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)

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

March 27, 2024

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TO: SERVICE LIST

PART I - OVERVIEW[1]

1. This Court authorized and directed Tacora to run the Court-approved Solicitation Process. On January 19, 2024, the Phase 2 Bid Deadline, three bidders submitted Phase 2 Bids. The Investors submitted the only Phase 2 Qualified Bid that provides for, among other things: (a) Tacora continuing to operate as a going concern; (b) continued employment for all of Tacora's approximately 460 employees; (c) payment in full in cash of Tacora's senior priority debt and *pari passu* secured debt; and (d) assumption of all of Tacora's equipment capital leases, including payment of all amounts outstanding under the leases in cash and assumption of all outstanding Pre-Filing Trade Amounts and Post-Filing Trade Amounts, with such suppliers enjoying the benefit of continuing to supply on a long-term basis to a stronger and well-capitalized Tacora.

2. The receipt of the Investors' Phase 2 Qualified Bid was the culmination of a year-long solicitation process and restructuring efforts by Tacora. The Company extensively canvassed the market to find a strategic transaction and additional investment, tirelessly attempted to achieve a consensual recapitalization transaction and filed these CCAA Proceedings to complete a restructuring in respect of Tacora once such efforts had proved unsuccessful. Throughout this time frame, Tacora has incurred significant losses funded through priming debt overleveraging the Company, been in critical need of additional capital to complete the necessary ramp-up of production and been unable to advance and execute upon a long-term business plan for the benefit of its stakeholders.

3. Against that backdrop, on January 29, 2024, having considered the advice and recommendations from Greenhill and Stikeman and in consultation with the Monitor, Tacora's Board exercised their good faith business judgement and unanimously determined that the

[1] Capitalized terms used and not defined herein have the meanings ascribed to them in the Affidavits of Joe Broking sworn October 9, 2023 (the "**First Broking Affidavit**"), October 15, 2023 (the "**Second Broking Affidavit**"), January 17, 2024 (the "**Third Broking Affidavit**"), February 2, 2024 (the "**Fourth Broking Affidavit**"), March 11, 2024 (the "**Fifth Broking Affidavit**"), and March 14, 2024 (the "**Sixth Broking Affidavit**", and collectively, the "**Broking Affidavits**"), the Affidavits of Michael Nessim sworn February 2, 2024 (the "**First Nessim Affidavit**") and March 14, 2024 (the "**Second Nessim Affidavit**", and together with the First Nessim Affidavit, the "**Nessim Affidavits**") and the Affidavits of Dr. Sharon Brown-Hruska affirmed February 2, 2024 (the "**First Brown-Hruska Affidavit**") and March 14, 2024 (the "**Second Brown-Hruska Affidavit**").

Investors' Phase 2 Qualified Bid should be declared the Successful Bid under the Solicitation Process.

4. Despite clear criteria set forth in the Solicitation Process, Cargill submitted an uncommitted, unfinanced and non-compliant Phase 2 Bid. Cargill's and Jefferies' internal documents show why. Cargill had learned, through "credible intelligence", that the Investors planned on submitting a competing Bid that replaced the Offtake Agreement. In order to protect the Offtake Agreement, Cargill was preparing to submit a Bid, with an implied purchase price of approximately [redacted], that would have paid all secured creditors in full, in cash. The Cargill SteerCo working on the transaction, along with Jefferies, recommended to Cargill's CEO that Cargill submit a fully backstopped Bid to put Cargill "in the best position" to win.[2] However, on January 9, 2024, just ten days before the Phase 2 Bid Deadline, Cargill's CEO killed the "preferred" Bid and restricted Cargill from investing any new capital into Tacora. The Cargill SteerCo was authorized to convert only $100 million of existing indebtedness (through the DIP Facility and the Advance Payments Facility) to equity as part of a Bid.

5. Over the next ten days, Cargill and its advisors scrambled to put together a Phase 2 Bid that they knew did not comply with the requirements of the Solicitation Process in order to strategically delay and "play for time" while they continued their efforts to find third-party equity financing for its Bid. Cargill believed that "through negotiation, leverage, and bid clarifications" it could get one to three weeks of delay to obtain an equity commitment from a third party. [3]

6. On January 9, 2024, Matthew Lehtinen, the Customer Manager Americas in respect of Cargill's metals business, wrote the following to other Cargill employees "we have to submit the bid with a few conditions, it is unlikely that we get tossed out right away, and <u>we can slow play this to buy more time</u> for equity to get there… we have no option but to <u>play this for more time</u> … All things are on the table to preserve the Tacora flow."[4] (emphasis added). On January 30, 2024, a day after the Investors' Bid was declared as the Successful Bid, another Cargill member

[2] Transcript of the Cross-Examination of Paul Carrelo held on March 21, 2024 ("**Carrelo Cross Examination**") at Q 280; Transcript of the Cross-Examination of Jeremy Matican held on March 22, 2024 ("**Matican Cross Examination**") at Q 194.
[3] Exhibit No. 6 to the Cross-Examination of Matthew Lehtinen held on March 19, 2024 ("**Lehtinen Cross Examination**").
[4] Confidential Exhibit No. 4 to Lehtinen Cross Examination.

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."[5] On February 9, 2024, after this Court ordered the litigation timetable to hear this sale approval motion, Mr. Lehtinen wrote an email to a potential third party equity investor that again confirmed Cargill's strategy of litigation delay to permit it to continue to find an equity provider:

> "By way of update, we have made progress on extending the litigation timetable into April to give us more time to assemble an alternative transaction. That being said time is of the essence. We are also making strong progress with another equity partner to be part of an alternative plan as well as a debt provider." [6] (emphasis added)

7. Jeremy Matican, the lead banker at Jefferies, Cargill's financial advisor, admitted on cross-examination that delay to the litigation timetable was actively part of Cargill's overall strategy.[7]

8. Over a year has passed since Cargill started looking for capital providers and Tacora commenced its strategic process. Six months have passed since Tacora commenced these CCAA Proceedings. Ten weeks have passed since Cargill's CEO killed the committed Bid. Nine weeks have passed since the Phase 2 Bid Deadline. Notwithstanding its continuing efforts, Cargill still has no committed financing to support an alternative (albeit flawed) transaction. Cargill is actively working to frustrate the CCAA process and prevent the Company from completing its restructuring to the detriment of Tacora and its stakeholders. Cargill's sole objective is to entrench its off-market Offtake Agreement in order to continue to reap profits while Tacora and all other stakeholders incur significant losses. Cargill's strategy is contrary to the CCAA's goal of allowing debtors to restructure in a timely manner and the obligation of parties in CCAA proceedings to act in good faith.

9. Cargill is clearly working against the goals of the CCAA and cannot be permitted to continue to abuse the Court's process. Leaving aside that Cargill's proposed "cram-up"

[5] Confidential Exhibit No. 8 to Lehtinen Cross Examination.
[6] Confidential Exhibit No. 9 to Lehtinen Cross Examination.
[7] Matican Cross Examination at Q 244.

transaction was not actionable on the Phase 2 Bid Deadline and remains unactionable today, the Successful Bid represents a superior transaction for Tacora and its stakeholders. The Investors' Bid provides significant recovery in cash to Tacora's stakeholders and restructures Tacora so as to permit the Company to become a sustainable, successful business in the future. The self-serving path preferred by Cargill would not address any of the underlying issues facing Tacora.

10. The Court should approve the Successful Bid and direct the Transactions to be implemented pursuant to a reverse vesting order ("**RVO**"). As set forth below, the Court has clear jurisdiction to grant the RVO and courts across the country have done so in similar circumstances. The RVO provides significant benefits to Tacora and its stakeholders, including the ability to deal with its permits and licenses and preserve the benefit of tax losses. The RVO structure is also important to maintain the value and benefits of the Investors' Bid. On the other hand, the RVO structure does not cause any additional prejudice to Cargill. The impact of the RVO on Cargill's Offtake Agreement is exactly the same as the impact of a traditional asset sale transaction.

PART II – FACTS

A. Tacora

11. 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 and Labrador.[8]

12. Since restarting mining operations in 2019, Tacora has been attempting to ramp up production of iron ore concentrate to the Scully Mine's nameplate capacity of approximately 6.0 Mtpa. Tacora needs to implement its capital expenditure plan as soon as possible. These

[8] Fourth Broking Affidavit at para. 5.

capital investments are critical for the sustainability and stability of Tacora's operations moving forward.[9] Tacora has suffered losses of over $345 million since restarting the Scully Mine.[10]

B. Capital Structure

13. Tacora has approximately $298 million in pre-filing secured debt owing primarily to (a) holders of Senior Notes and Senior Priority Notes (the "**Senior Noteholders**"); and (b) Cargill in respect of an Advance Payments Facility. Tacora has also drawn approximately $95 million under the DIP Facility. The secured debt (not including accrued interest) and its respective priority rankings is summarized as follows:[11]

	Cargill	Senior Noteholders
First Ranking	$95,000,000 of Advances and Post-Filing Credit Extensions	
Second Ranking	$4,717,648 of Margin Advances and Prepay Advances	$27,521,634 of Senior Priority Notes
Third Ranking	$30,000,000 of Initial Advances	$234,281,250 of Senior Notes
Total	$129,717,648	$261,802,884

C. The Offtake Agreement

14. Pursuant to the Offtake Agreement, Tacora sells 100% of its iron ore concentrate to Cargill.[12] The Offtake Agreement has a "life of mine" term.

15. 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.[13] The amount that Cargill earns is [redacted] and is more than Tacora was previously aware.[14] 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.[15]

[9] Fourth Broking Affidavit at para. 72.
[10] Sixth Broking Affidavit at para. 17.
[11] Fourth Broking Affidavit at para. 6.
[12] Fourth Broking Affidavit at para. 57.
[13] Matican Cross Examination at Qs 55-58; Lehtinen Cross Examination at Q 197.
[14] Lehtinen Cross Examination at Q 197.
[15] Sixth Broking Affidavit at para. 17.

16. Cargill's Offtake Agreement is not a "market" agreement. [redacted]

17. The Offtake Agreement has also 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 own expert recognizes that an offtake agreement is normally a critical tool for mining companies to raise capital.[18] [redacted]

18. 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]

19. Since late 2022, when Tacora began to encounter financial distress, Cargill's primary objective has been to protect the Offtake Agreement.[22] And in over a year of negotiations with

[16] Confidential Exhibit No. 13 to Matican Cross Examination; Matican Cross Examination at Qs 254-258.
[17] Confidential Exhibit No. 13 to Matican Cross Examination.
[18] Exh bit "A" to Affidavit of William Gula sworn March 1, 2024 (Expert Report) at paras. 51-53.
[19] Lehtinen Cross Examination at Q 197.
[20] Confidential Exhibit No. 14 to Matican Cross Examination.
[21] Confidential Exh bit No. 11 to Carrelo Cross Examination; Exh bit "G" to Affidavit of Matthew Lehtinen sworn March 1, 2024 ("**Lehtinen Affidavit**").
[22] Confidential Exhibit A to Carrelo Cross Examination.

investors and the Ad Hoc Group, Cargill has never offered concessions sufficient to attract new equity to Tacora.[23]

20. Mr. Lehtinen affirmed that Cargill was "open to the possibility" of modifying the Offtake Agreement's life of mine term and "this fact is known to Tacora…"[24] Cargill relies on a single text message sent to RCF on the eve of the CCAA Proceedings. But contrary to Mr. Lehtinen's evidence, Paulo Carrelo, the Senior Structuring Manager of Cargill's metals business, admitted on cross-examination that Cargill had never indicated to Tacora that it was willing to negotiate the term.[25] Further, Mr. Valdes, a Partner and Head of Private Equity at RCF, also testified that as of October 2, 2023, Cargill was not willing to agree to <u>any</u> permanent amendment to the Offtake Agreement.[26]

D. Pre-Filing Strategic Process

(i) Initial Company Solicitation Process

21. 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.[27] 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.[28]

22. 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. Greenhill facilitated conversations for the interested parties with Cargill and the Ad Hoc Group but no agreement was reached on any transaction.[29]

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[23] Transcript of the Cross-Examination of Michael Nessim held on March 18, 2024 ("**Nessim Cross Examination**") at Q 124.
[24] Lehtinen Affidavit at para. 59.
[25] Carrelo Cross Examination at Q 242 and Q 245.
[26] Transcript of the Cross-Examination of Martin Valdes held on March 21, 2024 ("**Valdes Cross-Examination**") at Q141.
[27] First Nessim Affidavit at para. 4.
[28] First Nessim Affidavit at para. 4.
[29] First Nessim Affidavit at para. 4.

(ii) May 2023 Executed LOI

23. In May 2023, the Company entered into a non-binding LOI for a sale of the Company to a strategic party. The transaction was supported by Cargill and the Ad Hoc Group. Cargill supported the offer because it "keeps our offtake etc" but they "recognize[d] there [was] a tonne of value upside that [was] not being recognized and therefore [Cargill] need[s] to continue working on our own Cargill backstopped offer."[30] 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.[31]

(iii) Cargill's Pre-Filing Solicitation for Investors

24. As referenced above, throughout 2023, Cargill was working on its own transaction in respect of Tacora. As early as 2022, Cargill started reaching out to third-party investors and other stakeholders of Tacora to inject more capital into Tacora.[32] The process conducted by Cargill was independent of the Pre-Filing Strategic Process being conducted by the Company. 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 (and apparently is continuing to engage with today).[33] As examples of this activity:

(a) [redacted]

(b) [redacted]

[30] Exh bit No. 5 to Carrelo Cross Examination.
[31] First Nessim Affidavit at para. 6.
[32] Lehtinen Affidavit at paras. 54-55; Confidential Exhibit "A" to Carrelo Cross Examination.
[33] Confidential Exhibit "A" to Carrelo Cross Examination; Carrelo Cross Examination at Qs 94-95 and 321; Exhibit Nos. 6-8 to Carrelo Cross Examination.
[34] Confidential Exhibit No. 3 to Carrelo Cross Examination.
[35] Confidential Exhibit No. 1 to Carrelo Cross Examination.

(c) [redacted]

25. During this timeframe, Phillip Mulvihill, the Cargill appointee on Tacora's Board, regularly leaked details of the Company's board meetings in summary e-mails to a group of Cargill employees. The leaks summarized board meetings discussing the Pre-Filing Strategic Process, Tacora's discussions with stakeholders, legal advice being provided to the Company, the Company's position on negotiations with Cargill and other strategic matters relating to Tacora.[37]

(iv) Potential Consensual Recapitalization Transaction

26. Starting in July 2023, Cargill and the Ad Hoc Group commenced discussions regarding a possible consensual restructuring and recapitalization transaction for the Company.[38] Internally, [redacted][39] However, they did believe RCF, who had previously worked to perform diligence on Tacora, could provide an equity commitment to support a transaction.

27. The discussions between Cargill and the Ad Hoc Group eventually involved RCF as a potential new equity participant. The negotiations continued through the summer with the backdrop of a potential CCAA filing in early September and the parties believed they were close to an agreement.[40]

28. The Company fully supported a consensual resolution between the parties and encouraged both Cargill and the Ad Hoc Group to be flexible and offer the concessions necessary to reach an acceptable transaction to restructure and recapitalize Tacora outside of CCAA. Tacora was "purely focused on getting a consensual agreement between Cargill and the noteholders to restructure the business..." and from July to October the Company "play[ed] the mediator to try and bring [the] two parties together to a consensual resolution."[41] As stated by

[36] Confidential Exhibit No. 6 to Carrelo Cross Examination.
[37] Confidential Exhibit Nos. 7 and 8 to Carrelo Cross Examination.
[38] Fourth Broking Affidavit at para. 17.
[39] Confidential Exhibit No. 9 to Carrelo Cross Examination.
[40] Lehtinen Affidavit at para. 56.
[41] Transcript of the Cross-Examination of Joseph Andrew Broking II held on March 20, 2024 ("**Broking Cross Examination**") at Qs. 152 and 666.

Joe Broking, Tacora's CEO, "Tacora did everything in its power to bring these two parties together, pre-CCAA."[42] However, negotiations between the groups broke down in early October.[43] Following the failure of a negotiated solution, Cargill and the Ad Hoc Group "hate[d] each other" and "didn't want to talk."[44] Michael Nessim, Greenhill's lead mining banker, described the relationship as "acrimonious".[45]

E. CCAA Proceedings

29. Following the failure between Cargill and the Ad Hoc Group to reach a consensual deal, Tacora filed for CCAA protection on October 10, 2023. The Company needed immediate liquidity and needed to find a transaction to sell or recapitalize Tacora's business.[46] The solicitation process agreed to by Cargill as part of the DIP Facility contemplated a deadline for non-binding letters of intent no later than December 1, 2023 and a final deadline for binding bids no later than January 19, 2024.[47]

F. Solicitation Process

30. On October 30, 2023, this Court granted the Solicitation Order, which, among other things: (a) approved the Solicitation Process to solicit offers or proposals for a sale, restructuring, or recapitalization transaction in respect of Tacora's assets and business operations; (b) authorized Tacora to market and solicit offers in respect of the Offtake Opportunity; and (c) authorized and directed Tacora, Greenhill and the Monitor to immediately commence the Solicitation Process.[48]

31. The Solicitation Process contemplated the following milestones:

Event	Timing
1. **Phase 1 Bid Deadline - d**eadline for Phase 1 Bidders to submit non-binding LOIs	By no later than December 1, 2023 at 12:00 p.m. (Eastern Time)
2. **Phase 2 Bid Deadline** – deadline for definitive offers by Phase 2 Qualified Bidders)	By no later than January 19, 2023, at 12:00 p.m. (Eastern Time)

[42] Broking Cross Examination at Q. 666.
[43] Broking Cross Examination at Q. 666.
[44] Broking Cross Examination at Q. 666.
[45] Nessim Cross Examination at Q 450.
[46] First Broking Affidavit at para. 11.
[47] Exh bit No. 1 to Lehtinen Cross Examination.
[48] Fourth Broking Affidavit at para. 12.

3. **Definitive Documentation – d**eadline for completion of definitive documentation in respect of a Successful Bid	By no later than February 2, 2023
4. **Approval Motion – h**earing of Approval Motion in respect of Successful Bid (subject to Court availability)	Week of February 5, 2024
5. **Outside Date – o**utside date by which the Successful Bid must close	February 28, 2024 (subject to customary conditions)

32. Cargill was provided with draft SISP Procedures on October 7, 2023, which included the final bid deadline of January 19, 2024, and substantially similar milestones to the final SISP Procedures.[49] The communication protocol included in the draft SISP Procedures was also provided to Cargill in draft on October 14, 2023. Cargill's counsel reviewed and commented on these SISP Procedures, and Cargill consented to the approval of the Solicitation Order.[50]

33. The Solicitation Process was designed to be broad and flexible and provide Tacora with the latitude to pursue a range of transactions, including an asset sale, a share sale, or a plan of arrangement. The Solicitation Process also specifically provided interested parties with the ability to investigate and conduct due diligence regarding the opportunity to arrange an offtake, service or other agreement in respect of the Business.[51] Marketing the Offtake Opportunity was a critical aspect of the Solicitation Process as the market feedback during the Pre-Filing Strategic Process was clear – investors were not interested in providing new money without significant changes to the Offtake Agreement.[52]

34. The Monitor commented in its First Report that the "Solicitation Process is a "two-phase" process of the type commonly utilized in proceedings under the CCAA."[53]

(i) Phase 1

35. Over 130 Potential Bidders were contacted by Greenhill following the commencement of the Solicitation Process.[54]

[49] Second Nessim Affidavit at para. 9.
[50] Second Nessim Affidavit at para. 9; Answer to Question 153 in Lehtinen Cross Examination.
[51] Fourth Broking Affidavit at paras. 18-19.
[52] Sixth Broking Affidavit at para. 11.
[53] First Report of the Monitor dated October 10, 2023 ("**First Report of the Monitor**") at paras. 61 and 72.
[54] First Nessim Affidavit at para. 14.

36. On December 1, 2023, the Phase 1 Bid Deadline, Tacora received seven non-binding term sheets, which consisted of: (a) two LOIs that expressed an interest in both the Transaction Opportunity and the Offtake Opportunity; (b) three LOIs that expressed an interest solely in the Transaction Opportunity; and (c) two indications of interest that expressed an interest solely in the Offtake Opportunity. Only one of the above LOIs, received from Cargill, contemplated the assumption of the Offtake Agreement.[55]

37. Following the Phase 1 Bid Deadline, the Board, in consultation with Greenhill, Stikeman, and the Monitor, assessed the five LOIs and two indications of interest received in accordance with the SISP Procedures and determined that the five Phase 1 Bids received constituted Phase 1 Qualified Bids.[56] Greenhill advised six of the Phase 1 Bidders and Financing Parties interested in the Offtake Opportunity that, in order to pursue a standalone proposal, they would need to significantly improve the value of their Bids. This included Cargill who received feedback that for its Bid to be competitive it must satisfy all secured creditors in full.[57]

38. Greenhill also proposed an alternative option for these Phase 1 Bidders to join in a consortium bid with Cargill in an effort to enhance the potential value that could be offered.[58]

(ii) Phase 2

39. Of the six Phase 1 Bidders who were informed they needed to materially improve the value of their Bids, Cargill and another party pursued stand-alone proposals, one party withdrew from the process, and three parties were introduced to Cargill in an effort to allow the parties to submit a consortium bid.[59]

40. On January 19, 2024, the Phase 2 Bid Deadline, Tacora received three Phase 2 Bids, which included:

(a) the Investors' Bid for all the shares of Tacora;

(b) a Bid from Cargill for all the assets of Tacora; and

[55] Fourth Broking Affidavit at paras. 21-22; First Nessim Affidavit at paras. 14 and 19-20.
[56] Fourth Broking Affidavit at para. 22; First Nessim Affidavit at para. 21.
[57] Nessim Cross Examination at Q 140.
[58] Fourth Broking Affidavit at para. 22.
[59] First Nessim Affidavit at para. 23.

(c) a Bid from Bidder #3 for all the shares of Tacora.[60]

41. The Investors' Phase 2 Bid was fully committed and financed, comprised of a credit bid of the Senior Secured Notes totalling approximately $250 million and a commitment to provide new equity and debt financing to Tacora of $268.5 million. The Investors' Phase 2 Bid satisfied each of the criteria to be a Phase 2 Qualified Bid and contained significant benefits for Tacora and its stakeholders, including:

(a) on emergence the Transactions reduced Tacora's pre-filing indebtedness by approximately $119.3 million, from approximately $325.6 million to $206.3 million, and extended the maturity dates of such debt which better aligned with the Company's business plan and anticipated "ramp up" over the next several years;

(b) the Transactions provided for repayment in full of all the Company's secured debt in cash or through a credit bid;

(c) on emergence Tacora would assume the Company's Pre-Filing Trade Amounts, Post-Filing Trade Amounts, and the payment in full of the Company's Cure Costs;

(d) the Investors committed to provide sufficient equity and new debt to fund emergence costs and the Company's ongoing operational costs; and

(e) the Transactions provided significant new capital to partially fund the Company's contemplated capital expenditure plan to ramp up production at the Scully Mine.[61]

42. In other words, the Transactions provide for full recovery by Tacora's secured creditors and allow Tacora to emerge as a stronger business to execute upon its long term plan to "ramp up" production for the benefit of the Company and its employees, suppliers and other stakeholders. The only stakeholder negatively impacted by the Transactions is Cargill in its capacity as offtaker, as the Offtake Agreement is an "Excluded Contract". Javelin would replace Cargill as Tacora's offtaker or marketing agent. Cargill otherwise stands to be repaid in full in cash in respect of its secured debt.

43. Cargill's Phase 2 Bid was not committed or financed, reflecting internal limitations imposed by Cargill's CEO, as further described below. The Cargill Phase 2 Bid contained no new committed funding from Cargill but contemplated (a) Cargill "equitizing" its existing secured debt, (b) maintaining the Offtake Agreement without any amendments (except for a limited and

[60] Fourth Broking Affidavit at para. 23; First Nessim Affidavit at para. 26.
[61] Fourth Broking Affidavit at paras.36 and 41-42.

temporary profit share with Tacora), (c) reinstating the existing Senior Notes without the Senior Noteholders' consent, and (d) finding a new equity investor within three weeks of the Phase 2 Bid Deadline to provide all the funding required to support the proposed transaction (the "**Cram-Up Transaction**"). The Cargill Phase 2 Bid contained the following financing condition solely in favour of Cargill:

> *"Additional Equity Commitment*. The Transaction Sponsor shall have obtained commitments to purchase equity of the Purchaser in connection with the implementation of the Transaction (including from any potential Equity Electing Noteholders) in an aggregate amount of at least $85 million on substantially the same terms as the Transaction Sponsor's equity investment in the Purchaser (or such other terms agreed among the Transaction Sponsor and such equity investors) (the "Additional Equity Commitment") by no later than the date that is three weeks following the execution of this Agreement by the Parties."[62]

44. Cargill's Phase 2 Bid contained a list of five equity investors that it was still engaging with to find equity commitments to support its Bid. However, despite its representations to the Company and the Monitor that each of these parties was interested, Mr. Lehtinen admitted on cross-examination [redacted], internal Cargill documents demonstrate that [redacted][64] and Jefferies was concerned internally "that we will not find any equity investors willing to provide a 80-90% recovery to the bondholders."[65]

45. Additionally, even if a third-party investor could be found, Cargill's Phase 2 Bid had other fundamental flaws. The Cram-Up Transaction did not address the fundamental underlying issues that caused Tacora to commence these CCAA Proceedings.[66] The Cram-Up Transaction provided the Company with minimal cash upon closing of the transaction (less than $20 million)[67] and provided no financing to execute upon the critical ramp up activities related to the Scully Mine.[68] Additionally, the full amount of the Senior Notes would have been reinstated

[62] Exh bit "G" to Lehtinen Affidavit.
[63] Lehtinen Cross Examination at Qs. 266-269.
[64] Confidential Exhibit No. 14 to Carrelo Cross Examination.
[65] Exh bit No. 6 to Matican Cross Examination.
[66] Fifth Broking Affidavit at para. 11.
[67] Exh bit "C" to First Nessim Affidavit.
[68] Fifth Broking Affidavit at para. 9.

without the consent of the Senior Noteholders and the Offtake Agreement would be assumed without amendments (except for some limited and temporary profit sharing with Tacora). The Cram-Up Transaction would effectively result in Tacora having the same capital structure it had in November 2022 when servicing the Senior Notes from operational cash flow which had been proven to be unsustainable.[69] The Plan that Cargill seeks (as described in the Lehtinen Affidavit) to force the Company to pursue is substantially similar to the Cram-Up Transaction contemplated by its Phase 2 Bid. A notable difference is that the Plan provides for additional debt to be incurred by the Company and potentially provides worse recovery for certain unsecured creditors.[70]

(iii) Declaring the Successful Bid

46. On January 24, 2024, the Board held a meeting with the Company's advisors, Greenhill and Stikeman, and the Monitor and its counsel to review and assess the Phase 2 Bids and determine whether each of them constituted a Phase 2 Qualified Bid and consider the path forward following the Phase 2 Bid Deadline (the "**January 24 Board Meeting**"). At the January 24 Board Meeting, with input and advice from Greenhill and Stikeman, and in consultation with the Monitor, the Company assessed each of the Phase 2 Bids against the criteria set forth at paragraph 34 of the SISP Procedures to evaluate whether the Phase 2 Bids met the requirements of a Phase 2 Qualified Bid. Only the Investors' Phase 2 Bid met all the requirements of a Phase 2 Qualified Bid.[71]

47. The Board, with the advisors, also assessed whether any criteria under the SISP Procedures should be waived to qualify Cargill's or Bidder #3's Phase 2 Bid. In making this decision, the Company, with its advisors and the Monitor, assessed the merits of each of the Phase 2 Bids with reference to the non-exhaustive list of considerations set out in the Solicitation Process and specifically considered: (a) the structure of the Investors' Bid (which requires a new marketing agreement with Javelin) and the unsecured claim created by

[69] Fifth Broking Affidavit at para. 10.
[70] Lehtinen Affidavit at para. 113.
[71] Fourth Broking Affidavit at paras. 24-27 and 29.

excluding the Offtake Agreement under the Transactions; and (b) the likelihood that Cargill would be able to satisfy the financing condition contained in its Bid. [72]

48. Following this assessment and careful consideration of all alternatives available to Tacora, the Board, with input and advice from Greenhill and Stikeman, and in consultation with the Monitor, exercised its good faith business judgement and determined that it was not in the Company's interest to waive the requirements of the Solicitation Process to qualify those Bids at that time.[73] The Company did not have confidence that Cargill could raise the capital in the circumstances given the feedback provided to the Company by third party investors during the Pre-Filing Strategic Process and the Solicitation Process, including feedback from certain of the potential equity financing parties that Cargill represented it was engaging with to raise capital.

49. Accordingly, on January 25, 2024, Stikeman, on behalf of the Company, communicated to Cargill that its Phase 2 Bid did not constitute a Phase 2 Qualified Bid. This communication followed earlier feedback provided to Cargill's advisors on January 22 and 23, 2024, and a request that Cargill backstop its Phase 2 Bid.[74]

50. Ultimately, on January 29, 2024, following negotiations with the Investors, further communication with Cargill and receiving an update on a meeting between Cargill's counsel and the Monitor, having considered the advice and recommendations from Greenhill and Stikeman and in consultation with the Monitor, the Board exercised their good faith business judgement and unanimously determined that the Investors' Phase 2 Qualified Bid should be declared the Successful Bid under the Solicitation Process. As described above, the Subscription Agreement with the Investors represents a going-concern solution for Tacora and the best outcome for Tacora, its creditors, and other stakeholders in the circumstances. The Transactions with the Investors are the culmination of extensive solicitation efforts on the part of Tacora and Greenhill, which commenced over a year ago.[75]

[72] Fourth Broking Affidavit at paras. 29 and 34.
[73] Fourth Broking Affidavit at para. 29.
[74] Fourth Broking Affidavit at paras. 29-30.
[75] Fourth Broking Affidavit at paras. 39 and 55.

(iv) Cargill's Participation in the Solicitation Process

(A) Phase 1

51. Following the commencement of the CCAA Proceedings, Cargill almost immediately started work on the Solicitation Process in contemplation of submitting a Bid. The work by Cargill was a continuation of its efforts prior to the CCAA Proceedings to develop a recapitalization transaction (having a primary aim of preserving the Offtake Agreement).[76] On October 15, 2023, Cargill engaged Jefferies to act as its financial advisor in the CCAA Proceedings.[77] Jefferies acknowledged upon their engagement that they were going to "work tirelessly on Cargill's behalf to … maintain the offtake agreement"[78] and Jefferies negotiated a [redacted]. Jefferies engagement letter also reflected the history of Cargill's process that had come before by carving out over 34 parties from their potential financing fee — consisting of existing stakeholders or financing sources that Cargill had independently contacted during its equity raising efforts prior to the CCAA Proceedings.[79]

52. During Phase 1 of the Solicitation Process, Cargill and Jefferies contacted 43 financing parties in an effort to develop a consortium bid. Greenhill permitted Cargill and Jefferies to solicit any debt financing source and equity financing sources that were unlikely to be able to act as a stand-alone bidder and were not interested themselves in the Offtake Opportunity.[80]

53. At the Phase 1 Bid Deadline, Cargill submitted a Phase 1 Bid which contemplated an acquisition of Tacora at a purchase price of [redacted] Cargill's Phase 1 Bid contemplated a [redacted].[81] As set out above, this Phase 1 Bid was not competitive with the Investors' Phase 1 Bid and accordingly, Greenhill

[76] Confidential Exhibit No. 2 to Carrelo Cross Examination; Confidential Exhibit No. A to Carrelo Cross Examination.
[77] Matican Cross Examination at Q 90.
[78] Confidential Exhibit No. 1 to Matican Cross Examination.
[79] Confidential Exhibit No. 2 to Matican Cross Examination.
[80] Second Nessim Affidavit at para. 13(d).
[81] Confidential Exhibit No. 3 to Lehtinen Cross Examination; Lehtinen Cross Examination at Q 225.

provided feedback to Cargill that it would need to improve its Phase 1 Bid to address all of Tacora's secured debt to have a competitive Phase 2 Bid.[82]

(B) Cargill's Initial Phase 2 Strategy

54. The feedback provided by Greenhill caused Cargill and Jefferies to re-evaluate their Phase 1 Bid and contemplate bidding at a higher valuation. Cargill had also obtained "credible intelligence" that the Ad Hoc Group, RCF and Javelin intended to submit a credit bid and replace Cargill as offtaker.[83] Accordingly, Cargill knew that to preserve the Offtake Agreement, Cargill would have to submit a compelling, committed Bid on the Phase 2 Bid Deadline to top the Investors' Bid. Jefferies and Cargill's internal steering committee ("**Cargill SteerCo**") immediately began work on such a Bid.

55. The Bid developed internally within Cargill was an all-cash Bid for Tacora of approximately [redacted] that would pay out all of Tacora's other secured claims, fully backstopped by Cargill (the "**Backstopped Bid**").[84] Submitting the Backstopped Bid was the "preferred" bidding strategy of Cargill SteerCo[85] and Jefferies recommended that Cargill pursue the Backstopped Bid.[86] Cargill and Jefferies believed "a bid at par + accrued would likely be deemed the winning bid and defeat any bid by the Senior Noteholders consortium."[87]

56. In order to submit the Backstopped Bid, Cargill SteerCo required approval of Cargill's CEO and ultimately, its Board of Directors. Cargill SteerCo and Jefferies prepared a Board presentation dated January 8, 2024 (the "**January 8 Board Materials**") in support of seeking these approvals: "[w]e are seeking approval to submit a binding all cash bid for Tacora, fully backstopped by Cargill, to preserve the direct and indirect value of the offtake agreement plus the inherent economic returns and upside from acquiring and owning Tacora."[88]

[82] Nessim Cross Examination at Qs. 141-142; Confidential Exhibit No. 2 to Lehtinen Cross Examination.
[83] Confidential Exhibit No. 3 to Lehtinen Cross Examination.
[84] Confidential Exhibit No. 3 to Lehtinen Cross Examination.
[85] Lehtinen Cross Examination at Qs 236-238.
[86] Matican Cross Examination at Qs 194-196 and 209-210.
[87] Confidential Exhibit No. 3 to Lehtinen Cross Examination.
[88] Lehtinen Cross Examination at Q 240; Confidential Exh bit No. 3 to Lehtinen Cross Examination.

57. The January 8 Board Materials outlined that Cargill would backstop the required equity commitment and [redacted] to solicit new money equity from other investors by the Phase 2 Bid Deadline. The January 8 Board Materials included a page entitled "Key Bid Considerations", which contained a summary of the criteria set out in paragraph 34 of the SISP Procedures to constitute a Phase 2 Qualified Bid, including that a Bid shall "include written evidence of a firm commitment for financing…" and "not [be] subject to… contingency financing".[90]

58. On January 9, 2024, following the presentation by members of Cargill's senior management, the CEO of Cargill made two important decisions. First, he rejected the submission of the Backstopped Bid developed by Cargill SteerCo[91] and second, he directed that Cargill should not provide any new capital to Tacora. Cargill was thereafter limited to converting $100 million of existing capital (through the DIP Facility and the Advance Payments Facility) in Tacora to equity.[92] In other words, Cargill would not be able to backstop any Bid for Tacora and Cargill would not be able to provide any of the capital Tacora required.

(C) Cargill Pivots to a Delay Strategy

59. Following the Cargill CEO's directive against submitting a committed Bid, Cargill knew internally that it was unlikely to be successful in the Solicitation Process. Cargill had no commitments for financing from third parties despite its efforts over the past year and now not permitted to provide new equity to Tacora itself. Shortly following the meeting with Cargill's CEO, on January 9, 2023, Mr. Lehtinen sent an email to other members of the Cargill SteerCo stating:

> "We feel with Goodman's input that even if we have to submit the bid with a few conditions, it is unlikely that we get tossed out right away, and we can slow play this to buy more time for equity to get there … reality is unless [investor #1] and [investor #2] commit ahead of Jan 19 we have no option but to play this for more

[89] Confidential Exhibit No. 3 to Lehtinen Cross Examination.
[90] Confidential Exhibit No. 3 to Lehtinen Cross Examination.
[91] Carrelo Cross Examination at Q 297
[92] Lehtinen Cross Examination at Q 289 and 536-538; Lehtinen Affidavit at para. 78.

> time … All things are on the table to preserve the Tacora flow. (Emphasis added).[93]

60. On cross-examination, Mr. Lehtinen refused to acknowledge that his clear words meant that Cargill intended to delay the Solicitation Process to but he could not offer a cogent explanation as to what his references to "slow play" and "to play this for more time" could mean.[94]

61. On January 14, 2024, Mr. Lehtinen wrote an email in response to a question from the head of Cargill's Metals division in Singapore as to whether equity financing would "need to be firm prior to the 19th Jan" stating: "[e]arlier the better by Jan 19, but we are expecting that through negotiations, leverage, and bid clarifications, we get 1-3 weeks post the Jan 19 deadline to firm up a funding commitment."[95] Mr. Carrelo testified that Cargill "did not see January 19th as a deadline…"[96] and Mr. Lehtinen admitted on cross-examination that despite the deadlines in the Solicitation Process, he expected Cargill would have additional time to firm up the equity financing in Cargill's Phase 2 Bid.[97] It was Mr. Matican of Jefferies who acknowledged in cross-examination that delay was part of the Cargill strategy.[98]

62. As described above, Cargill submitted its Phase 2 Bid on January 19, 2024, which was not a financed, committed Bid. Contrary to the requirements of section 34 of the SISP, the Cargill Bid was conditional on financing and did not even disclose who the majority owner of Tacora would be in the event Cargill was the winning bidder. The Bid reflected the willing decision of Cargill's CEO not to authorize further investment into Tacora and Cargill's strategy to "play for time" past the January 19, 2024 to find a new equity investor despite the deadline in the Solicitation Process.

63. The strategy of delay not only extended to Cargill's bidding strategy, but also its litigation strategy in these CCAA Proceedings. On January 30, 2024, a day after the Investors' Bid was declared the Successful Bid, Anthony Vala, an analyst within the corporate development group

[93] Confidential Exhibit No. 4 to Lehtinen Cross Examination.
[94] Lehtinen Cross Examination at Qs 323-333.
[95] Exh bit No. 6 to Lehtinen Cross Examination.
[96] Carrelo Cross Examination at Q 314.
[97] Lehtinen Cross Examination at Q 344.
[98] Matican Cross Examination at Q 244.

at Cargill,[99] wrote an internal email to other Cargill members that stated, in part: "[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."[100] (emphasis added). In the same vein, on February 9, 2024, Mr. Lehtinen wrote an email to a potential third-party equity investor and stated, in part: "[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."[101] (emphasis added).

64. As referenced above, Mr. Matican of Jefferies admitted on cross-examination that delay to the litigation timetable was actively part of Cargill's overall strategy. When asked whether Mr. Matican was aware that it became Cargill's strategy to extend the litigation timeline, to attempt to get a committed investor onboard, Mr. Matican admitted: "that was part of their approach."[102]

65. Despite Cargill's successful strategy to delay the litigation timetable at the expense of Tacora and its other stakeholders, Cargill has been unsuccessful in using the extra time to obtain any financing to support an alternative transaction. When Cargill submitted its Phase 2 Bid, the condition requested three additional weeks beyond January 19, 2024, to find a new equity investor contributing at least $85 million. It has now been nearly nine weeks since the Phase 2 Bid Deadline and still Cargill has no committed financing and does not even have a letter of intent.[103] Each of Cargill's witnesses admitted that despite the deadlines in the Solicitation Process, Cargill continued to attempt to work on an alternative transaction following the Phase 2 Bid Deadline,[104] but as of date of each examination, no investor has committed to provide any financing for their transaction:

(a) Mr. Lehtinen confirmed that Cargill "continued to work on finding the commitments [Cargill] was looking for … even after January 19th" and that as of the date of his examination, being March 19, 2024, Cargill did not have any committed investors[105];

[99] Lehtinen Cross Examination at Qs 31-32.
[100] Confidential Exhibit No. 8 to Lehtinen Cross Examination.
[101] Confidential Exhibit No. 9 to Lehtinen Cross Examination.
[102] Matican Cross Examination at Q 244.
[103] Lehtinen Cross Examination at Qs 273-275.
[104] Carrelo Cross Examination at Q 322.
[105] Lehtinen Cross Examination at Qs 308 and 510.

(b) Mr. Carrelo admitted that Cargill "did not see January 19th as a deadline" such that Cargill continued its process after January 19, 2024, to try and obtain a commitment from third party investors (which discussions are ongoing), and as of March 21, 2024, Cargill did not have a binding commitment[106]; and

(c) Mr. Matican confirmed that no third-party debt or equity commitments were available as of March 22, 2024.[107]

G. Tacora Needs to Emerge from CCAA

66. Significant damage will result to Tacora and its stakeholders if Tacora cannot emerge from these CCAA Proceedings as a going concern in an expedited manner.[108]

67. The volatile nature of the iron ore market can have a rapid and significant negative impact on Tacora's liquidity. The prices of iron ore fell from approximately $144/tonne at the beginning of January 2024 to $108.40/tonne on March 11, 2024.[109] The direct impacts of the recent decreases in the price of iron ore have resulted in, among other things, Tacora requiring additional DIP financing priming its secured creditors.

68. And even with access to DIP financing to fund "operating losses, significant professional fees and… significant drop in iron ore prices"[110], Tacora will be prejudiced if the Transactions cannot close quickly. The Scully Mine requires critical capital investment for Tacora to become profitable. Without capital improvements to increase production, Tacora will continue to generate losses. Tacora cannot obtain any equity financing while in the CCAA Proceedings and adding additional debt on Tacora through the DIP Facility during the CCAA Proceedings will result in less capital being available for these capital investments upon emergence.[111] As the Monitor notes "the Applicant is in need of substantial capital investment to enable it to achieve consistent, profitable operations. Such funding will not be forthcoming during this CCAA Proceeding."[112]

[106] Carrelo Cross Examination at Q 314 and 320-322.
[107] Matican Cross Examination at Qs 236-237.
[108] Fourth Broking Affidavit at para. 70.
[109] Fifth Broking Affidavit at para. 7.
[110] Supplemental Fourth Report at para. 23.
[111] Fourth Broking Affidavit at para. 72; Fifth Broking Affidavit at para. 10.
[112] Supplemental Fourth Report at para. 20.

69. In addition, Tacora's stakeholders continue to suffer from these CCAA Proceedings. Tacora's numerous trade creditors, many of which are small businesses, have not been paid pre-filing amounts and as the second largest employer in the Labrador West region, delayed emergence from these CCAA Proceedings will result in uncertainty for the Company's employees.[113] The Monitor is of the view that Tacora cannot afford to remain in CCAA Proceedings indefinitely and it is imperative that emerge as soon as possible.[114]

PART III – ISSUES

70. The issues to be determined on this motion are:

(a) whether the Court should approve the Subscription Agreement and the Transactions contemplated therein;

(b) whether the reverse vesting transaction structure is appropriate in the circumstances; and

(c) whether the Court should grant the Releases in favour of the Released Parties.

PART IV – LAW & ARGUMENT

A. The Subscription Agreement and the Transactions Should be Approved

71. The Solicitation Process culminated in the receipt of one Phase 2 Qualified Bid - the Investors' Bid, which: (a) results in significant recovery for Tacora's stakeholders; (b) preserves Tacora as a going concern for the benefit of its employees, suppliers and other stakeholders; (c) deleverages Tacora and capitalizes the Company with committed equity financing to allow Tacora to execute upon its plan to ramp-up production at the Scully Mine; and (d) fundamentally addresses the underlying issues that caused Tacora to commence these CCAA Proceedings – an overleveraged capital structure and prohibitive offtake agreement.

72. On the other hand, Cargill submitted a Phase 2 Bid that it knew did not satisfy the express criteria of the SISP Procedures necessary to constitute a Phase 2 Qualified Bid and that would not improve Tacora's business or address any of the fundamental issues leading to these CCAA Proceedings. Cargill has since sought to delay and frustrate Court approval of the

[113] Fourth Broking Affidavit at paras. 70-74.
[114] Fourth Report of the Monitor dated March 14, 2024 ("**Fourth Report of the Monitor**") at para. 68; Supplemental Fourth Report of the Monitor dated March 26, 2024 ("**Supplemental Fourth Report of the Monitor**") at para. 20.

Successful Bid as part of an overall strategy while it continues to seek third party financing for a its Cram-Up Transaction. Nine weeks have passed since the Phase 2 Bid Deadline. Under cross-examination, Cargill's representatives acknowledged that despite Cargill's continuing efforts, Cargill has failed to find the equity necessary to satisfy the financing condition.

73. The execution of the Subscription Agreement represents the culmination of extensive solicitation efforts on the part of Tacora and Greenhill, which commenced in March 2023 and continued after the commencement of the CCAA Proceedings in accordance with the Court-ordered Solicitation Process.[115] The Subscription Agreement and the Transactions contemplated thereby remain the best and only transaction available to Tacora in the circumstances.

74. 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 Subsection 36(3) factors.[116] More generally, in analyzing whether a transaction should be approved, a court is to consider the transaction as a whole and decide whether or not the sale is appropriate, fair, and reasonable.[117]

(i) The process leading to the Subscription Agreement and the Transactions was fair and reasonable in the circumstances. Sufficient efforts were made to obtain the best price, and Tacora did not act improvidently.

75. On October 30, 2023, the Court granted the Solicitation Order and authorized and directed Tacora, Greenhill and the Monitor to immediately commence the Solicitation Process.[118] This Court noted that the "Solicitation Process was developed by Greenhill in consultation with the Monitor, and provided to the company's secured creditors for feedback."[119]

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[115] Fourth Broking Affidavit at para. 39.
[116] *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*].
[117] *Quest University (Re)*, 2020 BCSC 1883 at para. 177 [*Quest*]; citing *Veris Gold Corp., Re*, 2015 BCSC 1204 at para. 23; *White Birch Paper Holding Co., Re*, 2010 QCCS 4915 at paras. 48-49.
[118] *Tacora Resources Inc. (Re)*, 2023 ONSC 6126 at para. 170 [*Tacora Comeback Decision*]; Solicitation Order of Justice Kimmel dated October 20, 2023 at para. 3.
[119] Tacora Comeback Decision at para. 168.

76. Cargill has suggested that Tacora, Greenhill, and the Monitor failed to engage properly with Cargill, should have exercised its discretion within the SISP Procedures to extend the timelines to provide Cargill with additional time to seek third party financing, and ultimately failed to use the Solicitation Process to achieve a "consensual" or "value maximizing" transaction.[120] There is no basis for these allegations. The Court approved the Solicitation Process and directed the Company to conduct it. It is well established that it is important to protect the integrity and the credibility of the process by following the procedures approved by the Court[121] and a "bitter bidder" has no standing to attack the process.[122]

77. Until January 9, 2024, Cargill was preparing to submit a Phase 2 Bid that would have satisfied the criteria under the SISP Procedures and paid Tacora's secured creditors in full, in cash, fully backstopped by Cargill. However, for reasons wholly within Cargill's control, Cargill submitted a Phase 2 Bid containing problematic features, including a financing condition, which Cargill knew would not satisfy the Court-ordered criteria of the Solicitation Process. Cargill has since sought to delay approval of the Successful Bid in order to buy time while it attempts (unsuccessfully) to firm up an equity financing commitment. [123]

78. In making the decision to declare the Successful Bid, the Board carefully assessed and considered the alternatives available to Tacora, and with input and advice from Greenhill and Stikeman, and in consultation with the Monitor, exercised its good faith business judgement and determined to move forward with the Investors' Bid. The decision was made after a robust in-person, full day Board meeting and two subsequent Board meetings following additional communications and negotiations with both the Investors and Cargill.[124] The Monitor was fully involved in the Company's decision-making noting that it "participated fully in board meetings at

[120] Lehtinen Affidavit at para. 10.
[121] *Arrangement relatif à Blackrock Metals Inc.*, 2022 QCCS 2828 at para. 60 [*Blackrock*]; *Boutiques San Francisco Inc., Re*, 2004 CanLII 480 (QCCS) at para. 20.
[122] *BDC Venture Capital Inc. v. Natural Convergence Inc.*, 2009 ONCA 665, paras. 7-8; and *Skyepharma PLC v. Hyal Pharmaceutical Corporation, 2000 CanLII 5650 (ON CA)*
[123] Fourth Broking Affidavit at para. 27.
[124] Fourth Broking Affidavit at paras. 24-26 and 29-36; First Nessim Affidavit at paras. 31-32; Exhibit No. 6 to Transcript of the Cross-Examination of Leon George (Trey) Jackson III held on March 19, 2024 ("**Jackson Cross Examination**");

which the bids were considered and the Directors exercised their business judgment in selecting the Investors Bid."[125]

79. Contrary to Cargill's allegations, the Company and its advisors, did consider whether to waive the criteria in the Solicitation Process to allow Cargill additional time to pursue equity financing. The simple fact is that the Company did not have confidence that Cargill could raise the capital given the feedback received during in the Pre-Filing Strategic Process and Solicitation Process. Additionally, even if Cargill could have raised the financing, the Cargill Cram-Up Transaction suffered from fundamental flaws. It did not restructure Tacora in a sustainable manner. The Company would have been left with its overleveraged balance sheet, minimal cash on hand and a problematic offtake agreement.[126]

80. The passage of nine weeks from the Phase 2 Bid Deadline while Cargill still has no equity commitments clearly demonstrates that the Company was correct to question Cargill's ability to raise capital. Cargill has continued its efforts to secure third party financing without success. Cargill had also been engaging with investors since late 2022 to support a transaction in respect of Tacora (some of which were the same parties Cargill represented would support its Phase 2 Bid).[127] Jefferies, Cargill's own financial advisor, questioned whether they could raise the financing.[128]

81. Cargill's criticisms of Tacora and its advisors for not seeking a "consensual resolution" are also without merit. Negotiations between Cargill and the Ad Hoc Group began in early 2023. Both were involved in the Pre-Filing Strategic Process and discussions continued right up to the commencement of the CCAA Proceedings culminating in a meeting between Cargill, RCF, and the Ad Hoc Group on October 3, 2023. The parties' failure to reach an agreement was the primary reason the Company needed to commence these CCAA Proceedings and conduct the Solicitation Process.[129] To suggest that Tacora should have rejected the Investors' Phase 2

[125] Supplemental Fourth Report of the Monitor at para. 33.
[126] Fourth Broking Affidavit at paras. 29 and 33-34; Second Nessim Affidavit at para. 23.
[127] Carrelo Cross Examination at Qs 115-117, 126, 320, and 447-449.
[128] Exhibit No. 7 to Matican Cross Examination; Matican Cross Examination at Q 192.
[129] Fourth Broking Affidavit at para. 17.

Qualified Bid in favour of further negotiations between parties who had previously failed to reach an agreement on numerous occasions over a period of close to a year lacks all credibility.

82. In *Quest*, Justice Fitzpatrick rejected a similar request to extend the bid deadline by a bidder who had included a financing condition in its bid.[130] In rejecting the request, Justice Fitzpatrick found that the party was given a reasonable opportunity to participate in the SISP and that it had been aware of the opportunity, even before it officially began. Even though the proposed alternative transaction by the unsuccessful bidder was potentially more beneficial to creditors, Justice Fitzpatrick decided that in the overall circumstances, there was "no reason to delay, if not risk, the 'bird in hand' transaction that arose through a reasonable sales process, in the hope that a more uncertain transaction may be finalized."[131]

83. Similarly, in *AbitibiBowater*, the debtor had rejected a higher offer where the purchaser did not have satisfactory evidence of committed financing. Justice Gascon (as he then was) held that "[a] court will not lightly interfere with the exercise of this commercial and business judgment in the context of an asset sale where the marketing and sale process was fair, reasonable, transparent and efficient."[132] The Court went on to state "the Court agrees that the Petitioners and the Monitor were 'entitled to prefer a bird in the hand to two in the bush' and were reasonable in preferring a lower-priced unconditional offer over a higher-priced offer that was subject to ambiguous caveats and unsatisfactory funding commitments."[133]

84. Justice Newbould in *Algoma* heard a motion brought by a union group to qualify a specific bidder as a Phase II Bidder which has been rejected by the Company.[134] In dismissing the motion, the Court found that the decision by the debtor was a decision "that a CCAA court is ill equipped to second-guess" and that under our corporate law, a court "should be loath to interfere with the good faith exercise of the business judgement of directors and officers of a corporation".[135] Justice Newbould went on to state the "reluctance to interfere with the debtor's

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[130] *Quest* at para. 83.
[131] *Quest* at paras. 86-88.
[132] *AbitibiBowater, Re*, 2010 QCCS 1742 at para. 72.
[133] *Ibid* at para. 73.
[134] *Essar Steel Algoma Inc. et al., Re*, 2016 ONSC 3205 [*Algoma*].
[135] *Algoma* at para. 29 citing the Supreme Court's decision in *Peoples Department Stores Inc. (Trustee of) v Wise*, 2004 SCC 68 at

business judgement was even more so in the CCAA proceedings in which the parties, including the party bringing the motion, agreed in the SISP that the decision was to be made not only by the CCAA debtor, but also by highly qualified professionals with great experience in restructuring, being the financial advisor, the CRA, and the Monitor."[136]

85. The Company's decision to declare the Successful Bid and not waive any requirements of the Solicitation Process to qualify Cargill's Phase 2 Bid was made by the Board, with the input and advice of Greenhill and Stikeman, and in consultation with the Monitor, after careful consideration of the available alternatives.[137] Both these decisions were clearly within the Company's authority under the Solicitation Process. This Court should be "loathe" to interfere with and second-guess such a decision.

86. Further, in the circumstances of these CCAA Proceedings, there is no reason to delay, if not risk, the Transactions contemplated by the Subscription Agreement, which arose through a fair and reasonable Solicitation Process, in the hope that a more uncertain (and flawed) transaction with Cargill may be finalized. Time is of the essence. Significant damage may result to Tacora and its stakeholders if the Company does not emerge in a timely manner.

(ii) The Monitor approved the process leading up to the Subscription Agreement.

87. As contemplated by the Solicitation Order, the Monitor was involved in the conduct of the Solicitation Process. In the Monitor's view, the Solicitation Process: (a) is consistent with the principles of Section 36 of the CCAA and provided for a broad, open, fair and transparent process with an appropriate level of independent oversight; (b) encouraged and facilitated bidding by interested parties; and (c) was reasonable in the circumstances.[138] As of the date of the Monitor's Fourth Report, and confirmed in its Supplemental Fourth Report, nothing had come to the Monitor's attention that caused the Monitor concern with the manner in which

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para. 67.
[136] *Ibid*.
[137] Fourth Broking Affidavit at para. 29.
[138] Fourth Report of the Monitor at para. 59.

Tacora conducted the Solicitation Process.[139]

(iii) The Monitor filed a report stating the Transactions are more beneficial to creditors than a sale or disposition under bankruptcy.

88. The Monitor conducted an analysis and concluded that completion of the Transactions would be more beneficial to Tacora's creditors and other stakeholders than a sale or disposition of the business and assets of the Company under a bankruptcy.[140]

(iv) Stakeholders were consulted during the sales process.

89. Tacora consulted with Cargill and the Ad Hoc Group throughout the Pre-Filing Strategic Process.[141] As described above, both groups were also involved in the design of the Solicitation Process.[142] Once the Solicitation Process began, Tacora, Greenhill and the Monitor became aware that both parties intended to act as Bidders and accordingly, limited the sharing of information due to the competitive nature of the Solicitation Process. However, Tacora, Greenhill and the Monitor provided regular updates on the Company's operations to Cargill and the Ad Hoc Group and feedback on their respective Bids. The Monitor is of the view that creditors were adequately consulted and that any further consultation with creditors during the conduct of the Solicitation Process was inappropriate in the circumstances.[143]

90. Cargill complains that Greenhill placed roadblocks on its engagement with financing parties which limited its ability to develop an actionable Bid. Like Cargill's other complaints, this allegation has no merit. Greenhill, in consultation with the Monitor, followed the communication protocol established in the SISP Procedures. The communication protocol permitted Greenhill to run the process so as to generate competitive tension and as many Bids as possible without being "front run" by Bidders.[144] The evidence establishes that Cargill was only limited from discussion with five financing parties during Phase 1 who could have submitted a stand-alone

[139] Fourth Report of the Monitor at para. 59.
[140] Fourth Report of the Monitor at para. 59.
[141] First Nessim Affidavit at para. 5.
[142] Tacora Comeback Decision at paras. 168 and 170.
[143] Fourth Report of the Monitor at para. 59.
[144] Second Nessim Affidavit at paras. 8 and 10.

Bid or were interested in the Offtake Opportunity.[145]

91. Contrary to Cargill's allegations, Greenhill took numerous steps to facilitate Cargill's financing efforts, including, among other things: (a) holding weekly calls with Tacora, the Monitor, Cargill, and Jefferies on the status of operations at Tacora; (b) inviting Cargill and Jefferies to provide names of potential bidders that Greenhill should contact during the Solicitation Process; (c) permitting Cargill to speak with various financing parties during Phase 1 of the Solicitation Process; (d) discussing a term sheet provided by Cargill prior to the Phase 1 Bid Deadline; (e) arranging for recorded management presentations and providing access to the VDR to allow Cargill's potential financing parties to get up to speed as quickly as possible; and (f) following the Phase 1 Bid Deadline, offering each other Phase 1 Bidder (other than the Investors and Bidder #3) an opportunity to engage with Cargill on a potential consortium bid.[146]

(v) The Subscription Agreement benefits the "economic community" and the interests of all parties have been considered.

92. The Subscription Agreement was (and remains) the best and only actionable transaction available to the Company and represents a successful outcome for Tacora and the vast majority of its stakeholders. As set out above, Tacora's secured debt will be paid in full in cash or satisfied through a credit bid, claims of trade creditors will be assumed and all Tacora's employees will maintain their employment. Cargill's proposed Cram-Up Transaction is inferior remains contingent on third party financing that Cargill has been attempting to secure for over a year.

93. The only stakeholder objecting to the Transactions is Cargill. Under the Transactions, Cargill's secured debt will be paid in full, but the Offtake Agreement will be left behind and Tacora will enter into a new marketing agreement with Javelin. This aspect of the Transactions will, by necessity, result in an unsecured claim that will not be satisfied. However, such a result is common in most CCAA restructurings. As noted by Chief Justice Morawetz in *Laurentian*,

[145] Second Nessim Affidavit at para. 11.
[146] Second Nessim Affidavit at para. 13.

"[r]estructurings are not easy and often result in treatment that a party can consider to be extremely harsh."[147]

94. Contrary to Cargill's assertion that "…Tacora essentially ignored the interests of Cargill" [148], in the Company's assessment of the Investors' Bid and the related Board deliberations, specific consideration was given to the fact that the Investors' Bid required the replacement of the Offtake Agreement with a new marketing agreement that would result in the creation of a significant unsecured claim.[149] However, the exclusion of the Offtake Agreement is not an unexpected outcome. The Offtake Agreement was a significant barrier for the Company in its efforts to attract potential acquirors and investors during the Pre-Filing Strategic Process and has prevented Tacora from raising sufficient capital to execute upon its business plan.[150]

95. In recognition of this fact, the Solicitation Process expressly contemplated soliciting offers in respect of the "Offtake Opportunity". Now that the Solicitation Process has concluded the evidence is clear: (a) the Offtake Agreement is not a "market" agreement and, in fact, has been a "one-sided" bargain that has allowed Cargill to profit by over [redacted] while all Tacora's other major stakeholders have lost all or most of the value on their investments.[151]; and (b) no third parties were or are willing to invest in Tacora while the Offtake Agreement remained in place.[152]

96. In evaluating whether to approve the Transactions, the Court is not required to be satisfied that all creditors will receive full recovery, but rather that the proposed sale will be beneficial to the "economic community".[153] In granting an RVO, the Court in *Quest* considered the competing interests between the objecting unsecured creditors and the significant broad stakeholder groups who stood to benefit from the RVO and found that the transaction was

[147] *Laurentian University of Sudbury (Re)*, 2021 ONSC 3272 at para. 72.
[148] Lehtinen Affidavit at para. 107.
[149] Fourth Broking Affidavit at para. 29.
[150] First Nessim Affidavit at paras. 5-6; Sixth Broking Affidavit at para. 11.
[151] Sixth Broking Affidavit at paras. 15-16.
[152] First Nessim Affidavit at paras. 5-6; Sixth Broking Affidavit at para. 11.
[153] *Nortel Networks Corp (Re)*, 2009 CanLII 39492 (ON SC) at paras. 47-58; and *Brainhunter Inc. (Re)*, 2009 CanLII 72333 (ON SC) at para. 13.

unquestionably the fairest and most reasonable means by which the greatest benefit could be achieved for the overall stakeholder group.[154]

97. The Subscription Agreement provides a favourable outcome to the Company and its stakeholders generally and is the best outcome available in the circumstances. This view is supported by the Monitor who opined that any potential prejudice to Cargill is outweighed by the benefits of the Transactions to Tacora's stakeholders as a whole.[155]

98. In addition, Cargill: (a) knew it needed a winning bid to preserve the Offtake Agreement[156]; (b) knew it needed to pay secured creditors to secure the winning bid[157]; (c) had the requisite knowledge and the financial wherewithal to submit a winning bid[158]; (d) had been working to secure financing since January 2023[159] and had been attempting to advance a "Cargill backstopped offer" since May 2023[160]; and (e) actively chose not to submit a Phase 2 Qualified Bid, preferring instead to submit a non-compliant Bid.

99. In opposing approval of the Successful Bid, Cargill has nakedly been attempting to gain a "veto" over Tacora's restructuring. As Cargill's witnesses admitted under cross-examination, Cargill's primary objective throughout Tacora's year long restructuring efforts has been to maintain the benefit of the Offtake Agreement.[161] As set out above, the Offtake Agreement is an uneconomic agreement that undermines Tacora's ability to restructure. Cargill is in effect attempting to force Tacora and the Ad Hoc Group to negotiate a less favourable transaction to the detriment of the Company and its other stakeholders. To allow a single unsecured creditor with an uneconomic agreement to hold the debtor and its other stakeholders hostage is contrary to the well-established principles of the CCAA.[162]

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[154] *Quest* at para. 178.
[155] Fourth Report of the Monitor at para. 53.
[156] Confidential Exhibit No. 3 to Lehtinen Cross Examination.
[157] Confidential Exhibit No. 3 to Lehtinen Cross Examination.
[158] Carrelo Cross Examination at Q. 282.
[159] Carrelo Cross Examination at Q. 320.
[160] Exhibit "F" to Lehtinen Affidavit.
[161] Matican Cross Examination at Q. 89; Lehtinen Cross Examination at Q. 232; Carrelo Cross Examination at Qs. 204 and 403-404.
[162] *Re Calpine Canada Energy Limited (Companies' Creditors Arrangement Act)*, 2007 ABCA 266 at para 38.

(vi) The consideration to be received for Tacora's assets is reasonable and fair, taking into account their market value.

100. The consideration payable under the Subscription Agreement is fair and reasonable as the Investors' Phase 2 Qualified Bid represents the highest, best and only actionable transaction received by the Company during the Pre-Filing Strategic Process and the Solicitation Process. The results of both processes demonstrate that no other party among the universe of potential purchasers was willing to pay more for Tacora and/or its assets than the Investors.

101. The Monitor is of the view that the consideration is reasonable and fair, taking into account Tacora's market value. The Investors' Bid was the best and highest bid received through the Solicitation Process.[163] No superior bid was received in compliance with the Solicitation Process. As stated in the Monitor's Fourth Report, the Monitor has no evidence to suggest that the value provided under the Subscription Agreement is not fair and reasonable.[164]

(vii) Assumption of most of Tacora's agreements and exclusion of the Offtake Agreement is appropriate.

102. Cargill criticizes the Transactions as isolating and prejudicing Cargill, as it will result in an unsecured claim that will not be satisfied, whereas the Transactions provide significant, if not full recovery, to Tacora's other unsecured creditors.[165] The jurisprudence on this point is clear – creditors' interests should be taken into consideration as a factor for approval of a transaction; however, those interests should be considered as part of the broader review of all key factors and impacts of a potential transaction and be balanced against such other factors.[166]

103. In *Grafton-Fraser*, this Court determined that a purchaser may assume certain of the CCAA debtor's obligations in the context of a sale of the debtor company's business, including pre-filing amounts owed by the debtor to certain suppliers of goods and services, but not other suppliers.[167] The Court applied the same principles in *Nelson Education*.[168] There is no basis to criticize the Transactions on the basis that the Subscription Agreement assumed the majority of

[163] Fourth Broking Affidavit at para. 36.
[164] Fourth Report of the Monitor at para. 59.
[165] Lehtinen Affidavit at paras. 17-18.
[166] *Grafton-Fraser Inc. v Cadillace Fairview Corp.*, at para. 23 [*Grafton-Fraser*].
[167] *Grafton Fraser* at paras. 21-23.
[168] *Nelson Education Ltd., Re* 2015 ONSC 5557 [*Nelson Education*].

contracts and agreements of Tacora, but not the Offtake Agreement – the Offtake Agreement is a "non-market", uneconomic agreement, and the root cause of issues that Tacora is facing.

B. The Reverse Vesting Structure is Appropriate in the Circumstances

104. The Subscription Agreement contemplates an RVO that vests and transfers the Excluded Assets, Excluded Contracts, and Excluded Liabilities to ResidualCo. The Excluded Contracts include the Offtake Agreement.

105. The jurisdiction to approve a transaction implemented through an RVO is found in section 11 of the CCAA, which gives the Court broad powers to make any order it thinks fit.[169] Section 36 of the CCAA is also relevant in providing guidance to the Court of the factors to be considered in exercising its discretion to approve a transaction and granting the Court jurisdiction to vest off "other restrictions".[170]

106. Courts across the country have considered and accepted this jurisdiction and applied it in approving RVOs in over 50 cases. The Court's jurisdiction is beyond doubt. A number of respected commercial courts and judges have opined on when an RVO may be appropriate. The jurisprudence 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.[171]

107. 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;

[169] *Blackrock Metals*, *supra* at para. 87; *Quest, supra* at para. 27;*Harte Gold*, *supra* at paras. 36-37.
[170] *Just Energy*, *supra* at paras. 30-31.
[171] See *Blackrock Metals*, *supra* at paras. 114-116; *Harte Gold, supra* at para. 71; *Acerus Pharmaceuticals Corporation (Re)*, 2023 ONSC 3314 at paras. 13-14 and 21 [*Acerus*]; *Quest University*, *supra* at para. 136, 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 attr butes, and para. 142, referring to the RVO granted in *JMB Crushing Systems Inc. (Re)*, 2020 ABQB 763 to preserve both licenses and tax attributes.

(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.[172]

(i) The proposed RVO is necessary in the circumstances.

108. Tacora operates in the highly regulated mining industry where RVOs are frequently used to facilitate sale transactions.[173] Tacora maintains eight material permits and licenses and six mining claims, leases, and other property rights that are required to maintain its mining operations and allow Tacora to perform exploration work on various parts of the Scully Mine, as well as other forest resource licenses and fire permits. Some of these permits and licences are non-assignable and cannot be transferred.[174] Each of these permits and licenses would need to be in place for any prospective purchaser to continue operations at the Scully Mine.[175] The reverse vesting structure will permit Tacora to maintain its permits and licenses without the delays and potentially significant risks and costs associated with attempting to transfer them in a traditional asset sale.[176] As set out above, significant delays in Tacora emerging from these CCAA Proceedings risks substantial damage to Tacora and its stakeholders.

109. Cargill implies through its evidence that Tacora could have sought the necessary approvals related to permits and licenses within a reasonable amount of time on the basis that the sale of the Scully Mine to Tacora took six weeks to close.[177] However, the circumstances of that sale were entirely different than these CCAA Proceedings. In 2017, the mine was not operating and had been previously placed on care and maintenance. There is no certainty that

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[172] *Harte Gold, supra* at para. 38; *CannaPiece*, *supra* at para. 52; *Just Energy*, *supra* at para. 33.
[173] See for example, *Arrangement relatif à Nemaska Lithium Inc.*, 2020 QCCA 1488 where a RVO granted in October 2020 by the Court in respect of a chemical company operating a spodumene mine and commercializing lithium hydroxide; *Harte Gold* where this Court a RVO was granted in February 2022 in respect of a gold producer operating a gold mine in northern Ontario; *Blackrock Metals*, where RVO granted in June 2022 by the Superior Court of Québec in respect of a metals and materials manufacturing business; *PricewaterhouseCoopers Inc. v Canada Fluorspar (NL) Inc.*, 2023 NLSC 88, where the Court granted an RVO in June 2023 in respect of a company operating a fluorspar mine; *Rambler Metals and Mining Limited, Re*, 2023 NLSC 134, where the Court granted an RVO in September 2023 in respect of a copper and gold mining and development company operating a copper and gold mine.
[174] Exhibit "P" to Lehtinen Affidavit.
[175] Fourth Broking Affidavit at para. 46.
[176] Fourth Broking Affidavit at paras. 48-49.
[177] Lehtinen Affidavit at para. 21.

the approval process could be as efficient today.[178] Additionally, Cargill has alleged that Tacora should have pursued a transfer of permits and licenses in parallel with Court approval of the Transactions.[179] Cargill's complaint is not reflective of the actual approval process where governmental authorities require a definitive transaction to review and consider or, where the permits and licenses are non-assignable, a new entity to make the relevant application.[180] Neither exist in this case such that the permit and licence process for a hypothetical asset sale could have proceeded in parallel with Court approval.

110. The evidence on this motion establishes that the Board was provided with advice from McInnes Cooper, Tacora's local counsel, on the transfer process related to permits and licenses,[181] which was considered at the January 24 Board Meeting and "there were a lot of discussions that the board had about structures and structuring a deal."[182] Mr. Broking's evidence on the difficulty of transferring permits and licenses was informed by legal advice, knowledge of the permits and licenses application process when the Scully Mine was acquired in 2017, knowledge of the actual permits and licences that Tacora requires to operate and knowledge of Tacora's relationship with governmental authorities and indigenous and community groups. Mr. Broking's evidence was unchallenged on cross-examination.

111. The reverse vesting structure will also permit Tacora to preserve Tacora's tax attributes. Tacora has aggregate net operating losses and other attributes totaling over $650 million.[183] Cargill's internal estimate values these tax attributes at "$30 – $50 million."[184] Each Phase 2 Bidder confirmed the tax attributes were a necessary part of the transaction. Bidder #3 contemplated completing a transaction through an RVO and Cargill, despite purporting to structure its transaction as an asset sale (in which tax attributes cannot be preserved), included

[178] First Broking Affidavit at para. 20.
[179] Exhibit "O" to Lehtinen Affidavit.
[180] Exhibit "P" to Lehtinen Affidavit.
[181] Exhibit No. 6 to Jackson Cross Examination; Nessim Cross Examination at Q. 192.
[182] Broking Cross Examination at Q 296.
[183] Fourth Broking Affidavit at para. 51.
[184] Exhibit No. 12 to Lehtinen Cross Examination.

a condition in its Bid that all tax attributes must be maintained in a manner satisfactory to Cargill, in its sole discretion.[185]

112. The advantages associated with a reverse vesting structure (particularly the ability to preserve the tax attributes) were an important consideration for the Investors in pricing their Phase 2 Qualified Bid.[186] The Subscription Agreement contains a "toggle feature" permitting a pivot to an asset purchase if the RVO is not accepted. However, in that case the parties are required to negotiate in good faith a purchase price adjustment, which creates uncertainty for Tacora and could significantly prejudice Tacora's stakeholders who currently stand to receive significant recovery under the Subscription Agreement (including Cargill in respect of its secured debt).[187]

113. Allowing Tacora to maintain the tax attributes does not prejudice Cargill or any other creditor of Tacora – the tax attributes have *de minimis* to no value to any person not operating the Scully Mine. If the Scully Mine is conveyed pursuant to an asset sale and the tax attributes are left behind in Tacora, any future usage of the tax losses will be severely limited by Section 111(5) of the *Income Tax Act*.[188] Upon a change of control (referred to as a loss restriction event), tax losses can only be used to offset profits generated from "that business" (i.e. the business that generated the losses).[189] In evaluating, whether the entity remains carrying on "that business", tax authorities examine, among other things, the (a) location of the business carried on before and after the acquisition of control; (b) nature of the business; (c) name of the business; and (d) existence of a period or periods of dormancy.[190] In *NRT Technology Corp.*, the Tax Court of Canada held that once operations cease (which would be the case if the Scully Mine was sold), tax losses cannot be used by a future acquiror.[191] The Monitor also confirmed

[185] Exhibit "G" to Lehtinen Affidavit.
[186] Fourth Broking Affidavit at para. 52.
[187] Fourth Broking Affidavit at para. 53.
[188] *Income Tax Act*, RSC 1985, c 1 (5th Supp), s. 111(5).
[189] Government Publications — Interpretation Bulletins, Interpretation Bulletin, IT-302R3 -- Losses of a Corporation—The Effect that Acquisitions of Control, Amalgamations, and Windings-up have on Their Deductibility—After January 15, 1987 at para. 14
[190] *Ibid* at para. 14.
[191] *NRT Technology Corp. v. R*, 2012 TCC 420 at paras. 35 – 49 (aff'd at 2013 FCA 221)

that "there is a high degree of uncertainty with respect to the possible monetization of tax attributes following an asset sale."[192]

114. Cargill's complaints about the Investors and Tacora receiving the benefits of the tax attributes is not based on a legitimate, good faith belief that Tacora is improvidently selling the tax attributes. In internal documents, Cargill summarizes the loss restriction event rules and notes that it is [redacted][193] Mr. Carrelo noted in text messages that "there are a lot of accrued operating losses in Tacora", which Cargill was analyzing "but [Cargill's] Canadian business tend to be beef and corn" and therefore the losses were "difficult to take advantage from work [Cargill] ha[s] done to date."[194] The complaints are simply part of Cargill's overall strategy to frustrate the Subscription Agreement in its effort to preserve the Offtake Agreement. If the RVO structure is denied, Tacora and its stakeholders will be prejudiced without generating any value for Cargill.

(ii) The Subscription Agreement and the Transactions produce the best economic result for Tacora and its stakeholders in the circumstances.

115. As described above, the Subscription Agreement (a) was the product of the broad market canvass through the Pre-Filing Solicitation Process and the Solicitation Process, (b) is the best and only actionable transaction available to Tacora, and (c) results in significant benefits for the "economic community" consisting of Tacora and its stakeholders. The benefits of the Subscription Agreement include the following features, among others:

(a) payment in full in cash of Tacora's senior priority debt, including the DIP Facility, the Senior Priority Notes, and Cargill's Margin Advances;

(b) payment in full in cash of the APF (including the Post-Filing Credit Extensions) net of any set-off claims against Cargill;

(c) cancellation of the Senior Secured Notes through the Investors' credit bid;

(d) extension of the maturity profile of Tacora's secured debt to allow it time to execute upon its business plan;

(e) assumption of all Tacora's equipment capital leases, Pre-Filing Trade Amounts and Post-Filing Trade Amounts;

(f) continued employment of all current employees;

[192] Supplemental Fourth Report at para. 31
[193] Confidential Exhibit No. 12 to Lehtinen Cross Examination.
[194] Exhibit No. 5 to Carrelo Cross Examination.

(g) provision of new marketing arrangements with Javelin on more favourable terms than the Offtake Agreement.[195]

116. The Subscription Agreement also mirrors the treatment that contractual counterparties, whose contracts are being retained, would have received in a traditional asset sale transaction. For example, although no contracts are being assigned pursuant to the Transactions, the Subscription Agreement provides for the payment of all Cure Costs owing under the Retained Contracts in respect of amounts not disputed by Tacora.[196]

117. Cargill is expected to assert that the Cram-Up Transaction is a "viable alternative" and produces a better economic result than the Subscription Agreement. The Cram-Up Transaction is not viable. Rather, it was, and remains, contingent, unfinanced and flawed. A debtor and its creditors are not required delay or risk a committed transaction with the hope that some future transaction may emerge.[197] In *Nelson Education*, in a transaction where second lien lenders were to be "wipe[d] out", Justice Newbould recognized that "[t]he first lien lenders however are not obliged to wait in the hopes of some future result. As the senior secured creditor, they have priority over the interests of the second lien lenders."[198]

118. There is also only one stakeholder that benefits from the Cram-Up Transaction – Cargill. Tacora and all other stakeholders are undoubtedly worse off. Even assuming Cargill could raise sufficient financing to support its preferred outcome, the Cram-Up Transaction is not the so-called "consensual" transaction that Cargill claims to desire. The Cram-Up Transaction seeks to impose a hostile, non-consensual transaction on Tacora's largest secured creditor group – the Senior Noteholders. Moreover, the Cram-Up Transaction is fundamentally flawed:

(a) it would leave Tacora undercapitalized, with minimal funding for the required expenditures to ramp up production at the Scully Mine. A problem that has been exacerbated since the Phase 2 Bid Deadline due the precipitous fall in iron ore prices;[199]

(b) it seeks to reinstate the Senior Notes, a level of debt which has previously proven to be unsustainable for Tacora; and[200]

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[195] Fourth Broking Affidavit at paras. 41-44.
[196] Fourth Broking Affidavit at para. 54.
[197] *Quest*, *supra* at para. 88; *Abitibi*, *supra* at paras. 83-84 and 87.
[198] *Nelson Education, supra* at para. 38(e).
[199] Sixth Broking Affidavit at para. 9.
[200] Sixth Broking Affidavit at para. 10.

(c) it seeks to maintain the Offtake Agreement, which has previously proven to inhibit Tacora's ability to raise capital.[201]

119. In short, the effect of the Cram-Up Transaction would be to place Tacora back where it was at the end of 2022 suffering from the same capital structure and offtake agreement that led to its financial difficulties and these CCAA Proceedings. This is the preferred approach of Cargill because it preserves its off-market Offtake Agreement. However, it is clearly not in Tacora's or its stakeholders' best interests to emerge from these CCAA Proceedings without solving the very same issues which caused the CCAA filing in the first place. Nor it is consistent with the remedial purpose of the CCAA. As the Supreme Court of Canada recognized in *Callidus*, the CCAA prioritizes "attempt[ing] to facilitate the reorganization and survival of the pre-filing debtor company in an operational state — that is, as a going concern."[202]

(iii) The RVO structure does not result in any stakeholder being worse off than they would have been under any other viable alternative.

120. The RVO structure does not result in material prejudice or impairment to any of Tacora's creditors' rights, including Cargill, that they would not otherwise suffer under a traditional asset sale structure.[203] The impact of transferring the Offtake Agreement to ResidualCo is the same under an RVO as under a traditional asset sale transaction where Tacora is left as an empty-shell. In both scenarios, Cargill's unsecured claim will remain unsatisfied. In addition, as stated above, Cargill will suffer no prejudice as a result of the retention of the tax losses.

(iv) The consideration payable pursuant to the Subscription Agreement is fair, reasonable, and reflects the importance of the assets being preserved under the RVO structure.

121. The consideration is fair and reasonable, as confirmed by the results of the Pre-Filing Strategic Process and the Solicitation Process. In addition to the various benefits of the Transactions set out above, the consideration payable pursuant to the Subscription Agreement reflects the importance of: (a) maintaining the benefit of the required permits and licenses without incurring the delay and risk associated with attempting to transfer same in a traditional

[201] Sixth Broking Affidavit at para. 10.
[202] *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 at para. 41. [*Callidus*]
[203] Fourth Broking Affidavit at para. 54.

asset sale; and (b) preserving Tacora's tax attributes. This is exactly the type of case where courts have found RVOs to be appropriate.[204] As set out above, the Monitor is of the view that the consideration is reasonable and fair, taking into account Tacora's market value.[205]

C. The Offtake Agreement Needs to be Transferred to ResidualCo

122. The core issue in these CCAA Proceedings is whether Tacora can shed the yoke of the Offtake Agreement in order to restructure as part of the best and only viable transaction available to the Company after a broad market canvass pursuant to a Court-approved sales process or is Tacora stuck in perpetuity with an unfavourable contract that restricts ability to attract capital to sustainably operate as a going-concern. The Company submits that anything but permitting Tacora to emerge without the Offtake Agreement would be antithetical to the remedial purpose of the CCAA and objective of allowing debtors to successfully rehabilitate and restructure.[206]

123. Section 11 of the CCAA allows the Court to make any order it considers appropriate in the circumstances. Subsection 36(6) of the CCAA expressly provides that "[t]he court may authorize a sale or disposition free and clear of any security, charge or other restriction…".[207] The provision obviously extends to unsecured contracts and claims such as the Offtake Agreement.

124. In *Quest*, in vesting off a lease that was registered on title, Justice Fitzpatrick noted the counterparty's rights were "purely contractual"[208] and the authority under Subsection 36(6) extends to RVO transactions.[209] In *Bellatrix Two*, in the context of a dispute regarding whether an "eligible financial contract" is required to be performed, Justice Romaine held that a right to mandatory performance of a contract by a CCAA debtor "would thwart the objectives of the CCAA, since compelling a CCAA debtor to performs an EFC that it cannot afford to perform would in many cases affect its ability to attempt to restructure"[210] and "[i]mplying an obligation to perform an uneconomic contract that may affect the ability of the CCAA debtor to attempt to

[204] *Just Energy*, *supra* at paras. 30-31.
[205] Fourth Report of the Monitor at para. 59.
[206] *Callidus, supra* at para. 41.
[207] CCAA, s. 36(6).
[208] *Quest* at para. 37.
[209] *Quest* at para. 40.
[210] *Bellatrix Exploration Ltd (Re)*, 2020 ABQB 809 at para. 43. [*Bellatrix Two*]

restructure would require more direct statutory language."[211] In *Dundee*, Justice Dunphy noted, "[b]ankruptcy and insolvency always involves a balancing of a number of such competing interests. Creditors, contract counterparties - all of these have rights arising under agreements with the debtor that are either actually compromised or at risk of being compromised by insolvency. The CCAA and BIA regimes are predicated on facilitating a pragmatic approach to minimize the damage arising from insolvency more than they are concerned with advancing the interests of one stakeholder over another."[212]

125. The principles espoused above are equally applicable to this case. [redacted] Cargill acknowledges internally that the "tremendous value" [213] of the Offtake Agreement is value taken away from Tacora.[214] Third party investors know this and the Offtake Agreement was a key reason why no third parties were willing to invest during the broad Pre-Filing Strategic Process which was premised on an out-of-court solution that kept the Offtake Agreement.

126. Fundamentally, the Offtake Agreement is at the heart of Tacora's problems. As the Monitor notes in its Supplemental Fourth Report, "Tacora is … of the view that the Cargill Offtake Agreement is 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." The Monitor goes on to state "[t]he Monitor agrees with this conclusion."[215]

127. Cargill will attempt to distract the Court from this core issue by alleging prejudice resulting from an RVO, attempting to advance the non-viable Cram-Up Transaction, continuing with its preliminary threshold motion (which the Company will fully address in its responding factum) and, no doubt, other dubious arguments. However, the focus needs to remain on the

[211] *Ibid* at para. 47.
[212] *Dundee Oil and Gas Limited (Re)*, 2018 ONSC 3678 at para. 29
[213] Matican Cross Examination at Qs 55-58.
[214] Confidential Exhibit No. 14 to Matican Cross Examination.
[215] Supplemental Fourth Report at para. 29.

key question of these CCAA Proceedings: can a single contractual counterparty frustrate a debtor's restructuring efforts to preserve a burdensome, uneconomic contract that solely benefits that counterparty? Tacora submits the answer is obvious – the Offtake Agreement can and should be vested in connection with the Transactions.

D. The Releases in the Approval and Reverse Vesting Order Should be Granted

(i) The Court has Jurisdiction to Approve the Releases

128. The proposed Approval and Reverse Vesting Order includes Releases in favour of: (a) Tacora, ResidualCo, and ResidualNoteCo and their respective present and former directors, officers, employees, legal counsel and advisors; (b) the Monitor, its legal counsel, and their respective present and former directors, officers, partners, employees and advisors; (c) the Notes Trustee and its respective present and former directors, officers, partners, employees and advisors; and (d) the Investors and their respective present and former directors, officers, employees, legal counsel and advisors (collectively, the "**Released Parties**").

129. The Releases cover any and all present and future liabilities of any nature or kind in connection with the CCAA Proceedings, the Subscription Agreement and related documents, and Tacora's assets, business or affairs, other than any claim that is not permitted to be released pursuant to Subsection 5.1(2) of the CCAA.[216]

130. It is now commonplace for third party releases in favour of the parties to a restructuring, their professional advisors, their directors and officers, and the Monitor to be approved outside of a CCAA plan in the context of a transaction, including in the context of RVO transactions.[217] In approving releases in *Harte Gold*, Justice Penny, citing Chief Justice Morawetz decision in *Lydian*, applied the following criteria ordinarily considered with respect to third-party releases provided for under a plan:

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[216] Fourth Broking Affidavit at para. 79.

[217] *Blackrock Metals, supra*, at para 128; Harte Gold at para 79; *Green Relief Inc. (Re)*, 2020 ONSC 6837 at para. 76; *Nelson, supra* at para. 49; *Golf Town Canada Holdings Inc. (Re)* (March 29, 2018), Toronto, CV-16-11527-00CL (CCAA Termination Order) (ONSC); *Green Growth Brands Inc. et al. (Re)*, (May 19, 2021), Toronto, Court File No. CV-20-00641220-00CL (Order Terminating CCAA Proceedings) (ONSC); *Fire & Flower Holdings Corp. (Re)*, (August 29, 2023), Toronto, Court File No. CV-23-00700581-00CL (Approval and Reverse Vesting Order).

(a) whether the claims to be released are rationally connected to the purpose of the restructuring;

(b) whether the release contributed to the restructuring;

(c) whether the release is fair, reasonable and not overly broad;

(d) whether the restructuring could succeed without the release;

(e) whether the release benefits the debtor as well as the creditors generally; and

(f) creditors' knowledge of the nature and the effect of the releases.[218]

131. It is not necessary for each of the above factors to apply for a release to be approved.[219]

(ii) The Releases Should be Granted in the Circumstances

132. The Releases are aligned with the *Lydian* factors applied in *Harte Gold* and *Green Relief*, are consistent with releases previously approved by this Court, are reasonable and appropriate in the circumstances[220], and should be granted:

(a) **The claims to be released are rationally connected to the purpose of the restructuring**. The Releases will have the effect of diminishing claims against the Released Parties, which in turn will diminish indemnification claims by the Released Parties against the Administration Charge and the D&O Charge. Given that a purpose of a CCAA proceeding is to maximize creditor recovery, a release that helps achieve this goal is rationally connected to the purpose of Tacora's restructuring.

(b) **The Released Parties made significant contributions to the restructuring**. Among other things, the directors and officers of Tacora and the Company's advisors were instrumental in the conduct of the Company's efforts to address its financial difficulties, the Strategic Process, the CCAA Proceedings, and negotiating the Successful Bid, which provide for a going concern solution for Tacora's business and represents the best offer and only executable transaction available to the Company. The Monitor and its counsel also made significant and

[218] *Harte Gold*, *supra* at paras. 78-86; *Lydian International Limited (Re)*, 2020 ONSC 4006 at para. 54. [*Lydian*]. See also *Green Relief*, *supra*, where Justice Koehnen also cited Chief Justice Morawetz's decision in *Lydian.*
[219] *Harte Gold*, *supra* at para. 80.
[220] *Harte Gold*, *supra* at para. 80; *Acerus*, *supra* at para. 38; *Green Relief*, *supra* at paras. 27-30.

material contributions in connection with the CCAA Proceedings and the Transactions. The Subscription Agreement, which represents the highest and best offer for the Tacora's business, was submitted by the Investors. Given the successful outcome for the Company and its stakeholders, the time, energy, and resources contributed to achieve this outcome are deserving of the Releases.

(c) **The Releases are fair, reasonable and not overly broad**. Tacora is unaware of any outstanding claim against its directors or officers, the Company's advisors or the Monitor and its counsel. As such, the Releases are not expected to materially prejudice any stakeholders. Further, the Releases are sufficiently narrow in the circumstances, as they explicitly carve out any claims (a) resulting from fraud or wilful misconduct; or (b) that are not permitted to be released pursuant to s. 5.1(2) of the CCAA.[221]

(d) **The Applicant's restructuring could be jeopardized without the Releases**. The restructuring of Tacora, manifested in the closing of the Transactions, is dependent on the efforts of the Released Parties. The Releases will bring certainty and finality for the Released Parties, who have worked in the best interests of Tacora and its stakeholders. In *Harte Gold*, Justice Penny noted that the Company and the purchaser both took the position that the proposed releases were an essential component to the transaction.[222] The Monitor is of the view that each of the Released Parties was a necessary part of the successful restructuring.[223]

(e) **The Releases benefit Tacora as well as the creditors generally** by reducing the potential for claims against the Released Parties and the Released Parties seeking indemnification from Tacora, thus minimizing further claims against the Administration Charge and the D&O Charge.

[221] Fourth Broking Affidavit at para. 79.
[222] *Harte Gold*, *supra* at para. 84.
[223] Fourth Report of the Monitor at para. 57.

(f) **All creditors and contractual counterparties have knowledge of the nature and effect of the Releases**. Throughout the CCAA Proceedings, Tacora has issued press releases announcing that it had filed for CCAA protection, commenced the Solicitation Process and entered into the Subscription Agreement. Further, the Service List will have received nine weeks notice of this motion.[224]

133. The Monitor is of the view that, having considered the facts of the situation, each of the Released Parties contributed meaningfully and was necessary to Tacora's efforts to address its financial difficulties, the Pre-Filing Strategic Process, the Solicitation Process, the CCAA Proceedings, and the Transactions, and each of the Released Parties was also a necessary part of the successful restructuring.[225] Accordingly, the Monitor is of the view that the proposed Releases are reasonable and not overly broad in the circumstances and supports the granting of the Releases.[226]

PART V – ORDER SOUGHT

134. For the reasons set out above, the Applicant respectfully submits that this Court should grant the Approval and Reverse Vesting Order in the form attached to the Applicant's Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of March, 2024.

/s Stikeman Elliott LLP

STIKEMAN ELLIOTT LLP

[224] *Ibid* at para. 80.
[225] Fourth Report of the Monitor at para. 57.
[226] Fourth Report of the Monitor at para. 58.

SCHEDULE "A"
LIST OF AUTHORITIES

Cases

1. *Royal Bank of Canada v Soundair Corp.*, 1991 CanLII 2727 (Ont. CA)
2. *Harte Gold (Re)*, 2022 ONSC 653
3. *In the Matter of the Companies' Creditors Arrangement Act and In the Matter of CannaPiece Group Inc.*, 2023 ONSC 841
4. *Just Energy Group Inc. et. al. v Morgan Stanley Capital Group Inc. et. al.*, 2022 ONSC 6354
5. *Quest University (Re)*, 2020 BCSC 1883
6. *Veris Gold Corp., Re*, 2015 BCSC 1204
7. *White Birch Paper Holding Co., Re*, 2010 QCCS 4915
8. *Tacora Resources Inc. (Re),* 2023 ONSC 6126
9. *Arrangement relatif à Blackrock Metals Inc.*, 2022 QCCS 2828
10. *White Birch Paper Holding Co., Re*, 2010 QCCS 4915
11. *Boutiques San Francisco Inc., Re*, 2004 CanLII 480 (QCCS)
12. *BDC Venture Capital Inc. v. Natural Convergence Inc.*, 2009 ONCA 665,
13. *Skyepharma PLC v. Hyal Pharmaceutical Corporation, 2000 CanLII 5650 (ON CA)*
14. *AbitibiBowater, Re*, 2010 QCCS 1742
15. *Essar Steel Algoma Inc. et al., Re*, 2016 ONSC 3205
16. *Peoples Department Stores Inc. (Trustee of) v Wise*, 2004 SCC 68
17. *Laurentian University of Sudbury (Re)*, 2021 ONSC 3272
18. *Nortel Networks Corp (Re)*, 2009 CanLII 39492 (ON SC)
19. *Brainhunter Inc. (Re),* 2009 CanLII 72333 (ON SC)
20. *Re Calpine Canada Energy Limited (Companies' Creditors Arrangement Act)*, 2007 ABCA 266

21. *Grafton-Fraser Inc. v Cadillac Fairview Corp.*, 2017 ONSC 2496

22. *Re Nelson Education Limited*, 2015 ONSC 5557

23. *Acerus Pharmaceuticals Corporation (Re)*, 2023 ONSC 3314

24. *JMB Crushing Systems Inc. (Re)*, 2020 ABQB 763

25. *Arrangement relatif à Nemaska Lithium Inc.*, 2020 QCCA 1488

26. *PricewaterhouseCoopers Inc. v Canada Fluorspar (NL) Inc.*, 2023 NLSC 88

27. *Rambler Metals and Mining Limited, Re*, 2023 NLSC 134

28. *NRT Technology Corp. v. R*, 2012 TCC 420

29. *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 (CanLII), [2020] 1 SCR 521

30. *Green Relief Inc. (Re)*, 2020 ONSC 6837

31. *Lydian International Limited (Re)*, 2020 ONSC 4006

32. *Dundee Oil and Gas Limited (Re)*, 2018 ONSC 3678

33. *Bellatrix Exploration Ltd (Re)*, 2020 ABQB 809

Other Authorities

34. Canada Revenue Agency, "Losses of a Corporation—The Effect that Acquisitions of Control, Amalgamations, and Windings-up have on Their Deductibility—After January 15, 1987" (February 28, 1994): Interpretation Bulletins, Interpretation Bulletin IT-302R3

SCHEDULE "B"
RELEVANT LEGISLATION

***Companies' Creditors Arrangement Act*, RSC 1985, c C-36**

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.

Income Tax Act, RSC 1985, c 1 (5th Supp)

Loss restriction event — non-capital losses and farm losses

111(5) If at any time a taxpayer is subject to a loss restriction event,

(a) no amount in respect of the taxpayer's non-capital loss or farm loss for a taxation year that ended before that time is deductible by the taxpayer for a taxation year that ends after that time, except that the portion of the taxpayer's non-capital loss or farm loss, as the case may be, for a taxation year that ended before that time as may reasonably be regarded as the taxpayer's loss from carrying on a business and, if a business was carried on by the taxpayer in that year, the portion of the non-capital loss as may reasonably be regarded as being in respect of an amount deductible under paragraph 110(1)(k) in computing the taxpayer's taxable income for that year is deductible by the taxpayer for a particular taxation year that ends after that time

(i) only if that business was carried on by the taxpayer for profit or with a reasonable expectation of profit throughout the particular year, and

(ii) only to the extent of the total of the taxpayer's income for the particular year from

(A) that business, and

(B) if properties were sold, leased, rented or developed or services rendered in the course of carrying on that business before that time, any other business substantially all the income of which was derived from the sale, leasing, rental or development, as the case may be, of similar properties or the rendering of similar services; and

(b) no amount in respect of the taxpayer's non-capital loss or farm loss for a taxation year that ends after that time is deductible by the taxpayer for a taxation year that ended before that time, except that the portion of the taxpayer's non-capital loss or farm loss, as the case may be, for a taxation year that ended after that time as may reasonably be regarded as the taxpayer's loss from carrying on a business and, if a business was carried on by the taxpayer in that year, the portion of the non-capital loss as may reasonably be regarded as being in respect of an amount deductible under paragraph 110(1)(k) in computing the taxpayer's taxable income for that year is deductible by the taxpayer for a particular taxation year that ends before that time

(i) only if throughout the taxation year and in the particular year that business was carried on by the taxpayer for profit or with a reasonable expectation of profit, and

(ii) only to the extent of the taxpayer's income for the particular year from

(A) that business, and

(B) if properties were sold, leased, rented or developed or services rendered in the course of carrying on that business before that time, any other business substantially all the income of which was derived from the sale, leasing, rental or development, as the case may be, of similar properties or the rendering of similar services.

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

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(Re: Approval of Successful Bid)

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