. The Offtake Agreement has been a significant impediment to Tacora's ability to raise new equity capital for Tacora in order to successfully complete its "ramp up" of the mine. Cargill's expert recognizes that an offtake agreement is normally a critical tool for mining companies to raise capital.[13] [redacted]

---

[8] *Ibid*.
[9] Transcript of the Cross-Examination of Jeremy Matican held on March 22, 2024 ("**Matican Cross Examination**") at Qs 55-58; Transcript of the Cross-Examination of Matthew Lehtinen held on March 19, 2024 ("**Lehtinen Cross Examination**") at Q 197.
[10] Affidavit of Joe Broking sworn March 14, 2024 ("**Sixth Broking Affidavit**") at para. 17.
[11] Confidential Exhibit No. 13 to Matican Cross Examination; Matican Cross Examination at Qs 254-258.
[12] Confidential Exhibit No. 13 to Matican Cross Examination.
[13] Exhibit "A" to Affidavit of William Gula sworn March 1, 2024 (Expert Report) at paras. 51-53.

[redacted] Cargill has also recognized internally that the Offtake Agreement is an impediment to Tacora's ability to raise new equity financing.[16]

15. As described further below, during both the Pre-Filing Strategic Process and the Solicitation Process, the Offtake Agreement has been a focal point for investors, who either required significant concessions on the Offtake Agreement or for the agreement to be terminated before they would provide capital to Tacora. [redacted]

16. Since late 2022, when Tacora began to encounter financial distress, Cargill's primary objective has been to protect the Offtake Agreement.[18] And in over a year of negotiations with investors and the Ad Hoc Group, Cargill has never offered concessions sufficient to attract new equity to Tacora.[19]

## C. The Pre-Filing Strategic Process[20]

17. In January 2023, the Company engaged Greenhill to formally undertake a strategic process to explore, review, and evaluate a broad range of alternatives for the Company, including sale opportunities or additional investments in Tacora.[21] Commencing in March 2023, Greenhill reached out to 30 strategic and financial parties in connection with a potential sale or financing transaction. Cargill was actively involved in the Pre-Filing Strategic Process, including with the review of marketing documents and receiving regular updates from Greenhill.[22]

18. In April 2023, the Company received several LOIs and term sheets in respect of potential transactions, each of which contemplated significant concessions from Cargill on the Offtake Agreement and/or the Senior Noteholders in respect of the Senior Notes.

---

[14] Lehtinen Cross Examination at Q 197.
[15] Confidential Exhibit No. 14 to Matican Cross Examination.
[16] Vuong Affidavit at Exhibit "B".
[17] Confidential Exhibit No. 11 to the Cross-Examination of Paul Carrelo held on March 21, 2024 ("**Carrelo Cross Examination**"); Exhibit "G" to Affidavit of Matthew Lehtinen sworn March 1, 2024 ("**Lehtinen Affidavit**").
[18] Confidential Exhibit "A" to Carrelo Cross Examination.
[19] Transcript of the Cross-Examination of Michael Nessim held on March 18, 2024 ("**Nessim Cross Examination**") at Q 124.
[20] The Pre-Filing Strategic Process is described more fully in the Nessim Affidavit at paras. 9-12.
[21] Affidavit of Michael Nessim sworn February 2, 2024 ("**First Nessim Affidavit**") at para. 4.
[22] First Nessim Affidavit at para. 4.

19. In May 2023, the Company entered into a non-binding LOI for a sale of the Company to a strategic party. Greenhill and the Company facilitated advanced due diligence for the strategic party in an effort to advance the transaction. However, in July 2023, the strategic party advised that it was no longer interested in the transaction contemplated by the LOI. One of the reasons the transaction did not move forward was that the Offtake Agreement would limit the party's ability to use Tacora's iron ore in its own operations and prevent realization of potential synergies.[23]

20. While the Company was continuing with these efforts, Cargill also conducted its own process to attempt to solicit third-party investors and other stakeholders of Tacora to inject more capital into Tacora.[24] Cargill's process involved regular communication with third party investors and a number of the parties involved during 2023 are the same parties that Cargill engaged with during the Solicitation Process.[25]

## D. The Solicitation Process[26]

21. From the termination of the LOI in July 2023, Tacora attempted to facilitate discussions between Cargill and the Ad Hoc Group on a consensual recapitalization transaction, which also involved RCF.[27] However, such efforts were unsuccessful and Tacora filed for CCAA protection on October 10, 2023.

22. On October 30, 2023, this Court granted the Solicitation Order, which, among other things, authorized and directed Tacora to undertake the Solicitation Process.[28] The Solicitation Process provided the ability for interested parties to investigate and conduct due diligence regarding an opportunity to arrange an offtake, service or other agreement in respect of the Business and permitted the Company to market the Offtake Opportunity.[29]

23. Over 130 Potential Bidders were contacted by Greenhill following the commencement of the SISP.[30] The Offtake Agreement continued to be a focal point for potential buyers and investors and each of the Bids received from Bidders did not contemplate assumption of the

---

[23] First Nessim Affidavit at para. 6.
[24] Lehtinen Affidavit at paras. 54-55; Confidential Exhibit "A" to Carrelo Cross Examination.
[25] Confidential Exhibit "A" to Carrelo Cross Examination; Carrelo Cross Examination at Qs 94-95 and 321; Exhibit Nos. 6-8 to Carrelo Cross Examination.
[26] The Solicitation Process is described more fully in the Nessim Affidavit at paras. 13-22.
[27] Transcript of the Cross-Examination of Joseph Andrew Broking II held on March 20, 2024 ("**Broking Cross Examination**") at Qs. 152 and 666.
[28] Nessim Affidavit at para. 13.
[29] Nessim Affidavit at para. 14.
[30] Nessim Affidavit at para. 15.

Offtake Agreement, except from the Bid received from Cargill (which contained no committed new money financing to either close the contemplated transaction or make the required investments in the Scully Mine).[31]

## E. The Disclaimer

24. Throughout the Pre-Filing Strategic Process and Solicitation Process, the market feedback on the Offtake Agreement has been clear to the Company – potential third-party buyers and investors view the Offtake Agreement as an off-market agreement that is a significant impediment to investing new capital into Tacora.[32]

25. With Tacora needing to complete another sales process following the failure of the Investors' Bid, the Board of Tacora, with advice from its advisors and approval of the Monitor, determined that the disclaimer of the Agreements was in the best interests of the Company and its stakeholders as it would enhance the Company's prospects of successfully identifying a going-concern transaction through the Sale Process. The earlier processes had clearly demonstrated that potential investors and purchasers (other than Cargill) were unwilling to assume the onerous obligations of the Offtake Agreement and being able to market Tacora "free and clear" of the Offtake Agreement will enhance the prospects of attracting the new capital needed to ramp up production at the Scully Mine.[33]

26. Accordingly, on May 16, 2024, Tacora delivered the Disclaimer to Cargill together with the Reasons for the Disclaimer, which describe certain problematic and "off-market" terms of the Offtake Agreement, including:[34]

(a) ***Term*.** The Offtake Agreement has a "life of mine" term. Tacora has no termination rights under the Offtake Agreement. The "life of mine" term limits the Company's flexibility to engage in future transactions and limits optionality with respect to its operations;

(b) ***Profit Share*.** The profit share attributable to Cargill under the Offtake Agreement is higher than a market offtake or marketing agreement that the Company could negotiate today. The above-market profit share reduces Tacora's realized price for every tonne of iron ore concentrate sold and limits its ability to generate sufficient profits to attract investors;

---

[31] Nessim Affidavit at paras. 15-19.
[32] Nessim Affidavit at para. 5.
[33] Nessim Affidavit at para 7.
[34] Vuong Affidavit at Exhibit "B".

(c) ***Profit Share Structure*.** The amounts paid to Tacora under the Offtake Agreement is based on the Platts 62% Index though Tacora's ore has quality aligned with the Platts 65% Index. The structure within the Offtake Agreement allows Cargill to capture a disproportionate amount of the premium of high-grade iron ore (i.e. >65% Fe) versus standard-grade iron ore (i.e. <62% Fe); and

(d) ***Quotation Period*.** The Offtake Agreement contains a quotational period whereby Tacora bears price risk related to the Platts 62% Index for a period of three months from loading of the iron ore onto vessels arranged by Cargill. The quotational period is excessively long and does not necessarily relate to the timing of when Cargill delivers the iron ore to an end-customer. The long quotation period negatively impacts Tacora by exposing Tacora's revenue to significant iron ore price risk and volatility and, in the past, has caused Tacora's cash and liquidity position to rapidly deteriorate with limited notice.[35]

## F. Solicitation of Alternative Offtake and/or Marketing Agreements

27. In accordance with the Sale Process Order granted on June 5, 2024,[36] the Company, with the assistance of Greenhill and the Monitor, has commenced the Sale Process by, among other things, (a) engaging with potentially interested parties for purposes of marketing and soliciting interest in the Opportunity (as defined in the Sale Procedures); (b) negotiating nondisclosure agreements with potentially interested parties; (c) providing access to the virtual data room maintained by Tacora to interested parties upon their execution of a non-disclosure agreement; and (d) arranging virtual management presentations and site visits for potentially interested parties.[37]

28. In parallel with the ongoing Sale Process, Greenhill has also been leading the solicitation of a potential replacement interim offtake and/or marketing agreement in the event Cargill did not dispute the Disclaimer or the Court determines that the effective date of the Disclaimer will occur prior to Tacora closing a restructuring transaction. The results of the replacement offtake solicitation process have provided further evidence that alternative superior option to the Offtake Agreement exist for the Company as other potential buyers of Tacora's ore have provided proposals that offer significantly improved terms to Tacora compared to the Offtake Agreement.[38] The potential proposals have offered a higher price for Tacora's ore relative to the Offtake Agreement, including basing the purchase price formula on the Platts 65% Index rather

[35] Vuong Affidavit at para. 24.
[36] Nessim Affidavit at para. 4.
[37] Tenth Report at para. 27.
[38] Nessim Affidavit at para. 8.

than the Platts 62% Index. The alternatives also have similar benefits as the Offtake Agreement without the same structural issues.[39]

29. Potential bidders in the Sale Process need to see a viable path forward for Tacora to exit the CCAA Proceedings with or without the Offtake Agreement. The Disclaimer, if approved by the Court, will pave a clear path forward for the Company by demonstrating to potential bidders that they are not required to assume the Offtake Agreement in any transaction. Potential bidders have expressed concern, based on the previous Sale Approval Motion, that if the Offtake Agreement is not assumed as part of the proposed restructuring transaction, approval of their transaction could be subject to extensive and protracted litigation.[40]

## G. Effective Date of Disclaimer

30. The Company has explored the possibility of alternative offtake and/or marketing agreements for the sale of Tacora's iron ore in the event Cargill did not oppose the Disclaimer or the Court ordered the Offtake Agreement should be immediately disclaimed. However, transitioning to a new offtake or marketing arrangement for an interim period prior to the bid deadline in the Sale Process would require significant operational changes to Tacora's shipping, logistics, and back-office administration, and risk causing undue disruptions. In addition, such an interim arrangement is likely to cause confusion in the marketplace amongst the ultimate customers of Tacora's iron ore concentrate. Transitioning from the Offtake Agreement once in connection with a long-term solution (i.e. following selection of the successful bid in the Sale Process) would provide practical advantages and greater stability to the Company and Cargill in the near term.[41]

31. If required, the Company believes that it could enter into a new offtake and/or marketing agreement within 30 days. Accordingly, the Company's view is that, to the extent the Court dismisses Cargill's motion opposing the Disclaimer, it should order the effective date of the Disclaimer to be the earlier of (a) August 12, 2024, and (b) the Company providing Cargill with 30 calendar days written notice.[42]

---

[39] Nessim Affidavit at para. 24.
[40] Nessim Affidavit at para. 27.
[41] Vuong Affidavit at para. 31.
[42] Vuong Affidavit at para. 33.

## H. Cargill's Recent Efforts to Cause Instability of Tacora

32. Following the issuance of the Disclaimer, Cargill has taken recent actions against Tacora, which has impacted the Company's cash flow forecast, liquidity position and ongoing operations.

33. Most recently, Cargill indicated to Tacora that it intended to postpone the scheduling of a vessel tentatively scheduled for a July 11-24, 2024, laycan (the "**July Vessel**") to a later date. With the limited liquidity available to Tacora during the CCAA Proceedings, the Company depends on regularly selling iron ore to support its cash flow. The postponement of the July Vessel could force Tacora to exceed the stockpile limit contained in the Stockpile Agreement and thereby alleviate Cargill from being required to purchase iron ore upon delivery to the stockpile at the Port. The delay also has the potential to interrupt operations if train shipments cannot be made because the stockpile reaches its maximum capacity.[43]

34. In its Tenth Report, the Monitor noted that it is imperative that Tacora's operations be funded through to the completion of a going concern transaction. Accordingly, the Monitor urged Cargill to fulfill its obligations under the Offtake Agreement consistent with prior practice, until such time as the Court may set an effective date of the disclaimer of the Offtake Agreement. Specifically, this includes working with Tacora to finalize vessel scheduling and reach agreement on an interim Offtake Agreement to allow for an orderly transition depending upon the results of the Disclaimer Motion and the Sale Process.[44]

35. Cargill responded to correspondence of Tacora and the Monitor alleging it would not schedule the July Vessel due to Tacora "seeking to disclaim the Offtake Agreement and Stockpile Agreement and the massive uncertainty for Cargill and others created by Tacora's position in that regard."[45] However, this was despite Tacora reassuring Cargill and agreeing that Tacora "will honour its obligations related to the [July Vessel] pursuant to the terms of the existing Offtake Agreement and Stockpile Agreement consistent with the sale of all other iron ore sold to Tacora during the CCAA proceedings."[46]

36. In addition to refusing to schedule the July Vessel, Cargill also recently set-off $1,185,592.21 from amounts due to Tacora in respect of post-filing deliveries to Cargill (the

[43] Tenth Report at Appendix "F".
[44] Tenth Report at para. 40.
[45] Tenth Report at Appendix "H".
[46] Tenth Report at Appendix "F".

"**Illegal Set-off**"). The amounts set-off were amounts that Cargill had previously alleged were pre-filing amounts. On June 19, 2024, Tacora sent further correspondence to Cargill demanding that Cargill reverse the Illegal Set-off and also immediately pay the other Outstanding Amounts that Cargill owes the Company.[47] To date, Cargill has refused to do so.

## PART II - ISSUES

37. The issues on this motion are as follows:

(a) with respect to the Disclaimer Motion:

(i) whether the Offtake Agreement is an "eligible financial contract" and therefore not able to be disclaimed;

(ii) whether the Agreements are "financing agreements" with Tacora as a borrower, and therefore not able to be disclaimed; and

(iii) whether the Disclaimer should be set aside as a disclaimer of the Agreements would not enhance the prospects of a viable compromise or arrangement;

(b) with respect to the Global Process Motion, whether as a matter of law, an RVO is available under the CCAA where:

(i) there is a material unsecured creditor in a position to vote against a CCAA plan of compromise or arrangement;

(ii) that unsecured creditor opposes the RVO and the RVO is sought over their objection; and

(iii) there is an unsecured CCAA plan alternative which provides for consideration to all affected unsecured creditors in the form of restructured shares or other consideration (collectively, the "**Assumed Facts**").

[47] Tenth Report at para. 37.

## PART III - LAW AND ANALYSIS

### A. The Disclaimer Motion should be Dismissed

#### 1. The Offtake Agreement is not an EFC

##### *(a) The EFC regime in the CCAA*

38. The meaning of "eligible financial contract" (an "**EFC**") is contained in section 2 of the *Eligible Financial Contract Regulations* (the "**Regulations**"). Pursuant to section 2(a) of the Regulations, the following kinds of "financial agreements" are prescribed as EFCs:

> (a) derivatives agreement, whether settled by payment or delivery, that:
>
> (i) trades on a futures or options exchange or board, or other regulated market, or
>
> (ii) is the subject of recurrent dealings in the derivatives markets or in the over- the counter- securities or commodities markets.[48]

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

> …a financial agreement whose obligations are derived from, referenced to, or based on, one or more underlying reference items such as interest rates, indices, currencies, commodities, securities or other ownership interests, credit or guarantee obligations, debt securities, climatic variables, bandwidth, freight rates, emission rights, real property indices and inflation or other macroeconomic data and includes:
>
> (a) a contract for differences or a swap, including a total return swap, price return swap, default swap or basis swap;
>
> (b) a futures agreement;
>
> (c) a cap, collar, floor or spread;
>
> (d) an option; and
>
> (e) a spot or forward.[49] (emphasis added)

40. The Offtake Agreement meets neither of the requirements under section 2(a) of the Regulations.

---

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

### *(b) The Offtake Agreement is a supply contract and not derivatives agreements*

41. As described by Martin Marcone in *Eligible Financial Contracts*, the definition of "derivates agreement" under the Regulations has two elements: (a) financial agreement; and (b) obligations relating to underlying reference items.[50] Marcone defines derivatives agreements as "investment tools with values linked to the performance of some underlying item [called an underlier]…"[51] In particular:

> Derivatives are predominantly utilized to protect investments by hedging against unfavourable movements in the price, rates or values of a particular underlier or to earn income by using risk capital to speculate and take advantage of fluctuations in a particular market.[52]

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

> Generally speaking, financial derivatives are contracts whose value is based on the value of an underlying asset, reference rate, or index. As Professors Grottenthaler and Henderson explain, there are essentially two reasons for entering into such a contract — to speculate on the movement of the underlying asset, reference rate or index, or to hedge exposure to a particular financial risk such as the risk posed by volatility in the prices of commodities…
>
> The two basic types of derivative transactions are forward contracts and options… Nevertheless, they both function as hedging tools.[53] [Emphasis added.]

43. The term "financial agreement" is not defined in the Regulations. However, the type of contract can be determined by looking at its core features. Derivatives – including various types of swaps, futures, options, and forward contracts – all have prices fixed at the time of contracting. Derivatives are used for financial purposes rather than commercial purposes, and as stated above by the Supreme Court, are used to either hedge or speculate. Such contracts are intended to transfer price risk from one party to another from the moment of contracting.[54]

---

[50] Martin Marcone, *Eligible Financial Contracts* (Canada: LexisNexis Canada Inc., 2009) ("**Marcone**") at p. 68, Book of Authorities of the Applicant dated April 6, 2024 ("**BOA**") at Tab "R".
[51] *Ibid* at p. 65, BOA at Tab "R".
[52] *Ibid* at p. 65, BOA at Tab "R".; **see also** *Placer Dome Canada Ltd v Ontario (Minister of Finance)*, 2006 SCC 20 ("***Placer Dome***") at paras. 29-35.
[53] *Placer Dome*, *ibid* at paras. 29-30.
[54] Report of Sharon Brown-Hruska ("**Brown-Hruska Report**") at para. 33, Affidavit of Dr. Sharon Brown-Hruska affirmed February 2, 2024 at Exhibit "A".

44. In *Androscoggin*,[55] the Court of Appeal for Ontario held that EFCs must serve a "financial purpose unrelated to the physical settlement of the contracts."[56] The Court explained that EFCs:

> …enable[e] the parties to manage the risk of a commodity that fluctuate[s] in price by allowing the counterparty to terminate the agreement in the event of an assignment in bankruptcy or a CCAA proceeding, to offset or net its obligations under the contracts to determine the value of the amount of the commodity yet to be delivered in the future, and to re-hedge its position.[57]

45. Similarly, in *Blue Range*, the Court of Appeal of Alberta explained that "[f]orward commodity contracts and other derivatives have a financial value that can readily be calculated; they are commercial hedging contracts that can be used to manage various types of risk, including changes in commodity prices, exchange rates, interest rates and market risks" (emphasis added).[58]

46. Both *Androscoggin* and *Blue Range* considered the definition of "forward commodity contract" prior to the 2007-amendments to the CCAA.[59] Only one case – the decision of the Alberta Court of Queen's Bench in *Bellatrix One*[60] – has considered the definition of "derivatives agreement" under the current Regulations. However, the Court in *Bellatrix One* followed *Androscoggin* and *Blue Range* in emphasizing the requirement of a financial purpose related to hedging and confirming that derivatives agreements permit parties to hedge against commercial risk.[61]

47. Offtake agreements are unlike the contracts described in the case law as derivative agreements. Offtake agreements are generally long-term contracts in which a producer, such as a mining concern, commits to sell substantial volumes of a commodity to a buyer or "offtaker" over a period of time. As is common in mining and other natural resource commodities, an offtake agreement specifies that the offtaker purchases all or a substantial percentage of production.[62] In other words, the primary purpose of an offtake agreement is the purchase and

---

[55] *Re Androscoggin Energy LLC*, 2005 CarswellOnt 589 (Ont CA) ("***Re Androscoggin***").
[56] *Ibid* at para. 15.
[57] *Ibid*.
[58] *Enron Capital & Trade Resources Canada Corp v Blue Range Resource Corp*, 2000 ABCA 239 ("***Blue Range***") at paras. 18, 23; **see also**, *Re Calpine Canada Energy Ltd*, 2006 ABQB 153 ("***Re Calpine***") at paras. 20-22, which followed the decisions in *Re Androscoggin* and *Blue Range*.
[59] Regulations, s. 1(e): The term "forward" is now listed as a specific type of "derivatives agreement".
[60] *Re Bellatrix Exploration Ltd*, 2020 CarswellAlta 350 (AB QB) ("***Bellatrix One***"). This decision is not available on CanLII. A copy of this decision is at BOA at Tab "S".
[61] *Ibid* at paras. 125, 158, BOA at Tab "S".
[62] Brown-Hruska Report at para. 24.

sale of a natural resource commodity, and such purchase and sale transactions are physically settled for commercial reasons. Offtake agreements are not used for hedging or speculation of commodities independent from the supply of underlying product.

48. The Offtake Agreement between Tacora and Cargill does not differ from this standard description. Pursuant to the Offtake Agreement, Tacora sells 100% of the iron ore concentrate production at the Scully Mine to Cargill.[63] The Offtake Agreement is a supply contract; in that it specifies the terms and conditions under which Tacora supplies to Cargill, who subsequently transports and markets the shipments of iron ore under the terms of the Offtake Agreement.[64] Both Tacora's expert, Dr. Brown-Hruska, and Cargill's expert, Jeremy Cusimano, agreed on this. Dr. Brown-Hruska opined that "[t]he Offtake Agreement is a supply contract for the sale and purchase of iron ore" and "not a 'derivative contract' as that term is commonly understood by financial market authorities, in the commodities derivatives markets, or in the commodities industry."[65]

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

> Q. … I take it you don't disagree with Ms. Brown-Hruska's conclusions that the Offtake Agreement is not a derivative agreement?
>
> A. When you look at the contract and its amendments in their entirety, it is not what I would consider to be a derivative.[66]
>
> […]
>
> Q. … I take it you would characterize it as a contract of purchase and sale, buyer and seller agreement?
>
> A. Yes.[67]

### *(c) The Offtake Agreement does not hedge price risk for Tacora*

50. As described above, a key feature of evaluating whether an agreement is a "derivative agreement" is evaluating whether the purpose of the agreement is to enable hedging of price risk. In *Calpine*, the court concluded that the contract at issue was not an EFC because the

---

[63] Fourth Broking Affidavit at para. 57.
[64] Brown-Hruska Report at para. 22.
[65] Brown Hruska Report at paras. 12-13.
[66] Transcript of the Cross Examination of Jeremy Cusimano led on March 18, 2024 ("**Cusimano Cross Examination**") at Q 74.
[67] Cusimano Cross Examination at Q 203.

price under the contract, which was determined by the market price (determined by various industry measurements) could not "prudently be hedged by an off-setting contract"[68] and "demand, price and quantity of gas to be purchased is based solely upon the purchaser's needs from time to time at prices that fluctuate."[69] In *Bellatrix One*, the Alberta Court of Queen's Bench held that, though a fixed price is not required for an agreement to be a derivative agreement, the agreement must have a "price… capable of determination at the date of delivery" for hedging purposes.[70]

51. The Offtake Agreement does not hedge against any price risk. The Offtake Agreement dictates that the Final Purchase Price will be determined based on negotiation between Cargill and third-party consumers. Similar to the situation in *Calpine*, the Offtake Agreement provides for a price based on a market index with a profit share component and without hedging against commodity price risk.[71] The Offtake Agreement also fails the test outlined in *Bellatrix One* – Tacora does not know the Final Purchase Price until several months after delivery. In fact, the Offtake Agreement exposes Tacora to significant price risk over a long period following delivery due to the extensive quotational period. This was acutely demonstrated when the recent fall in iron ore prices caused significant liquidity challenges at Tacora given payments that were due to Cargill.

### *(d) The Side Letters do not change the nature of the Offtake Agreement*

52. Cargill has asserted that the Offtake Agreement is an EFC on the basis that there were certain separate side letters (the "**Side Letters**") between the parties that provided hedging in respect of the Platts 62% Index aspect of the pricing formula in the Offtake Agreement. These Side Letters were separate agreements designed to supplement and provide risk-sharing arrangements for specific transactions that were executed under the Offtake Agreement.[72] None of the Side Letters fixed the final price received by Tacora under the Offtake Agreement, which

---

[68] *Re Calpine*, *supra* at para. 20.
[69] *Re Calpine*, *supra* at para. 22; **see also** Marcone, *supra* at p. 79, which states: "A commodity future can be defined as a contract to make or take delivery of a specified quantity and quality, grade or size of a commodity during a designated future time at a price agreed upon when the contract is entered into on a futures exchange. As an example, the S&P Goldman Sachs Commodity Index futures contract is traded on the Chicago Mercantile Exchange", BOA at Tab "R".
[70] *Bellatrix One*, *supra* at paras. 158-159, BOA at Tab "S".
[71] Brown-Hruska Report at para. 40; Fourth Broking Affidavit at para. 62.
[72] Vuong Affidavit at para. 22.

always continued to include a profit share component based on Cargill's sales to end customers of the iron ore.[73]

53. These Side Letters are not the subject of this motion as none of the Side Letters have been disclaimed by Tacora (since they do not apply to future sale of any iron ore) and accordingly, whether the Side Letters are EFCs is irrelevant. The question for this motion is whether the Offtake Agreement is an EFC. And the fact that the Side Letters were entered into periodically to provide some price protection is in fact further evidence that the Offtake Agreement is not itself a hedging agreement or a derivative.[74] If the Offtake Agreement provided hedging or price protection to Tacora, the Side Letters would be unnecessary. However, since the Offtake Agreement provides no hedging or price protection for Tacora, these separate Side Letters became periodically necessary to help Tacora to attempt to mitigate against iron ore price risk.

***(e) No other hallmarks of a derivatives agreement.***

54. The Offtake Agreement does not contain the features of the types of agreements enumerated in the Regulations as "derivative agreement[s]".

55. ***The Offtake Agreement is not a forward contract***. As opined by Dr. Brown-Hruska, in general, a physically-settled forward contract would obligate one party to make, and the other party to take, physical delivery of a fixed quantity of a specified commodity, transacting at a fixed price determined such that the forward contract has zero value at inception, on a fixed date more than two days in the future.[75] In contrast, the Offtake Agreement does not set a fixed price for iron ore, specify the source of iron ore consistent with a supply contract, and does not fix a specific quantity to transact on a specific future date.

56. Further, a forward contract by definition does not include transfers of cash or assets at the inception of the contract and because of this feature, a forward contract must have zero value for both parties at inception. Because of the specific sourcing requirement of the Offtake Agreement and the long and indefinite term, Tacora effectively gives up its ability to sell to third parties to hedge the risk the Offtake Agreement poses, while Cargill does not give up a similar ability to purchase iron ore from third parties and its ability to hedge the risk via its final sale of

[73] Vuong Affidavit at para. 23.
[74] Brown-Hruska Report at para. 42.
[75] Brown-Hruska Report at para. 35.

Tacora's iron ore concentrate to third parties (while earning a spread implicit in the profit share calculation). Cargill's ability to determine the ultimate destination for and sale of Tacora's iron ore concentrate implicitly created an asymmetry of basis at the inception of the Offtake Agreement. As a result of this asymmetry, the value of the Offtake Agreement is not zero at inception for both parties.[76]

57. ***The Offtake Agreement is not a swap contract***. A swap contract is a contract to exchange (or swap) a series of periodic future cash flows based on a predetermined "notional principal" at terms agreed upon at inception such that the up-front payment is zero. Also, a physically-settled swap does not involve a direct purchase of an asset or commodity, and thus, the Offtake Agreement lacks many of the key features of a swap agreement.[77]

58. In general, all swap agreements involve a two-way exchange, or "swapping", of a set of comparable cash flows and/or assets in turn based upon an agreed underlying notional principal amount. It is commonly understood by financial market authorities and in the commodities markets that the swapping is distinct from a one-directional purchase or sale of an asset.[78] The key feature shared by all swaps including interest rate swaps, currency swaps, and commodity swaps is that in each agreement, there is a bi-directional "swapping" of assets or cash flows tied to underlying assets between both parties.[79]

59. Cargill relies on Mr. Cusimano's opinion that the pricing mechanism in the Offtake Agreement operates similarly to a total return swap ("**TRS**"), a form of swap, by replicating the cash flows of an investment in an asset and requiring parties to make payments to each other based on the performance of an underlying asset.[80] The comparison of the Offtake Agreement to a TRS is inapplicable for several reasons. The features of the Offtake Agreement that Mr. Cusimano relies upon to compare the Offtake Agreement to a TRS – including the provisional payment, true-up payments, and the profit share mechanism – do not hedge price risk or change the risk profiles of Tacora or Cargill. For example, unlike a TRS where one party's gain is the other's loss, both Tacora and Cargill can profit significantly under the Offtake Agreement without doing so at the other's expense. Under a TRS, the receiving party receives exposure to the benefit (or loss) of an asset's performance without actually owning it, in exchange for

[76] Brown-Hruska Report at para. 47.
[77] Brown-Hruska Report at para. 48.
[78] Brown-Hruska Report at para. 50.
[79] Brown-Hruska Report at para. 52.
[80] Expert Report of Jeremy Cusimano dated March 1, 2024 at para. 60.

making interest payments to the payer party. Conversely, under the Offtake Agreement, Tacora remains exposed to iron ore price volatility until the final purchase price is determined; Cargill's payoff is different because of the formula for calculating the profit share. As a result, Cargill's risk profile is completely different than if it were the payer party on a TRS. If Tacora and Cargill engaged in an actual TRS, Tacora's gain would equal Cargill's loss, and vice-versa.[81]

60. Further, a TRS also typically includes interest or index payments based on a set notional amount at regular intervals between both parties, whereas the Offtake Agreement does not.[82]

61. Finally, as with all over-the-counter-derivatives transactions, a TRS is typically governed by its own standard documentation, such a International Swaps and Derivatives Association ("**ISDA**") Master Agreement, which is a flexible and widely accepted standard form of documentation for all types of OTC derivatives. The Offtake Agreement is not governed by an ISDA Master Agreement.[83] The Offtake Agreement is a supply agreement for Tacora to sell, and for Cargill to purchase, iron ore. This type of direct, one-directional sale agreement does not resemble "swapping," nor would it be a feature of a "swap" as the term is traditionally understood in financial industries.[84]

62. The other reasons why the Offtake Agreement is not similar to a TRS are set forth in the Reply Report of Dr. Sharon Brown-Hruska dated March 14, 2024.

63. ***The Offtake Agreement is not a futures or options contract***. In general, futures and options contracts are standardized contracts listed on an exchange that offer fixed terms and a set maturity or delivery date at the expiration of the contract. While iron ore futures with standardized features are offered on futures exchanges, the Offtake Agreement lacks many of the key features of futures contracts. The Offtake Agreement neither fixes a price at the time of contracting nor at the point of title transfer and it differs from contracts offered on regulated and traded markets such as futures and options markets.[85]

64. ***The future deliveries under the Offtake Agreement cannot be valued.*** In *Androscoggin*, the Court of Appeal for Ontario observed that the hallmarks of an EFC include the ability of a counterparty to "terminate the agreement in the event of an assignment in

---

[81] Reply Report of Dr. Sharon Brown-Hruska ("**Reply Brown-Hruska Report**") at paras. 31-32, Affidavit of Dr. Sharon Brown-Hruska affirmed March 14, 2024 at Exhibit "A".
[82] Reply Brown-Hruska Report at para. 33.
[83] Reply Brown-Hruska Report at paras. 33-36.
[84] Brown-Hruska Report at para. 53.
[85] Brown-Hruska Report at para. 54.

bankruptcy or a CCAA proceeding, to offset or net its obligations under the contracts to determine the value of the amount of the commodity yet to be delivered in the future, and to re-hedge its position."[86] Similarly, in *Bellatrix One*, it was an important indicia of an EFC that the contract "contemplates netting or set-off in the event of a default based on market prices prevailing at the date of default" and "its provisions… provide a party with certainty that, in the Event of Default, calculation of monetary damages will be possible."[87]

65. The Offtake Agreement contains no such provision and in fact, it would be impossible for the Offtake Agreement to contain such a provision. The value of 100% of the iron ore from the Scully Mine for a "life of mine" term is not a fixed amount that can be readily calculated as it is depended on numerous unknowable variables. The evidence from the sale approval motion established that the Offtake Agreement does not have a specific value. As of January 8, 2024, Cargill indicated that its forward-looking net-present-value sensitivity analysis on the Offtake Agreement ranged from [redacted] under certain market production and discount rate assumptions, and from [redacted], if varying prices of iron ore are also assumed.[88]

***(e) The Agreements do not trade on exchanges and are not the subject of recurrent dealings in the derivatives markets or over-the-counter securities or commodities markets.***

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

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

67. With respect to section 2(a)(i), Martin Marcone in *Eligible Financial Contracts*, explains that these types of transactions are traded on a "central trading floor or through an electronic trading system and are cleared and settled centrally through the exchange's clearing house,

---

[86] *Re Androscoggin*, *supra* at para 15.
[87] *Bellatrix One*, *supra* at paras. 52-53, BOA at Tab "S".
[88] Lehtinen Cross Examination at Q 197.

which acts as central counterparty to all the contracts."[89] With respect to section 2(a)(ii), the same text sets out the following explanation of its requirements:

> Subparagraph 2(a)(ii) of the Regulations can be divided into two categories. In the first category, included as EFCs are "derivatives agreements" (settled by payment or delivery), which are "the subject of recurrent dealings in the derivatives markets". Simply put, this classification requires that the "derivatives agreement" be traded with some frequency by participants in the *derivatives markets*.
>
> In the second category, included as EFCs are "derivatives agreements (again, settled by payment or delivery), which are "the subject of recurrent dealings…in the over-the-counter securities or commodities markets". This category contains three general elements.
>
> First, the "derivatives agreement" must be traded with some frequency in the stated markets…
>
> Second, the "derivatives agreement" must be traded over-the-counter. This method involves bilateral negotiations and, unlike on-exchange transactions, customization to the preferences of the parties…
>
> Third, and finally, the "derivatives agreement" must be traded in the OTC *securities or commodities markets*.[90]

68. Again, the Offtake Agreement does not satisfy any of these requirements. Neither the Offtake Agreement, nor iron ore offtake agreements generally, trade on exchanges due to their bespoke nature. An offtake agreement is typically a long-dated contract, customized to the needs of the buyer and seller. Thus, unlike the commodities, securities, and derivatives that trade on exchanges, an offtake agreement is unique and non-standardized.[91]

69. The Offtake Agreement and iron ore offtake agreements generally are also not the subject of recurrent dealings in derivative or commodity markets because their contents reflect idiosyncratic negotiations between the buyer and seller at a specific point in time and involve unique and non-standardized terms. Such counterparty specificity and complexity makes an offtake agreement unsuitable for recurrent dealing in derivative or commodity markets or transferability generally.[92] In this case, the Offtake Agreement reflects customization or complexity related to the quantities (e.g., 100% of Scully Mine's production, specifically), quality

---

[89] Marcone, *supra* at p. 129, citing at FN 501: Committee on Payment and Settlement Systems, *OTC Derivatives: Settlement Procedures and Counterparty Risk Management*, (September 1998), at p. 9. See online: Bank of International Settlements http://www.bis.org, BOA at Tab "R".
[90] Marcone, *supra* at pp. 131-133, BOA at Tab "R".
[91] Brown-Hruska Report at para. 58.
[92] Brown-Hruska Report at para. 61.

(e.g., the customized quality provisions in the Offtake Agreement), and pricing mechanisms (e.g., the Offtake Agreement's negotiated freight rates and profit-share provision).

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

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

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

> Q. And you would agree with me, I take it, that the Offtake Agreement is not traded on any futures or options exchanges or any other regulated markets?
>
> A. This specific agreement?
>
> Q. Yes.
>
> A. It is my understanding that this specific agreement is not traded on any exchange.[93]

72. Though *Bellatrix One*[94] concluded only trading or recurrent dealings in the underlying commodity was necessary to satisfy this aspect of the EFC test, the conclusion is clearly contrary to the wording of the Regulations which specifically refence the agreement, not the underlying commodity, by stating "a derivatives agreement… that (i) trades…, or (ii) is the subject of recurrent dealings…". This interpretation is consistent with the policy goal of the Regulations, which is to provide certainty and protection for global financial markets where derivative agreements themselves trade, not provide protection for commodity purchasers on bespoke purchase and sale agreements. Potentially applying the Regulations and relevant EFC protections to contracts which deal with underlying commodities that may trade in financial markets would significantly expand their intended scope and could hamper the other policy goals of the CCAA for mining or energy companies by limiting their ability to stay remedies under their contracts or disclaim the contracts in order to successfully restructure.

---

[93] Cusimano Cross Examination, Qs 204-205.
[94] The Court should also note that leave to appeal of *Bellatrix One* was granted by the Alberta Court of Appeal but the appeal was later rendered moot by a sale of the business which left behind the contract at issue.

### 2. The Agreements are not Financing Agreements where Tacora is the Borrower

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

74. Pursuant to the Stockpile Agreement[95], Tacora is paid by Cargill for iron ore concentrate that is loaded to the stockpile rather than when vessels are loaded. However, all iron ore concentrate purchased by Cargill becomes Cargill's property at the moment of unloading by Tacora to the stockpile.[96] There is no advance of funds by Cargill where Tacora becomes a "borrower" under the Offtake Agreement or Stockpile Agreement. The iron ore is merely being sold to Cargill similar to any other agreement of purchase and sale for a good or product.

75. Cargill also attempts to argue that the Offtake Agreement provides for a margining facility to Tacora. This margining facility does not change the primary purpose of the Offtake Agreement, which is the purchase and sale of iron ore. In any event, the APF Agreement explicitly removed the margining facility from the Offtake Agreement and incorporated margining into the APF Agreement.[97] Section 2.2(a) of the APF Amendment states, in part:

> "[I]n particular, the Seller and the Buyer agree that Section 15.3 of the Offtake Agreement shall be amended, pursuant to this clause 2.2(a) for the duration of the term of this Agreement, to (A) delete the words "and greater than $7.5 million" and (B) delete the words "less $5 million" from the second sentence of Section 15.3".[98]

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

> "SMA in respect of each Relevant Shipment may be either negative or positive. On each Calculation Date, all valuations of SMA for all Shipments for which the final Purchase Price has not been determined shall be netted to result in a single positive or negative value (the "Margin Amount"). If that value is positive ~~and greater than $7.5 million~~, then Buyer shall be entitled to hold margin equal to but no greater than that Margin Amount ~~less $5.0 million~~, and if that value is negative and less than -$5 million, then Seller shall be entitled to hold margin equal to but

---

[95] Tacora also notes that, pursuant to the DIP Agreement, the Stockpile Agreement will expire on maturity of the DIP Facility, which matures upon completion of the Transactions. See Exhibit No. 1 to the Lehtinen Cross-Examination.
[96] Affidavit of Joe Broking sworn October 9, 2023 ("**First Broking Affidavit**") at para. 38.
[97] Exhibit No "I" to First Broking Affidavit.
[98] Exhibit No "I" to First Broking Affidavit.

> no greater than that Margin Amount. In determining which party makes a payment to the other, any Margin Amount (if any) already held by one party shall be taken into account and netted. The receiving party shall raise a debit note for the relevant amount which shall be settled by the paying party by TT within 5 Working Days."[99]

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

78. As described in the Tenth Report, the Monitor remains of the view that the Agreements are not subject to the restrictions in section 32(9).[100]

## B. The Disclaimer of the Agreements should not be Set Aside

### 1. Factors for Setting Aside a Disclaimer

79. Section 32(1) of the CCAA broadly permits a debtor company, on notice to the other parties to the agreement and the Monitor, to disclaim *any* agreement to which the debtor company is a party on the day on which CCAA proceedings commence.[101]

80. Under section 32(2) of the CCAA, a party receiving a disclaimer may seek an order that the agreement is not to be disclaimed.[102] Where a party seeks such an order, section 32(4) requires the Court to consider the following non-exhaustive factors:

(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.[103]

---

[99] Confidential Exhibit "H" to Fourth Broking Affidavit.
[100] Tenth Report at para. 55.
[101] CCAA, s. 32(1).
[102] CCAA, s. 32(2).
[103] CCAA, s. 32(4).

81. For a disclaimer to be upheld, not every factor is required to be satisfied. Rather, the Court needs to consider relevant factors and generally apply its discretion on whether to uphold the disclaimer based on the specific facts and circumstances.

82. In this case, the Disclaimer should not be set aside as the Monitor approved the Disclaimer, the Disclaimer will enhance the prospects of a viable compromise or arrangement being made in respect of the Company, and the Disclaimer will not cause significant financial hardship to Cargill. Cargill only disputes the Disclaimer on a single ground – whether the Disclaimer will enhance the prospects of a viable compromise or arrangement.

### *(a) The Monitor Approved the Disclaimer*

83. The Monitor approved the Disclaimer when it was issued by Tacora.[104]

84. The Monitor has been significantly involved in these CCAA Proceedings and has a thorough understanding of Tacora's business and the challenges facing the Company to successfully restructure. Prior to the Disclaimer, in the Supplemental Report to the Fourth Report, the Monitor stated that it understood that Tacora viewed the Offtake Agreement as "off-market, significantly inhibits Tacora's ability to raise capital to fund the necessary ramp-up and that Tacora cannot be restructured with the current Cargill Offtake Agreement in place."[105] Based on its experience in the CCAA Proceedings, the Monitor went on to state that "[t]he Monitor agrees with this conclusion."[106] In the Supplement to the Eighth Report, the Monitor states "[t]he Monitor agrees that the Offtake Agreement as currently structured is an impediment to a successful restructuring."[107] With that context, the Monitor approved the Disclaimer and expressed its view that the Disclaimer is necessary and appropriate in the circumstances as it will enhance Tacora's ability to pursue a going concern transaction.[108]

85. The Monitor has also noted that as the CCAA Proceedings are prolonged, the Company is in an increasingly vulnerable position, and it is increasingly important that it be permitted to pursue a going-concern transaction that would permit it to emerge from the CCAA Proceedings. According to the Monitor, clarity on whether the Agreements are capable of being disclaimed is

---

[104] Tenth Report at para. 55.
[105] Supplement to the Fourth Report of the Monitor dated March 26, 2024 at para. 29.
[106] *Ibid.*
[107] Supplement to the Eighth Report of the Monitor dated April 24, 2024 at para. 10.
[108] Tenth Report at para. 56.

a fundamental issue that must be settled to permit Tacora to identify and pursue a going-concern transaction.[109]

86. Given its familiarity with the Company and these CCAA Proceedings, the Monitor is well-positioned to thoughtfully evaluate the necessity and appropriateness of the Disclaimer. The Monitor's approval should carry substantial weight. [110]

### *(b) The Disclaimer will Enhance the Prospects of a Viable Arrangement*

87. Pursuant to section 32(4)(b) of the CCAA, courts have recognized that a proposed disclaimer is not required to be necessary or essential for the restructuring. It merely has to be advantageous and beneficial to the restructuring.[111] Further, for a disclaimer to be approved is not necessary that there be a plan of arrangement "or even the certainty that there will be a plan of arrangement filed."[112] Rather, section 32(4)(b) requires that the disclaimer merely "enhance the prospects of a viable arrangement."[113]

88. Viable arrangement in this context has been recognized as applying to the overall restructuring of a debtor, rather than specifically a plan of arrangement. For example, in *Quest University*,[114] the Court approved a disclaimer in the context of an RVO. The Court found that the section 32(4)(b) factor "applies equally in respect of disclaimers in the context of a sale process by which the business is to continue as a going concern".[115] The opposing party argued that Quest and the purchaser in the transaction were simply trying to secure a bargaining advantage. While the Court agreed that there was some indication of this, it acknowledged "that is often the reality that arises after a debtor concludes that it is no longer viable to abide by those contractual commitments and that a disclaimer is appropriate."[116]

89. In this case, the Disclaimer will enhance the prospects of a viable compromise or arrangement. The market feedback from the solicitation processes run by the Company is clear – the Offtake Agreement is a significant impediment to attracting third-party buyers and

---

[109] Tenth Report at para. 56.
[110] *Laurentian University of Sudbury*, 2021 ONSC 3272 ("***Laurentian***") at para. 46; *Nortel Networks Corp. Re*, 2018 ONSC 6257 at para. 27; *Aralez Pharmaceuticals Inc*., *Re*, 2018 ONSC 6980 at para. 36; *Aveos Fleet Performance Inc*., 2012 QCCS 4074 at para. 50(f).
[111] *Homberg Invest Inc (Arrangement Relatif á*), 2011 QCCS 6376 at para. 103 and *Timminco Limited (Re)*, 2012 ONSC 4471 at para. 54.
[112] *Aveos Fleet Performance Inc./Aveos Fleet performance aéronautique inc. (Arrangement relatif à)*, 2012 QCCS 6796 at para. 48.
[113] *Ibid*.
[114] *Quest University Canada (Re)*, 2020 BCSC 1883 ("***Quest***").
[115] *Ibid* at para. 96.
[116] *Ibid* at para. 105.

investors.[117] The Offtake Agreement allows Cargill to extract significant value from Tacora's ore, thereby effectively increasing Tacora's operating costs on a per tonne basis and making Tacora a less valuable investment.[118] Further, the "life-of-mine" term significantly restricts potential exit transactions for investors and limits flexibility for the Company.[119] Potential bidders have also expressed concern that, based on the previous Sale Approval Motion, if the Offtake Agreement is not assumed as part of the proposed restructuring transaction, approval of their bid could be subject to extensive and protracted litigation.[120]

90. Considering these factors and based on his experience in the Pre-Filing Strategic Process and Solicitation Process, Michael Nessim, Greenhill's lead mining investment banker, opined that "Tacora is more likely to attract sale and restructuring transactions and the new capital needed to ramp up production at the Scully Mine if Tacora can be marketed "free and clear" of the Offtake Agreement and without the prospect of protracted litigation and potential delay associated with a potential disclaimer of the Offtake Agreement following selection of the successful bid."[121] Cargill does not seriously challenge this conclusion. In fact, Cargill admits openly that "bidders in the Second Sale Process may not want to assume the Offtake Agreement…"[122] and Cargill "remains open to the possibility of negotiating amendments to the Offtake Agreement…"[123], in effect recognizing the Offtake Agreement as currently structured will not survive these CCAA Proceedings.

91. Cargill attempts to oppose the Disclaimer, not on grounds that the Disclaimer is unhelpful to the restructuring, but only that *now* is not the right time for the Disclaimer. In effect, Cargill wants Tacora be required to wait until following the Sales Process and only following conclusion of the process litigate over the Disclaimer. However, waiting to address the Offtake Agreement was previously attempted in the Solicitation Process. The result of waiting allowed Cargill to engage in a litigation delay strategy[124] that eventually killed the successful bid due a

---

[117] Nessim Affidavit at para. 5.
[118] *Ibid.*
[119] *Ibid.*
[120] Nessim Affidavit at paras. 5-6, 27.
[121] Nessim Affidavit at para. 7.
[122] Factum of Cargill, Incorporated and Cargill International Trading Pte Ltd. dated June 20, 2024 ("**Cargill Factum**") at para. 46.
[123] Cargill Factum at para. 21.
[124] See Confidential Exhibit No. 4 to the Lehtinen Cross Examination where on January 9, 2024, Matthew Lehtinen, wrote the following to other Cargill employees "we can slow play this to buy more time for equity to get there… we have no option but to play this for more time … All things are on the table to preserve the Tacora flow." See also Confidential Exhibit No. 8 to Lehtinen Cross Examination where on January 30, 2024, a day after the Investors' bid was declared as the Successful Bid, another Cargill member wrote the following to other Cargill members: "[a]s you know, Tacora decided to move with the bonds' deal but should our strategy to buy time works [sic] we may need to be clear on next steps / feasibility of the deal structuring in due time. See also Confidential Exhibit No. 9 to Lehtinen Cross Examination where on February 9, 2024, Mr. Lehtinen wrote an email to a potential third-party equity

corresponding fall in iron ore prices. After being in CCAA Proceedings for over 9 months, Tacora no longer has the luxury of time. How the Offtake Agreement may be addressed if an investor or purchaser does not wish to assume the agreement in the Sales Process must be dealt with now.

92. Cargill also attempts to oppose the Disclaimer because the Offtake Agreement is "Tacora's *sole source* of revenue"[125] and the Disclaimer would "place Tacora offside the DIP Facility and leave it vulnerable to having no cash flow at all."[126] However, these are issues invented by Cargill in attempt gain leverage over Tacora. As explained below, Tacora has offered to Cargill that it will continue to perform under the Agreements for any agreed vessel shipments of iron ore regardless of the Disclaimer. This would allow both Tacora and Cargill to continuing benefiting from the Agreements in the short term and allow for an orderly transition following the conclusion following the Sales Process, if necessary. Despite the offer, Cargill has continued to delay the scheduling of vessels and accordingly, Tacora is requesting this Court set the date of the disclaimer and require the parties to continue to perform until such date.

93. The bad faith threat by Cargill regarding the DIP Facility is also meritless. Cargill is required to advance remaining amounts under the DIP Facility regardless of the outcome of this motion on the Disclaimer. The DIP Facility provides a carve-out from compliance with the Agreements based on any Court approved disclaimer (the "**Disclaimer Carve-Out**").[127] The DIP Facility also has no defaults arising from a lack of revenue or cash receipts. Variance testing on the DIP Budget is solely based on disbursements.[128]

94. Despite statements to the contrary in his most recent affidavit[129], Mr. Lehtinen of Cargill swore an affidavit earlier in the CCAA Proceedings referencing the same Disclaimer Carve-Out and stating "Cargill agreed that a disclaimer, termination, suspension, default or breach of the Offtake Agreement or OPA would not result in a breach of or an Event of Default under the Cargill DIP Agreement, to the extent such disclaimer, termination, suspension, breach or default was completed pursuant to a Court approved disclaimer."[130] In opposing the Ad Hoc Group's

---

investor stating "[b]y way of update, we have made progress on extending the litigation timetable into April to give us more time to assemble an alternative transaction."

[125] Cargill Factum at para. 41.
[126] Cargill Factum at para. 42.
[127] Amended and Restated Interim DIP Facility Term Sheet dated March 18, 2024 ("**A&R DIP Agreement**"), s. 21(s).
[128] A&R DIP Agreement, s. 13.
[129] Affidavit of Matthew Lehtinen sworn June 11, 2024 at para. 31, Motion Record of Cargill, Incorporated and Cargill International Pte Ltd. dated June 11, 2024 at Tab 2, p. 26.
[130] Affidavit of Matthew Lehtinen sworn March 14, 2024 at paragraph 24(b).

replacement DIP facility, Cargill represented to the Court in its factum that the Disclaimer Carve-Out (which is the same in the current DIP Facility) "… would provide the Company with full flexibility to seek to disclaim or terminate the Offtake Agreement at any time, with no impact on the Cargill DIP Financing…"[131]

95. Cargill's bad faith threats are mere attempts to place further handcuffs around Tacora and this Court to prevent them from addressing a fundamental impediment to Tacora's restructuring – the Offtake Agreement.

### *(c) Cargill will not Suffer Significant Financial Hardship from the Disclaimer*

96. Finally, Cargill will not suffer significant financial hardship if the Offtake Agreement and the Stockpile Agreement are disclaimed.

97. Significant financial hardship is a high threshold and requires that the party opposing the disclaimer provide evidence of its "individual characteristics and circumstances" in connection with its claim of financial hardship.[132] No objective test of financial hardship exists because imposing such a test would "make it difficult [for] debtor companies to disclaim large contracts regardless of the financial ability of the counter parties to absorb the resultant losses [and] such a result would be contrary to the purpose [and] principles of the CCAA."[133]

98. Cargill earns significant profits from the purchase and sale of iron ore pursuant to the Offtake Agreement and the Stockpile Agreement.[134] According to the 2023 Cargill Annual Report, Cargill generated approximately $177 billion in revenue in 2023.[135]

99. Consideration of the section 32(4) factors requires a balancing of interests. While this section is silent on the relative importance of any one of the factors to be considered and is not restricted to the listed factors, the test does, however, require the Court to balance the benefit of the proposed disclaimer for the Company against the detrimental impact on Cargill.[136]

---

[131] Factum of Cargill, Incorporated and Cargill International Trading Pte Ltd. dated March 17, 2024 at para. 26.
[132] *Target Canada Co Re*, 2015 ONSC 1028 at para. 26; **see also** *Laurentian University of Sudbury*, 2021 ONSC 3272 at para. 46.
[133] *Timminco*, *supra* at para. 60.
[134] Vuong Affidavit at para. 32.
[135] Vuong Affidavit at para. 14.
[136] *Laurentian*, *supra* at para. 44.

100. A disclaimer must be "fair, appropriate and reasonable in all the circumstances." Whether the disclaimer should be upheld is ultimately a discretionary decision for the Court, which is exercised by weighing the competing interests and prejudice to the parties and assessing whether the disclaimer or resiliation is fair and reasonable.[137] The devastating impact on Tacora's 460 employees, trade creditors (many of which are small businesses) and other stakeholders resulting from an inability to restructure the Company would be exponentially greater than any financial hardship experienced by Cargill as a result of the Disclaimer.

### 2. Effective Date of Disclaimer

101. Section 32(5)(b) of the CCAA provides that, in the context of a motion by the counterparty seeking an order that the agreement not be disclaimed, the effective date of the disclaimer shall be 30 days after the date on which the Company gave notice of the disclaimer or on any later date fixed by the Court.[138] Tacora is requesting the effective date of the Disclaimer Notice be established as the earlier of (a) August 12, 2024, and (b) Tacora providing Cargill with 30 calendar days written notice. The proposal provides the certainty of an outside date (August 12, 2024) for Cargill to know when the latest it will be required to continue to perform the Agreements, while also allowing Tacora certain flexibility to end the Agreements earlier if determined prudent.

102. The Company has explored the possibility of alternative offtake and/or marketing agreements for the sale of Tacora's iron ore. Confidential discussions remain ongoing with several participants in the process.[139] The Company believes that it could enter into a new offtake and/or marketing agreement within 30 days, if necessary.[140] However, in order to minimize operational disruption for the Company, it would be advantageous to allow for time to complete the Sale Process which is currently underway. The Company will know on or shortly after July 12 who is the successful bidder. If Cargill (or another purchaser that contemplates assuming the Offtake Agreement) is the successful bidder in the Sale Process, a transition from the Offtake Agreement will not be necessary. However, if Cargill is not the successful bidder in the Sale Process and there is a new buyer of Tacora's ore, it will be prudent for Tacora to complete an orderly transition, only once, thereby minimizing any disruption that may result from the Disclaimer to Tacora's and Cargill's operations.

---

[137] *Ibid*.
[138] CCAA, s. 32(5)(b) (emphasis added).
[139] Nessim Affidavit at para. 24.
[140] Vuong Affidavit at para. 33.

103. Setting a later date for the Disclaimer to become effective will not cause any prejudice to Cargill. Despite arguing against a delayed effective date for the Disclaimer, Cargill has identified no prejudice to setting one. Cargill earns significant profits from the purchase and sale of iron ore pursuant to the Agreements. In fact, Cargill earns an average of over [redacted] per tonne of iron ore that it purchases from Tacora.[141] Tacora has also confirmed to Cargill that it will honour the delivery of iron ore for any agreed future vessel that Cargill arranges for the shipping of iron ore in accordance with the terms of the Offtake Agreement and Stockpile Agreement.[142] The setting of a later date will allow Cargill to continue to earn the profits that they have been desperately attempting to protect in these CCAA Proceedings, but rather than accepting Tacora's fair and reasonable proposal, Cargill is attempting to argue against a future date solely in an attempt to gain leverage and hold Tacora captive.

104. The Monitor supports the Company's approach, which it has noted will allow the parties time to work together and encourage the parties to continue to work on a consensual basis regarding timing for replacement of the Offtake Agreement. The Monitor also noted that this approach will further allow for an orderly transition of the Offtake Agreement, while minimizing the risk of disruption to Tacora's operations.[143]

## C. The Global Process Motion should be Dismissed

### 1. RVO Approval Is Available in Circumstances Not Akin to Plan Approval

105. Cargill has brought the Global Process Motion seeking a declaration from this Court that an RVO is not available where three hypothetical facts are present but have not provided any case law to support its position. In fact, the RVO case law supports the opposite conclusion. The most that can be said based on Cargill's argument is that a Court must consider all of the circumstances of the case when determining whether to approve an RVO, which is well established by *Harte Gold* and the other relevant authorities.

106. Cargill's submission that that an RVO is only available in circumstances akin to a CCAA plan is contrary to well-established jurisprudence by commercial courts across the country with respect to the approval of RVO transactions.

---

[141] Lehtinen Cross Examination at Q 196.
[142] Vuong Affidavit at para. 32.
[143] Tenth Report at para. 58.

107. As recognized by Cargill, an asset sale is different than a CCAA plan. Accordingly, the factors to be considered by the Court in approving an RVO transaction are different than the factors to be considered by the Court in approving a CCAA plan. As described below, the considerations are similar to whether the Court should approve an asset sale.

108. When exercising its jurisdiction to approve a sale transaction, this Court is required to consider, among other things, the non-exhaustive factors enumerated under Subsection 36(3) of the CCAA as well as the principles articulated in *Royal Bank v Soundair*, which are consistent with and overlap with many of the section 36(3) factors.[144] The jurisprudence also establishes that RVOs are appropriate in at least three types of circumstances:

(a) where the debtor operates in a highly regulated environment in which its existing permits, licences or other rights would be difficult or impossible to assign to a purchaser;

(b) where the debtor is party to certain key agreements that would be difficult or impossible to assign to a purchaser; and

(c) where maintaining the existing legal entity would preserve tax attributes that would otherwise be lost in a traditional asset sale.[145]

109. In *Harte Gold*, Justice Penny held that scrutiny of a proposed reverse vesting transaction may be informed by the following enquiries:

(a) why is the reverse vesting order necessary in this case;

(b) does the reverse vesting transaction structure produce an economic result at least as favourable as any other viable alternative;

(c) is any stakeholder worse off under the reverse vesting transaction structure than they would have been under any other viable alternative; and

(d) does the consideration being paid for the debtors' business reflect the importance and value of the licenses and permits (or other intangible assets) being preserved under the reverse vesting transaction structure.[146]

---

[144] CCAA, s. 36(3); *Royal Bank of Canada v Soundair Corp*, 1991 CanLII 2727 (Ont CA) at para. 16. See also, *Harte Gold Re*, 2022 ONSC 653 at paras. 20-21 ("***Hart Gold***"), leave to appeal dismissed (2020 BCCA 364); *In the Matter of the Companies' Creditors Arrangement Act and In the Mater of CannaPiece Group Inc*, 2023 ONSC 841 at paras. 53-54 ("***CannaPiece***"); *Just Energy Group Inc et al v Morgan Stanley Capital Group Inc et al*, 2022 ONSC 6354 at paras. 31-32 ("***Just Energy***").

[145] *Arrangement relatif à Blackrock Metals Inc*, 2022 QCCS 2828 at paras. 114-116; *Harte Gold, supra* at para. 71; *Acerus Pharmaceuticals Corporation (Re)*, 2023 ONSC 3314 at paras. 13-14, 21 ("***Acerus***"); *Quest University Canada (Re)*, 2020 BCSC 1883 at para. 136 ("***Quest***"), referring to the RVO granted in *Re Comark Holdings Inc et al*, (July 13, 2020), Toronto CV-20-00642013-00CL (Ont SCJ [Commercial List]) proceeding to preserve tax attributes, and para. 142, referring to the RVO granted in *JMB Crushing Systems Inc (Re)*, 2020 ABQB 763 to preserve both licenses and tax attributes.

[146] *Harte Gold, supra* at para. 38; *CannaPiece*, *supra* at para. 52; *Just Energy*, *supra* at para. 33.

110. Cargill is effectively asking the Court to make a blanket determination as to the availability of an RVO where three hypothetical facts exist, without considering the several other factors outlined above which the Court must consider before approving an RVO transaction. The Assumed Facts alone are not sufficient for the Court to definitively conclude as to whether an RVO should or should not be granted.

111. Cargill's submission that creditor voting rights should not be bypassed absent genuinely exceptional circumstances ignores the fact that the number of sale transactions have long exceeded the number of CCAA plans being implemented.[147] In *Callidus*, the Supreme Court of Canada recognized that CCAA proceedings have evolved such that liquidating CCAAs "are now commonplace in the CCAA landscape."[148]

112. Finally, Cargill's submission that an RVO is not provided for in the CCAA flies in the face of recent Supreme Court of Canada authority in *Callidus* and *Canada North*[149] on the breadth and interpretation of the Court's discretionary powers under section 11 of the CCAA and the Court's well accepted jurisdiction to approve an RVO transaction, as outlined in Tacora's factum in support of its Reconstituted Preliminary Threshold Motion. It is also worth noting that before section 36 of the CCAA came into force in 2009, the CCAA did not expressly contemplate the authority of a CCAA debtor to "sell or otherwise dispose of assets outside the ordinary course of business".[150] However, prior to the introduction of section 36 of the CCAA, courts relied on their discretionary and inherent jurisdiction to "fill in the gaps in legislation so as to give effect to the objects of the *CCAA*" and approve sale transactions.[151]

### 2. An RVO is Available Based on the Assumed Facts

113. The existing RVO jurisprudence strongly supports Tacora's submission that an RVO is available in circumstances where the Assumed Facts exist. Cargill attempts to distinguish the leading RVO cases of *Quest* and *Just Energy* on the basis of various facts which are irrelevant to the issue on this motion. However, Cargill has provided no authority whatsoever with facts similar to the Assumed Facts which support its position.

---

[147] *Maria Konyukhova* and *Nicholas Avis* "Trends in CCAA Proceedings: A Quantitative Review of a Decade of Data": 2021 CanLII Docs 13558.
[148] *9354-9186 Québec inc v Callidus Capital Corp*, 2020 SCC 10 at para. 42.
[149] *Ibid*; *Canada v Canada North Group Inc*, 2021 SCC 30 ("***Canada North***").
[150] CCAA, s. 36(1).
[151] *Re Canadian Red Cross Society* (1998), 5 CBR (4th) 299, 1998 CanLII 14907 at para. 43 (Ont Ct J (Gen Div) [Commercial List]), citing *Re Dylex Ltd* (1995), 31 CBR (3d) 106 at 110, 1995 CanLII 7370 (Ont Ct J (Gen Div) [Commercial List]).

114. Justice Fitzpatrick in *Quest* approved an RVO in circumstances substantially similar to the Assumed Facts. In *Quest*, the CCAA debtor (Quest University) had initially sought approval of a CCAA plan.[152] However, Quest University did not appreciate the potential magnitude of an unsecured creditor's claim and that this unsecured creditor was: (a) not likely to vote in favour of the CCAA plan; and (b) the value of its claim could swamp the class votes to prevent any approval by the creditors.[153] The Monitor noted that the unsecured creditors' claims could effectively veto the proposed CCAA plan.[154]

115. When Quest University learned that it could likely not obtain approval of its CCAA plan, it solved this dilemma by revising the CCAA plan to be structured as an RVO transaction.[155] The Court accepted that the effect and substance of the RVO was that Quest University could avoid having to obtain creditor or Court approval of its CCAA plan.[156]

116. The unsecured creditors objected to the granting of the RVO, contending that it effectively and unfairly negated their rights to vote on Quest University's CCAA plan.[157] At its core, these facts are substantially similar to the Assumed Facts as: (a) the CCAA plan could not satisfy the requirements of the CCAA without the support of these unsecured creditors; (b) these unsecured creditors opposed the RVO and the RVO was sought over their objection; and (c) there was a CCAA plan alternative. Notwithstanding the foregoing, Justice Fitzpatrick approved the RVO transaction, finding that the RVO transaction was the best option available in the circumstances.[158]

117. In the *Just Energy Plan Decision*, the CCAA debtors (Just Energy) sought an authorization and meetings order in connection with a potential CCAA plan.[159] Just Energy attempted to restrict numerous litigants' claims to $1 per vote, asserting that the causes of action were highly speculative and unproven.[160] Justice McEwen ordered that summary proceeding ought to be conducted on an expedited basis to determine the validity and value of the class action claims.[161] The litigation related to numerous class actions that could result in

---

[152] *Quest*, *supra* at paras. 1, 115.
[153] *Ibid* at para. 116.
[154] *Ibid* at para. 119.
[155] *Ibid* at paras. 120-121.
[156] *Ibid* at para. 124.
[157] *Ibid* at para. 126.
[158] *Ibid* at paras. 179-180.
[159] *Just Energy Group Inc et al v Morgan Stanley Capital Group Inc et al*, 2022 ONSC 3470 ("***Just Energy Plan Decision***").
[160] *Just Energy Plan Decision* at para. 42.
[161] *Just Energy Plan Decision* at para. 48.

significant claims.[162] While not explicitly stated, given the magnitude of the claims, it is likely that the value of these litigants' claims could have swamped the unsecured class vote to prevent any approval the proposed CCAA plan.

118. As result of the *Just Energy Plan Decision*, the debtor company abandoned its attempt to advance a plan of arrangement and following the sales process, Justice McEwen approved the RVO transaction proposed by Just Energy.[163] Notably, while the RVO was not opposed by the litigants, the RVO transaction did not provide for any recovery to unsecured creditors as opposed to the earlier proposed plan arrangement which would have provided a significant pool cash for unsecured creditors. Justice McEwen found that this result simply reflected the fact that the value of Just Energy, as tested by the market, was not high enough to generate value for the unsecured creditors and that these unsecured creditors were not in a worse position with the RVO structure than they would have been under a traditional asset sale.[164]

119. Similarly, while it is possible that Cargill will not receive any recovery as an unsecured creditor in an RVO transaction if the Assumed Facts are true, the effect of that result cannot remove the Court's jurisdiction to approve an RVO transaction if it is satisfied that the other factors established by *Harte Gold* to be considered in approving an RVO transaction are met.

## PART IV - ORDER SOUGHT

120. Tacora respectfully requests that this Court dismiss the Disclaimer Motion and the Global Process Motion.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 24th day of June 2024.

Stikeman Elliott LLP

**STIKEMAN ELLIOTT LLP**
Counsel for the Applicant

[162] *Just Energy Plan Decision* at para. 16.
[163] *Just Energy* at para. 101.
[164] *Just Energy* at para. 57.

**SCHEDULE "A"**
**LIST OF AUTHORITIES**

1. *9354-9186 Québec inc v Callidus Capital Corp*, 2020 SCC 10.
2. *Acerus Pharmaceuticals Corporation (Re)*, 2023 ONSC 3314.
3. *Aralez Pharmaceuticals Inc*, *Re*, 2018 ONSC 6980.
4. *Arrangement relatif à Blackrock Metals Inc*, 2022 QCCS 2828.
5. *Aveos Fleet Performance Inc*, 2012 QCCS 4074.
6. *Canada v Canada North Group Inc*, 2021 SCC 30.
7. *Enron Capital & Trade Resources Canada Corp v Blue Range Resource Corp*, 2000 ABCA 239.
8. *Harte Gold Re*, 2022 ONSC 653, leave to appeal dismissed 2020 BCCA 364.
9. *Homberg Invest Inc (Arrangement Relatif á*), 2011 QCCS 6376.
10. *In the Matter of the Companies' Creditors Arrangement Act and In the Mater of CannaPiece Group Inc.*, 2023 ONSC 841.
11. *JMB Crushing Systems Inc. (Re)*, 2020 ABQB 763.
12. *Just Energy Group Inc et al v Morgan Stanley Capital Group Inc et al*, 2022 ONSC 6354.
13. *Just Energy Group Inc et al v Morgan Stanley Capital Group Inc et al*, 2022 ONSC 3470.
14. *Laurentian University of Sudbury*, 2021 ONSC 3272.
15. *Nortel Networks Corp. Re*, 2018 ONSC 6257.
16. *Placer Dome Canada Ltd v Ontario (Minister of Finance)*, 2006 SCC 20.
17. *Quest University Canada (Re)*, 2020 BCSC 1883.
18. *Re Androscoggin Energy LLC*, 2005 CarswellOnt 589 (Ont CA).
19. *Re Bellatrix Exploration Ltd*, 2020 CarswellAlta 350 (AB QB).
20. *Re Calpine Canada Energy Ltd*, 2006 ABQB 153.
21. *Re Canadian Red Cross Society* (1998), 5 CBR (4th) 299, 1998 CanLII 14907 (Ont Ct J (Gen Div) [Commercial List]).

22. *Re Dylex Ltd* (1995), 31 CBR (3d) 106 at 110, 1995 CanLII 7370 (Ont Ct J (Gen Div) [Commercial List]).

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

24. *Tacora Resources Inc (Re)*, 2024 ONSC 2454 at para. 47.

25. *Target Canada Co Re*, 2015 ONSC 1028.

26. *Timminco Limited (Re)*, 2012 ONSC 4471.

**Articles**

27. *Maria Konyukhova* and *Nicholas Avis* "Trends in CCAA Proceedings: A Quantitative Review of a Decade of Data": 2021 CanLII Docs 13558.

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

# SCHEDULE "B"
# RELEVANT STATUTES

***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.

**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**

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.

**Court-ordered disclaimer or resiliation**

32(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**

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.

**Date of disclaimer or resiliation**

32(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.

**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**

36(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**

36(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.

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

**1** The following definitions apply in these Regulations.

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

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

(b) a futures agreement;

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

(d) an option; and

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

**financial intermediary** means

(a) a clearing agency; or

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

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

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

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

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

(b) an agreement to

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

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

(iii) act as a depository for securities;

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

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

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

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

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

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

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

**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TACORA RESOURCES INC. (Applicant)**

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

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**
**(COMMERCIAL LIST)**
PROCEEDING COMMENCED AT TORONTO

# FACTUM OF THE APPLICANT
## (Re: Disclaimer and Global Process Motions)


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

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

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

**Alex Rose (LSO #49415P)**
Tel: 416-869-5261
Email: arose@stikeman.com

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

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

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

Counsel for the Applicant