

**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

**SUPPLEMENT TO THE RESPONDING FACTUM OF THE MONITOR DATED APRIL 6, 2024**

June 20, 2024

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TO: **SERVICE LIST**

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**PART I - THE MONITOR'S POSITION**

1. With regard to the two motions relating to this Court's jurisdiction and discretion to issue RVOs, the Monitor:

- (a) supports the relief sought in the Tacora Preliminary Threshold Motion; and
- (b) opposes the relief sought in the Cargill Global Process (RVO Declaration) Motion.<sup>1</sup>

2. It is readily apparent as a matter of law that this Court has both the jurisdiction and discretion to grant an RVO in appropriate circumstances.

**A. The Tacora Preliminary Threshold Motion Should Be Granted**

3. The jurisdiction to grant an RVO is clearly established in the caselaw and was confirmed in *Harte Gold*.<sup>2</sup> The Harte Gold Test alone should guide the exercise of the Court's discretion in the event of any RVO involving the transfer of the Offtake Agreement and the Debt Documents. Tacora correctly asserts that such discretion is not fettered by sections 11.3 and 32 of the CCAA.

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<sup>1</sup> Unless otherwise indicated, defined terms have the meanings given to them in the Initial Monitor Factum (as defined below) and the Tenth Report of the Monitor dated June 19, 2024 (the "Tenth Report"). The Monitor notes that paragraphs 2(b), 3, 4(c), 8-9, and 22-33 of the Initial Monitor Factum no longer apply because they relate to the specific RVO that Tacora sought in connection with the Investor Transaction.

<sup>2</sup> Initial Monitor Factum, para. 14; *Harte Gold Corp Re.*, [2022 ONSC 653](#), ("*Harte Gold*"), para. [37](#).

4. The Monitor delivered its initial factum, which focused on the Offtake Agreement, on April 6, 2024 (the “**Initial Monitor Factum**”). In paragraphs 2(a) and 10-21 of the Initial Monitor Factum, the Monitor set out the basis for the Court’s broad discretionary jurisdiction to approve an RVO pursuant to section 11 of the CCAA regarding the Offtake Agreement.<sup>3</sup> Those principles are equally applicable to the Debt Documents.<sup>4</sup>

5. In considering whether to approve an RVO, the Court must exercise its discretion in accordance with (i) the objects and purpose of the CCAA,<sup>5</sup> and (ii) the Harte Gold Test, which firmly established that subsection 36(3) of the CCAA should be used as the analytical framework to assess the propriety of contract transfers pursuant to RVOs.<sup>6</sup>

6. Tacora seeks a declaration that the Offtake Agreement and the Debt Documents may, as a matter of law, be transferred to and vested in a newly incorporated company pursuant to an RVO, without satisfying the assignment requirements of section 11.3 or disclaiming the agreements pursuant to section 32.

7. The Monitor agrees with Tacora that, as a matter of law, neither the assignment provision in section 11.3 nor the disclaimer provision in section 32 constrain the Court’s discretion to approve the transfer of contracts to a residual company through an RVO.<sup>7</sup>

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<sup>3</sup> Initial Monitor Factum, paras. 2(a), 10-21; *Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al.*, [2022 ONSC 6354](#) (“*Just Energy*”), paras. [29](#), [31](#); *Arrangement relatif à Blackrock Metals Inc.*, [2022 QCCS 2828](#) (“*Blackrock*”), paras. [85-86](#).

<sup>4</sup> Courts in other CCAA proceedings have approved RVOs that involve transferring similar types of agreements to ResidualCo. For example, in *Harte Gold*, the Court [approved](#) the Second Amended and Restated Subscription Agreement, which required the transfer of certain financing agreements (described as “Excluded Contracts”) to a newly incorporated entity (the Court’s Order refers to “Exhibit J” of the Affidavit of Frazer Bouchier sworn January 24, 2022. That Exhibit contains a redline copy of the agreement. Exhibit I contains the clean and executed copy. Section 3.2 (p. [418](#)) addresses the transfer of Excluded Contracts and Schedule “D” (p. [483](#)) lists the Excluded Contracts).

<sup>5</sup> Initial Monitor Factum, para. 10; *Harte Gold*, para. [32](#).

<sup>6</sup> Initial Monitor Factum, para. 14; *Harte Gold*, paras. [29](#), [37](#); *Just Energy*, paras. [29](#), [31](#).

<sup>7</sup> Initial Monitor Factum, paras. 14-19; *Harte Gold*, para. [37](#); *Arrangement relatif à Nemaska Lithium Inc.*, [2020 QCCA 1488](#), para. [19](#); Transcript of the Reasons for Judgment of the Honourable Justice Nixon, dated July 27, 2020, Action No.: 2001-08434, E-File Name: CVQ2012178711CANADA, pages 7-8, Initial Monitor Factum, Tab 1; *Dundee Oil and Gas Limited (Re)*, [2018 ONSC 3678](#), para. [27](#); *Quest University Canada (Re)*, [2020 BCSC 1883](#) (“*Quest*”), paras. [35-40](#).

8. It is not unusual for the CCAA Court to specifically transfer contracts (i) without the consent of the counterparty and (ii) in the absence of a disclaimer,<sup>8</sup> because:

- (a) the statute and the caselaw preserve the flexibility of the Court's discretion by requiring that "the relief sought be 'appropriate' [...] in the sense that it accords with the statutory objectives of the CCAA";<sup>9</sup>
- (b) there is no case law or statutory provision which provides a basis for rigid preconditions that constrain the exercise of the Court's discretion to approve the transfer of contracts pursuant to an RVO;<sup>10</sup> and
- (c) requiring consent or a disclaimer as a precondition to an RVO would provide a party with an impermissible veto right:

In any event, in the context of an application such as the RVO Application, the Court has the necessary power, after having satisfied itself that the criteria of section 36(3) are met, to order that such transfer be made, without the consent of the Cantore Creditor, or of any other creditor in respect of a contract to be transferred, otherwise the creditor concerned would benefit from a right of veto over the Proposed Transaction, which would be unacceptable.<sup>11</sup>

9. Accordingly, the Tacora Preliminary Threshold Motion should be granted.

## **B. The Cargill Global Process (RVO Declaration) Motion Should Be Dismissed**

10. The considerations outlined above also dispose of the Cargill Global Process (RVO Declaration) Motion.

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<sup>8</sup> Initial Monitor Factum, paras. 19-20; [Quest](#), paras. 35-40; *Arrangement relatif à Nemaska Lithium Inc.*, 2020 QCCS 3218 (Certified Translation), paras. 108-109, Initial Monitor Factum, Tab 2; Re-Modified and Restated Contestation of Nemaska's Approval Application dated September 30, 2020, paras. 30-31, Initial Monitor Factum, Tab 3.

<sup>9</sup> [Quest](#), para. 41; *Arrangement relatif à Nemaska Lithium Inc.*, 2020 QCCA 1488, para. 19; [Just Energy](#), paras. 29, 31; [Harte Gold](#), paras. 29, 32, 37; [Blackrock](#), paras. 85-87, 90, 115-117.

<sup>10</sup> Initial Monitor Factum, para. 13; *U.S. Steel Canada Inc. (Re)*, 2016 ONCA 662 ("U.S. Steel"), paras. 84, 87.

<sup>11</sup> Initial Monitor Factum, para. 20; *Arrangement relatif à Nemaska Lithium Inc.*, 2020 QCCS 3218 (Certified Translation), para. 108, Initial Monitor Factum, Tab 2; Re-Modified and Restated Contestation of Nemaska's Approval Application dated September 30, 2020, paras. 30-31, Initial Monitor Factum, Tab 3.

11. On that motion, Cargill advances an entirely novel and legally incorrect position by suggesting that, as a matter of law, an RVO is not available where:

- (a) a material unsecured creditor is in a position to vote against a CCAA plan of compromise or arrangement;
- (b) the unsecured creditor opposes the RVO and the RVO is sought over their objection; and
- (c) 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.<sup>12</sup>

12. There is no legal basis for the position taken by Cargill. Its attempt to impose manufactured and rigid preconditions on this Court's jurisdiction to transfer contracts under an RVO is not supported by the CCAA or the caselaw, and it would unjustifiably restrict this Court's broad remedial discretion.

13. In the absence of explicit statutory restrictions that constrain the Court's discretion in unequivocal terms, the Court has the power to exercise that discretion to grant an order that is appropriate in the circumstances.<sup>13</sup> None of the preconditions created by Cargill are explicit statutory restrictions. Nor are they restrictions found in caselaw. Rather, they appear to have been invented by Cargil in an attempt to remake the law to fit their own circumstances.

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<sup>12</sup> Notice of Motion para. 21, Cargill Global Process (RVO Declaration) Motion, Tab 1.

<sup>13</sup> Initial Monitor Factum, para. 13; *9354-9186 Québec Inc. v. Callidus Capital Corp.*, [2020 SCC 10](#), para. [48-49](#); [U.S. Steel](#), paras. [84](#), [87](#).

14. Ultimately, the Court should not impose additional impediments that would, as a matter of law, preclude a transaction involving an RVO. Instead, the Court should rely on well-established jurisprudence that maintains the flexibility of its discretion.

15. The Court must be able to review the specific RVO presented in connection with the specific transaction that may emerge to determine whether it is appropriate in the circumstances of that specific transaction to grant the RVO.

16. In that scenario, the key question before the Court will be, as it should be, whether the Court should exercise its discretion to approve an RVO in accordance with the open-ended and flexible nature of the CCAA and the Harte Gold Test – not whether it can exercise its discretion.<sup>14</sup>

17. That is the legally correct approach which the Cargill Global Process (RVO Declaration) Motion wrongly seeks to displace.

## **PART II - ORDER REQUESTED**

18. The Monitor supports the relief and Order sought by Tacora on the Reconstituted Preliminary Threshold Motion. The Monitor opposes the relief and Order sought in the Cargill Global Process (RVO Declaration) Motion.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 20<sup>th</sup> day of June, 2024.



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**CASSELS BROCK & BLACKWELL LLP**

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<sup>14</sup> Initial Monitor Factum, para. 21; [Just Energy](#), paras. 29, 31; [Harte Gold](#), paras. 29, 32, 37-38; [Blackrock](#), paras. 85-87, 90, 115-117.

## SCHEDULE "A"

### LIST OF AUTHORITIES

1. *9354-9186 Québec Inc. v. Callidus Capital Corp.*, [2020 SCC 10](#)
2. *Arrangement relatif à Blackrock Metals Inc.*, [2022 QCCS 2828](#)
3. *Arrangement relatif à Nemaska Lithium Inc.*, [2020 QCCA 1488](#)
4. *Arrangement relatif à Nemaska Lithium Inc.*, 2020 QCCS 3218 (Certified Translation)
5. *Dundee Oil and Gas Limited (Re)*, [2018 ONSC 3678](#)
6. *Harte Gold Corp. (Re)*, [2022 ONSC 653](#)
7. *Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al.*, [2022 ONSC 6354](#)
8. *Quest University Canada (Re)*, [2020 BCSC 1883](#)
9. Transcript of the Reasons for Judgment of the Honourable Justice Nixon, dated July 27, 2020 Action No.: 2001-08434, E-File Name: CVQ2012178711CANADA
10. *U.S. Steel Canada Inc. (Re)*, [2016 ONCA 662](#)



## SCHEDULE “B”

### TEXT OF STATUTES, REGULATIONS & BY – LAWS

#### 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.

##### **Assignment of agreements**

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

##### **Exceptions**

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

- (a) an agreement entered into on or after the day on which proceedings commence under this Act;
- (b) an eligible financial contract; or
- (c) a collective agreement.

##### **Factors to be considered**

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

- (a) whether the monitor approved the proposed assignment;
- (b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and
- (c) whether it would be appropriate to assign the rights and obligations to that person.

##### **Restriction**

[\(4\)](#) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company’s insolvency, the commencement of proceedings under this Act or the company’s failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

## **Copy of order**

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

## **Disclaimer or resiliation of agreements**

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

## **Court may prohibit disclaimer or resiliation**

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

## **Court-ordered disclaimer or resiliation**

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

## **Factors to be considered**

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

- (a) whether the monitor approved the proposed disclaimer or resiliation;
- (b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
- (c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

## **Date of disclaimer or resiliation**

[\(5\)](#) An agreement is disclaimed or resiliated

- (a) if no application is made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1);
- (b) if the court dismisses the application made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1) or on any later day fixed by the court; or
- (c) if the court orders that the agreement is disclaimed or resiliated under subsection (3), on the day that is 30 days after the day on which the company gives notice or on any later day fixed by the court.

## **Intellectual property**

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

## **Loss related to disclaimer or resiliation**

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

## **Reasons for disclaimer or resiliation**

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

## **Exceptions**

[\(9\)](#) This section does not apply in respect of

- (a) an eligible financial contract;
- (b) a collective agreement;
- (c) a financing agreement if the company is the borrower; or
- (d) a lease of real property or of an immovable if the company is the lessor.

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

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

## **Notice to creditors**

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

## **Factors to be considered**

[\(3\)](#) In deciding whether to grant the authorization, the court is to consider, among other things,

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

#### **Additional factors — related persons**

[\(4\)](#) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

#### **Related persons**

[\(5\)](#) For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (a) or (b).

#### **Assets may be disposed of free and clear**

[\(6\)](#) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

#### **Restriction — employers**

[\(7\)](#) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(5)(a) and (6)(a) if the court had sanctioned the compromise or arrangement.

#### **Restriction — intellectual property**

[\(8\)](#) If, on the day on which an order is made under this Act in respect of the company, the company is a party to an agreement that grants to another party a right to use intellectual property that is

included in a sale or disposition authorized under subsection (6), that sale or disposition does not affect that other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

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