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)

REPLY FACTUM OF THE APPLICANT
(Re: Approval of Successful Bid)
(Returnable April 10-12, 2024)

April 9, 2024

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TO: SERVICE LIST

PART I - OVERVIEW[1]

1. This Reply Factum is limited to addressing four points raised by Cargill in its Responding Factum:

(a) Cargill's assertion that approval of the Transactions would set a "far reaching precedent" and eliminate the need for any future CCAA debtor to comply with the provisions of the CCAA or to advance and successfully complete a CCAA plan of arrangement;

(b) Cargill's historical relationship with and claim of support for Tacora;

(c) Cargill's claim that Tacora's tax attributes are being improperly sold; and

(d) Cargill's argument that the Monitor should not be permitted to hold any amounts in relation to the DIP Facility and the APF pending resolution of any dispute relating to set-off.

PART II – LAW AND ARGUMENT

A. Evolution of the CCAA Regime

2. Cargill's position that approval of the RVO in the present circumstances would set a "far reaching precedent" and its related criticisms of Tacora for not pursuing a CCAA plan or traditional asset sale is contradictory to both the well-known purpose of the CCAA to "facilitate the reorganization and survival of the pre-filing debtor company in an operational state — that is, as a going concern"[2], and the manner in which the CCAA has evolved to permit more flexibility in fashioning a restructuring.

3. Before section 36 of the CCAA came into force in 2009, the CCAA did not contain any provisions that explicitly gave a CCAA debtor the ability to "sell or otherwise dispose of assets outside the ordinary course of business".[3] However, prior to the introduction of section 36, courts relied on their inherent jurisdiction to "fill in the gaps in legislation so as to give effect to the objects of the *CCAA*" and approve sale transactions.[4]

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[1] Capitalized terms used and not defined herein have the meanings ascribed to them in the Factum of the Applicant in support of its sale approval motion.
[2] *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 at para. 41. [*Callidus*]
[3] CCAA, s. 36(1).
[4] *Re Canadian Red Cross Society* (1998), 5 CBR (4th) 299, 1998 CanLII 14907 at para. 43 (Ont Ct J (Gen Div) [Commercial List]) [*Red Cross*], citing *Re Dylex Ltd* (1995), 31 CBR (3d) 106 at 110, 1995 CanLII 7370 (Ont Ct J (Gen Div) [Commercial List]).

4. In *Nortel*, Justice Morawetz (as he then was) concluded that the CCAA – even before the introduction of section 36 – permitted a debtor company to complete an asset sale in the absence of a CCAA plan. Justice Morawetz stated: "[t]he *CCAA* is intended to be flexible and must be given a broad and liberal interpretation to achieve its objectives and a sale by the debtor which preserves its business as a going concern is, in my view, consistent with those objectives"[5]

5. The intended purpose of section 36 and the increased flexibility afforded to CCAA debtors were described in the Government of Canada's Briefing Book on the 2009 amendments to the CCAA, which stated that the introduction of section 36 "is intended to provide the debtor company with greater flexibility in dealing with its property while limiting the possibility of abuse."[6]

6. From 2013 to 2020, the number of sale transactions have outnumbered CCAA plans being implemented.[7] In 2020, the Supreme Court of Canada in *Callidus* recognized that CCAA proceedings have evolved such that liquidating CCAAs "are now commonplace in the CCAA landscape."[8]

7. In a similar fashion to how courts relied upon the flexibility of the CCAA to approve asset sales prior to the enactment of section 36, beginning as early as 2015[9], sophisticated commercial courts have approved going-concern transactions under the CCAA through an RVO structure. Since 2020, CCAA courts across the country have approved RVOs in over 50 cases.[10]

8. RVOs have developed as another structure to provide CCAA debtors with greater flexibility in pursuing and implementing a going concern solution for an insolvent enterprise. In

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[5] *Re Nortel Networks Corporation* (2009), 55 CBR (5th) 229, 2009 CanLII 39492 at para. 47 (Ont SCJ [Commercial List]) [*Nortel*].
[6] Government of Canada, "Bill C-55: Clause by Clause Analysis", Bill Clause No 131 – CCAA Section 36, online: *Government of Canada* <https://ised-isde.canada.ca/site/corporate-insolvency-competition-law-policy/en/insolvency/bill-c-55-clause-clause-analysis/bill-c-55-clause-clause-analysis-cl00908.
[7] *Maria Konyukhova* and *Nicholas Avis* "Trends in CCAA Proceedings: A Quantitative Review of a Decade of Data": 2021 CanLII Docs 13558.
[8] *Callidus* at para. 42.
[9] See *Plasco Energy Re* (July 17, 2015), Court File No. CV-15-10869-00C (Commercial List). A copy of this decision is included in Tacora's Book of Authorities at Tab O.
[10] See Appendix "B" to Tacora's Responding Factum to Cargill's preliminary threshold motion for a list of RVOs approved by courts across the country.

this case, the Solicitation Process expressly contemplated a "share purchase" as an option for bidders.[11] The option was provided because the RVO exists as a tool by which a purchaser can acquire a CCAA debtor while preserving permits and tax attributes, and thereby realize more value to Tacora. As a mining company with critical permits and tax attributes, Tacora is a prime candidate for an RVO and, in fact, each of the bidders, including Cargill, confirmed that obtaining the tax attributes was necessary for them to complete a transaction.[12]

9. Ultimately, the determining factor in whether to approve a transaction is the substantive effect of the transaction and not the structure through which it is to be implemented. Tacora's Factum in support of its sale approval motion aptly demonstrates why an RVO is appropriate and necessary in the circumstances and the substantive benefits of the Transactions for Tacora and its broader stakeholder group. There is no viable or better alternative for Tacora.

B. Cargill's Historical Relationship with Tacora

10. Cargill attempts to paint a picture of being an important stakeholder and creditor who has provided credit and significant value to Tacora. Cargill criticizes Tacora for creating a "recent narrative pivot" to blaming Cargill and the Offtake Agreement for Tacora's cash flow issues. Cargill attempts to use evidence from Joe Broking, Tacora's CEO, that the primary driver for Tacora's losses is operational issues and the need to reach nameplate capacity of 6 Mtpa and a text from Mr. Broking where he stated that "I love Cargill", to refute the assertion that Cargill is to blame for Tacora's cash-flow issues which forced Tacora to file for CCAA, and to provide support for it being a "key partner" of Tacora.

11. However, Cargill misconstrues Tacora's position – Tacora does not blame Cargill for its negative cash flow from operations. Rather, Tacora is simply stating a fact with respect to the Offtake Agreement – no third parties were or are willing to invest in Tacora while the prohibitive Offtake Agreement remains in place.[13] That fact is evident from the results of the Pre-Filing

[11] SISP Procedures at para. 23(c)(i).
[12] Fourth Broking Affidavit at paras. 23 and 27.
[13] First Nessim Affidavit at paras. 5-6; Sixth Broking Affidavit at para. 11.

Strategic Process, the Solicitation Process, and Cargill's attempts to raise capital outside of the Solicitation Process.

12. Cargill is also entirely different from a creditor that has provided a loan or significant value to Tacora. To the contrary, Cargill is a creditor with an onerous contract which takes value away from the Company. The size of Cargill's alleged $500 million claim is directly tied to how off-market its contract is.

C. Use of the Tax Attributes

13. In response to Tacora's position that the tax attributes are likely not available for use by creditors, Cargill asserts that "the current owners of Tacora (including Cargill) can use the tax attributes." This assertion assumes either (a) Tacora's current owners would contribute assets to a company with an alleged $500 million claim against it; or (b) Cargill contributes assets in proportion to their current ownership to Tacora and allows the current owners to control such assets as they see fit. Either assertion is fanciful. Understandably, the Monitor reported based on the facts of this case that "there is a high degree of uncertainty with respect to the possible monetization of tax attributes following an asset sale."[14]

14. Cargill also states that the tax attributes could be monetized by selling Tacora to the purchaser of Tacora's assets. This ignores the fact that Tacora is already doing that. The clear evidence on this motion is the Investors took the value of the tax attributes into account in developing the Subscription Agreement and the purchase price payable thereunder.[15] The Subscription Agreement provides significant value to Tacora and its stakeholders (including the repayment of all of Cargill's secured debt and the assumption or payment of most trade claims), which may not be available in the absence of an RVO.

15. The Solicitation Process encouraged bidders to put their "best foot forward" by submitting their highest and best bid on the Phase 2 Bid Deadline. The Investors played by the rules and submitted their best bid; Cargill did not. Cargill's encouragement of a "two-step"

[14] Supplement to the Fourth Report of the Monitor at para. 31.
[15] Fourth Broking Affidavit at paras. 49 and 52-53.

transaction creates risk and uncertainty for Tacora and its stakeholders and is another example of Cargill wanting to operate outside the rules of the Court-approved Solicitation Process.

D. Reserving the Cargill Payments is Appropriate

16. Tacora is not seeking the Court's authorization to exercise set-off – rather, it is seeking to have the Monitor hold funds that will be used to repay the DIP Facility and the APF to ensure that Cargill does not inappropriately exercise set-off. There are amounts owed to Tacora for iron ore that is shipped to Cargill or for revised amounts for tonnes on the ocean based on the Platts 62% Index. It is entirely appropriate for the Court-appointed Monitor to hold amounts in reserve while the parties work cooperatively post-closing to reconciliate amounts that may be owed.

17. Cargill having the financial wherewithal to satisfy any claims that Tacora has is irrelevant – Cargill demonstrated both prior to and during the commencement of the CCAA Proceedings that it will act solely in its own interests and is prepared to hold back payments to Tacora as leverage. As recognized by this Court in the *Tacora Comeback Decision*, just prior to the Company filing for CCAA, Cargill had withheld contractual payments owed to Tacora for shipments of iron ore, to protect what it described as its pre-filing contractual set-off rights.[16] Additionally, in Cargill's latest DIP proposal, it would not agree to continue making all post-filing payments due to Tacora – Cargill only agreed to continue making such payments only if the Cargill DIP remained in place, which conveniently would expire on closing of the Transactions.[17]

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of April, 2024.

/s Stikeman Elliott LLP

STIKEMAN ELLIOTT LLP

[16] *Tacora Comeback Decision* at para. 51.
[17] Affidavit of Matthew Lehtinen sworn March 14, 2024, at para. 24.

SCHEDULE "A"
LIST OF AUTHORITIES

Cases

1. *9354-9186 Québec inc. v. Callidus Capital Corp*., 2020 SCC 10

2. *Re Canadian Red Cross Society* (1998), 5 CBR (4th) 299, 1998 CanLII 14907 (Ont Ct J (Gen Div) [Commercial List])

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

4. *Re Nortel Networks Corporation* (2009), 55 CBR (5th) 229, 2009 CanLII 39492 (Ont SCJ [Commercial List])

5. *Tacora Resources Inc. (Re)*, 2023 ONSC 6126 (CanLII)

Other Authorities

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

SCHEDULE "B"
RELEVANT LEGISLATION

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.

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.

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