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.

REPLY FACTUM OF CARGILL, INCORPORATED AND CARGILL INTERNATIONAL TRADING PTE LTD.
RE: THRESHOLD MOTION AND CROSS-MOTION

(Returnable April 10-12, 2024)

April 9, 2024

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

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

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

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

Sarah Stothart (LSO No. 73068O)
sstothart@goodmans.ca

Tel: 416.979.2211

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

1. To support their argument that the protections in s. 11.3 and s. 32 of the CCAA are not applicable in this contested RVO case, the Respondents to the Preliminary Threshold Motion rely on a litany of cases in which RVOs were granted on consent or unopposed. Their argument is unpersuasive. The Courts in those cases simply did not turn their mind to how these provisions interacted with s. 11 and did not have the benefit of any argument on the point.[1]

2. Tacora apparently concedes that it cannot meet s. 11.3's requirements; its argument is that s. 11 gives the Court the discretion to circumvent the requirements of s. 11.3, or that s. 11.3, though applicable to all contracts on its face, only applies to certain contracts. Neither argument succeeds.

3. Obviously, s. 11.3 does not come into play if the counterparty consents to the assignment of its contract; s. 11.3 applies and imposes "restrictions" where consent to an assignment is required but refused.[2] The Monitor points out that the Court in *Harte Gold* referred to the transfer of certain excluded contracts as an assignment and did not conduct a s. 11.3 analysis.[3] But the Court noted in the very same paragraph 15 that the two major parties whose contracts were being excluded supported the transaction, unlike here, where Cargill does not support Tacora's RVO.

4. Similarly, it may not be necessary to invoke s. 32 if the transaction is proceeding on consent or, in the case of an asset sale, if the purchaser is not assuming the contract, and there will be no funds left for the counterparty as an unsecured creditor in any event. That was the case in *Bellatrix,* on which the AHG Consortium relies.[4] But that does not mean that the disclaimer procedure does not have to be followed otherwise.

---

[1] As the Monitor appears to concede at para. 17 of the Monitor's Factum [CL p E323].

[2] *Zayo Inc. v Primus Telecommunications Canada Inc.*, 2016 ONSC 5251 at paras. 12, 14, 35(1), 51, 58, 72 ("*Primus*")

[3] Factum of the Monitor, para. 14 [CL p E322], citing *Harte Gold Corp. (Re),* 2022 ONSC 653 at para. 15 ("*Harte Gold*").

[4] Factum of the AHG Consortium at paras 27, 36-38, 42 [CL p F1234, F1236-F1238] citing *Bellatrix Exploration Ltd. (Re),* 2020 ABQB 332 and *Bellatrix Exploration Ltd. (Re),* 2020 ABQB 809, lv to app re'd 2021 ABCA 85.

5. Indeed, counsel to the AHG Consortium in this case recognized by late December 2023 that "the landscape for bidders is fundamentally shaped by whether the Cargill Documents, including the Offtake Agreement, can be disclaimed and/or assigned in Tacora's CCAA proceeding."[5] They recommended Tacora bring a motion for advice and directions on the point (i.e. a motion similar to Cargill's preliminary motion) as soon as possible in January 2024. They recognized there were material legal issues if Cargill did not consent to a share sale transaction.

6. The only two cases the Respondents have identified in which an RVO was approved in the face of any real creditor opposition are *Quest University* and *Nemaska.*[6] *Quest University* involved an asset sale, not a share sale. Quest University was a corporation without share capital whose degree-granting authority could not be transferred.[7] The RVO enabled it to sell land and continue its operations as a degree-granting institution while divesting itself of certain subleases and other obligations. Southern Star held ground leases of the lands for the University's residences, and leased them back to the University. A disclaimer of the subleases on two lots remained a condition of the RVO transaction after the parties abandoned proceeding by way of a CCAA plan.[8] The Court thoroughly canvassed the disclaimer issue in the context of the RVO and allowed disclaimer of the subleases.[9] Upon approval of the disclaimer, Southern Star's claim was transferred to the

---

[5] Letter from M. Wasserman (Osler) to A. Taylor and L. Nicholson (Stikeman Elliott) and R. Jacobs and J. Dietrich (Cassels Brock & Blackwell) dated December 27, 2023, Exhibit 1 to the Transcript of the Cross-Examination of Michael Nessim held on March 18, 2024, Joint Transcript Brief, Tab 2 (A) [CL p A232].

[6] They do not cite the cases in which an RVO was initially refused, and granted only following further negotiations and amendments: *CannaPiece Group Inc. (Re),* 2023 ONSC 841 and *CannaPiece Group Inc. v. Marzilli,* 2023 ONSC 3291; *PaySlate Inc. (Re),* 2023 BCSC 608 and *PaySlate Inc. (Re),* 2023 BCSC 977.

[7] *Quest University (Re),* 2020 BCSC 1883 at para. 161, lv to app ref'd 2020 BCCA 364 ("*Quest University*").

[8] *Quest University* at para. 92.

[9] *Quest University* at paras. 94-114.

"Residualco" – that is what Southern Star objected to.[10] *Quest University* does not suggest that use of an RVO structure rendered the disclaimer "irrelevant", as Tacora contends.[11]

7. The Court also addressed Southern Star's argument that its alleged unregistered ground lease over another lot could not be disclaimed because it fell within s. 32(9)(d), "a lease of real property … if the company is the lessor".[12] The Court found that Southern Star's rights were at their highest contractual and the lot could be vested in the purchaser free and clear of such "other restrictions" pursuant to s. 36(6).[13] That finding has no application to the share sale proposed here.

8. As for *Nemaska*, Cargill submits that the Superior Court's reasoning, on which Tacora and the Monitor rely, is open to question, was not approved by the Court of Appeal, and is contrary to the jurisprudence of this Court. The case is in any event distinguishable. Though it appears that the need for compliance with s. 32 was raised in the Superior Court,[14] the Court did not directly address the issue. It opined that excluded liabilities could be "transferred" to Residualco pursuant to an RVO under s. 36(1) of the CCAA.[15] However, s. 36(1) provides for a sale of assets, not for a debtor to sell its shares and restructure itself while divesting itself of contractual obligations.[16]

9. Tacora misstates the Quebec Court of Appeal's decision in *Nemaska.*[17] It says that the Court of Appeal stated at paragraph 19 of its decision that s. 36(1) should be broadly interpreted to allow for RVOs, in accordance with the wide discretionary powers of the supervising judge

---

[10] *Quest University* at para. 126.

[11] Factum of Tacora (Preliminary Threshold Motion), paras. 30-31 [CL p A3797-A3798].

[12] *Quest University* at para. 35.

[13] *Quest University* at paras. 38-40.

[14] Factum of the Monitor, Tab 3, paras. 8b, 30a [CL p E426, E429].

[15] *Arrangement relatif à Nemaska Lithium inc.,* 2020 QCCS 3218 at paras. 71, 108.

[16] Farley J. distinguished between restructuring and sale as follows: "if a restructuring of the 'old company' is not feasible, then there is the exploration of the feasibility of the sale of the operations/enterprise as a going concern" (*Stelco Inc. (Re)* (2004), 6 C.B.R. (5th) 316, as cited in *Nortel Networks (Re)*, 2009 CanLII 39492 at para. 39.

[17] *Arrangement relatif à Nemaska Lithium inc.,* 2020 QCCA 1488 ("*Nemaska CA*").

under s. 11.[18] However, the Court of Appeal in that paragraph was not stating its own view but only summarizing the decision below.

10. In fact, the Court of Appeal identified "the scope of authority of the CCAA supervising judge in the context of an order that is not strictly limited to the 'sale or disposition of assets' provided for under section 36(6) CCAA" as an issue of significance to the practice of insolvency.[19] The Court also noted that all parties agreed that a "delimitation" of a CCAA judge's powers under s. 11 of the CCAA in a contested RVO was a point of interest to the practice; it denied leave to appeal because the objecting creditor, Mr. Cantore, could not have swayed a creditor vote in any event.[20] Here, Cargill is the fulcrum creditor and a plan could not succeed without its vote.

11. The Court of Appeal's decision in *Nemaska* is consistent with the case law of this province equating an RVO with a plan, questioning whether s. 36 provides for RVO transactions, and emphasizing the limits to the Court's jurisdiction under s. 11.[21]

12. The AHG Consortium argues that s. 11.3 does not constrain the Court's ability to "transfer" a contract under an RVO pursuant to s. 11.[22] But Parliament considered the conditions under which a Court might order the assignment of rights and obligations under a contract, expressly limited the Court's authority, and required the Court to consider certain factors.[23] Interpreting "subject to the restrictions set out in this Act" so narrowly as to enable a Court to do under s. 11 the very thing contemplated in s. 11.3 – assign a contract – without regard to the limitations imposed by s. 11.3 is contrary to the presumption of statutory interpretation that the provisions of a statute are "meant

---

[18] Factum of Tacora (Preliminary Threshold Motion), para. 24 [CL p A3795].

[19] *Nemaska CA* at para. 36; see also *Arrangement relatif à Blackrock Metals Inc.,* 2022 QCCA 1073 at para. 11.

[20] *Nemaska CA* at paras. 33, 38.

[21] *Plasco Energy (Re)* (July 17, 2015), CV-15-10869-00CL; *Harte Gold* at paras. 32, 36-37.

[22] Factum of the AHG Consortium, paras. 19-20 [CL p F1230-F1231].

[23] CCAA, s. 11.3(2)-(3).

to work together 'as parts of a functioning whole' … and form an internally consistent framework."[24] This interpretation should be rejected. This is not a case like *US Steel Canada Inc. (Re),* where a mere definition ("equity claim") was found not to constitute a restriction.[25]

13. RVOs did not exist at the time s. 11.3 was enacted, so it is not surprising that the clause-by-clause analysis on which the AHG Consortium relies at paragraph 22 of their factum did not consider them. The goals of the section recognized in the case law - to assist the reorganization process and *treat the counterparty fairly and equitably* - should apply in the case of an RVO.[26]

14. This is not a case like *Rose-Isli*, on which the Monitor relies.[27] There was no question in that case as to the validity of the accepted offer, and this Court found that the Receiver's conduct of the sales process met all of the *Soundair* criteria. Here, Cargill submits that the AHG RVO Transaction is flawed and contrary to the CCAA, and that the sale process did not maximize value.

15. Contrary to paragraph 7 of Tacora's factum, Cargill did not split its case that the Offtake Agreement is an EFC or financing agreement, but addressed that in its RVO Factum.

16. Tacora and the AHG Consortium mischaracterize Cargill's cross-motion seeking approval of a claims process and authority to file its proposed Plan as the conduct of a "bitter bidder" or as "hijacking" the SISP. This misconstrues the intention and purpose of Cargill's cross-motion. Cargill is advancing its cross-motion not as a disappointed bidder, but as the fulcrum creditor, and because it believes the proposed RVO cannot be approved under the CCAA.

---

[24] *Heritage Capital Corp. v. Equitable Trust Co.,* 2016 SCC 19 at para. 28; see also *Primus* at paras. 14, 51.

[25] 2016 ONCA 662 at paras. 84, 87, cited in the Factum of the Monitor at para. 13 [CL p E322].

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

[27] Factum of the Monitor, paras. 29-31 [CL p E326-E328], citing *Rose-Isli Corp. v. Frame-Tech Structures Ltd.,* 2023 ONSC 832, aff'd 2023 ONCA 548.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

April 9, 2024

/s/ Goodmans LLP

Goodmans LLP

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.

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

Reply Factum of Cargill, Incorporated and Cargill International Trading Pte Ltd. Re: Threshold Motion and Cross-Motion

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

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

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

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

Sarah Stothart (LSO No. 73068O)
sstothart@goodmans.ca

Tel: (416) 979-2211

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