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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

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

(Applicant)

REPLY FACTUM OF THE APPLICANT
(RE: MFC DISPUTE)

April 14, 2024

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TO: THE SERVICE LIST

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1. For the Court's reference, the party's respective positions on the royalty payments owed by Tacora to MFC are set out in table form at Appendix "A" of this reply factum.

A. MFC Unnecessarily Complicates the Arm's Length Analysis

2. According to the Supreme Court, the first step in any contractual interpretation exercise is simply to read the contract as a whole.[1] In this case, the plain language of paragraph (j) of the Scully Mine Lease provides that the parties are to apply the j(i) calculation method where the iron ore is sold pursuant to an "arm's length *bona fide* contract of sale". Only if this is not true (i.e., "the Lessee *otherwise* sells Iron Ore Products") does the analysis proceeds to j(ii).[2] The analysis therefore must hinge on if the Offtake Agreement was entered into at arm's length.

3. The most that MFC can say of its factum, is that Tacora and Cargill have been "non-arm's length… since at least 2018…".[3] Tacora disputes that it has ever been non-arm's length with Cargill, but even MFC appears to acknowledge that a credible claim of a non-arm's length relationship cannot be made when the Offtake Agreement was originally entered into in 2017.

4. MFC devotes over 10 pages of its factum to setting out a "strict" and "flexible" taxonomy of cases dealing with the meaning of "arm's length".[4] To the extent there are any differences in approach in the case law, the differences are slight. The "flexible" approach cases identified by MFC stand for the proposition (reproduced three times in MFC's factum) that the transaction will

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[1] *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at para 47.
[2] Affidavit of Joe Broking sworn March 21, 2024 ("**Broking Affidavit**"), Exhibit "A", definition (j).
[3] Factum of MFC dated April 12, 2024 ("**MFC Factum**"), at para 62.
[4] MFC Factum at paras 80-115.

be non-arm's length where the superior party is "in a position to pervert the ordinary rule of supply and demand and **force the other to transact** for a consideration which is substantially different than adequate normal or fair market value."[5] The party arguing that the relationship was non-arm's length must evidence an absence of independent thought and purpose and a lack of self-interested bargaining and negotiation.[6]

5. There is no evidence that Cargill ever forced Tacora to do anything. On the contrary, the evidence is clear that Tacora has negotiated independently and in its self interest, represented by its own counsel, and it has submitted the agreements to its own Board for approval.[7] There is no evidence that the members of Tacora's Board acted in Cargill's interest – in violation of their fiduciary duties – or failed to recuse themselves in the event of a conflict. Tacora has consistently negotiated in an adversarial format and to maximize its economic self-interest.[8] Of the four cases cited by MFC, three found that despite some connections between the parties the transactions in dispute were at arm's length.[9] Mere points of connection do not transform an agreement into a non-arm's length bargain.

6. In addition to asking the Court to infer control from various points of contact, MFC now suggests that the Offtake Agreement – and its profit-splitting pricing mechanism – turned Tacora and Cargill into "joint venture partners" such that the Offtake Agreement should be considered a "non-arm's length contract of sale".[10] Not only is this suggestion logically incoherent, but it is factually flawed. MFC's own expert has admitted that there is nothing in a profit-splitting pricing mechanism that implies that the contract is a non-arm's length contract.[11]

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[5] MFC Factum at paras 93, 94, and 100.
[6] *Doyle Salewski Inc. v. Scott* 2019 ONSC 5108 ("***Doyle Salewski***")at paras 203-207 and para 268.
[7] Broking Affidavit at paras 23 and 33. Transcript of the Cross-Examination of Joe Broking held on April 4, 2024 ("**Broking Transcript**"), Qs. 355-360, pp. 150-151.
[8] *Doyle Salewski* at paras 203-204.
[9] *Canada v McLarty*, 2008 SCC 26; *Gingras, Robitaille, Marcoux Ltée v Beaudry*, 1980 CarswellQue 59 36 CBR (NS) 111; *Montor Business Corporation v Goldfinger,* 2016 ONCA 406. The fourth case (*Doyle Salewski*) found a non-arm's length relationship between an entity running a Ponzi scheme and those working in concert with it. By MFC's own admission, the case is highly distinguishable from the Offtake Agreement (MFC Factum at para 110).
[10] MFC Factum at paras 3 and 6(b)(iii).
[11] Transcript of the Cross-Examination of David Persampieri ("**Persampieri Transcript**"), Qs. 110-115, pp. 33-34.

B. MFC Distorts the Facts and the Timeline

7. MFC's factum makes material errors and distortions in furtherance of its claim. It is impossible to address them all here, however, by way of example:

- A Proterra entity was *not* Tacora's majority shareholder at the time the Offtake Agreement was entered into.[12] MagGlobal (unaffiliated with Cargill or Proterra) was Tacora's sole shareholder at the time.[13]
- Phil Mulvihill joined the Tacora board following Cargill's November 2018 financing, and not in 2017 (the year that the Offtake Agreement was entered into).[14]
- Cargill acquired ~10% (not ~14%) indirect interest in Tacora in November 2018.[15].
- While MFC alleges that a relationship existed between the principals of Tacora and Cargill going back to 2011, that is simply not true.[16] The truth is that an affiliate of MagGlobal had a one-off, non-binding agreement with Cargill at one point in 2011 that resulted in limited to no activity.[17] It was not an ongoing relationship.
- MFC relies on Cargill's provision of a small number of operational staff to Tacora as evidence of a "non-arm's length relationship", but ignores that those employees only started at Tacora in 2023.[18] It cannot be evidence of Cargill's control before 2023.[19]
- Despite the suggestion at paragraph 5(d) of MFC's factum, Tacora did not "finally admit" to being a related party with Cargill in 2022. The company made such disclosure in December 2022 for accounting purposes based on Cargill's preferred equity subscription the month before.[20] It was Mr. Broking's evidence on cross-examination that it is

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[12] MFC Factum at para 116.
[13] Broking Affidavit at paras 19, 24, and 29.
[14] MFC Factum at para 117 but see Broking Affidavit at para 38 and Broking Transcript, Exhibit "I".
[15] MFC Factum at para 44. MFC's math is incorrect as other investors contributed financing to Tacora in November 2018 and the September 2018 shareholdings are therefore not an accurate denominator.
[16] MFC Factum at para 118
[17] Broking Transcript, Qs. 142-147, pp. 56-58.
[18] MFC Factum at para 118; Broking Transcript, Q. 240, pp. 95-96.
[19] Contra MFC Factum paras 11(d) and 102(a)
[20] Affidavit of Samuel Morrow sworn March 26, 2024 ("**Morrow Affidavit**"), Exhibit "Z".

possible for an agreement to be entered into on an arm's length basis with a person classified as a "related party" for purposes of IFRS.[21] That was not intended to be, and was not, an admission of anything.

- While MFC has suggested that Tacora has somehow formally admitted the calculation of amounts under (j)(ii) of the Scully Mine Lease without reference to the deductions now being advanced by Mr. Broking, there is no truth to it. [22] In reality, Tacora's Chief Accounting Office, Hope Wilson, was asked by MFC in late 2022 to populate one column in a spreadsheet as a preliminary "exercise".[23] MFC did not advise Ms. Wilson of the true use it intended to make of the numbers.[24] In reply, Ms. Wilson specifically noted that her calculations omitted certain cost and stated: "Our agreement with Cargill is arm's length, which is why we use (i) for our calculation of Net Revenues".

C. Tacora's Deductions are Credible and Fact-Based

8. Tacora stands by the deductions set out in Joe Broking's affidavit sworn March 28, 2024.

9. In respect of Deductible Expenses, Tacora cannot accept that Deductible Expenses are only to be deducted from j(i) but not j(ii).[25] Contrary to MFC's assertion, there is no evidence that doing so was intended as an incentive for Tacora to engage in arm's length sales.[26] Mr. Broking (who negotiated the agreement) does not recall any such incentive structure being discussed.[27] As the market-index should act as an accurate proxy of the sales prices, there is no reason the party's would want either method incentivized.

10. In respect of the iron ore price adjustment, MFC takes issue with one of the reasons that Mr. Broking believes Tacora iron ore concentrate sells [redacted].[28] It is worth remembering that the reason for the discount is not ultimately at issue. Across the

[21] Broking Transcript, Qs. 129-130, pp. 50-52.
[22] MFC Factum para 125(d)(i); Morrow Affidavit, Exhibit 'B" at para 93.
[23] Morrow Affidavit, Exhibits "II" and "JJ".
[24] Morrow Affidavit, Exhibits "II" and "JJ".
[25] MFC Factum at paras 152-154.
[26] MFC Factum at para 152
[27] Broking Transcript, Q. 285, p. 117.
[28] MFC Factum at paras 153-159.

relevant time period, Tacora's iron ore [redacted].[29] MFC could, at any time, have chosen to audit Tacora's books to obtain the third-party sales prices to confirm that fact for itself.[30] It could then have provided this information to its expert to opine on a reasonable subparagraph j(ii) deduction. MFC did not take either of these steps and Mr. Broking is accordingly the only person who can speak with any authority about the realized sales price of Tacora iron ore.[31]

11. One of three observations made by Mr. Broking about why Tacora's iron ore is discounted by buyers was that the iron ore deposit at the Scully Mine is high in manganese.[32] That is true. Through manganese reduction circuits, Tacora is able to lower the manganese content, but it remains a challenge of production and sale.[33] Mr. Broking believes that customer perception of manganese content could account for a portion of the discount applied to Tacora's products, along with other factors.[34]

12. Tacora's past comment about its products commanding a premium "in most instances" must be taken in context (i.e., it is to be compared alongside other products suitable for blending).[35] Tacora's statement was made in May 2021, when the price of iron ore was at a 10-year high and had been on an upward trajectory since Tacora resumed production. This is a completely different context than the past three years, where iron prices have dropped to 50% of their July 2021 peak. In a bad market, smaller, less-established producers will fare worse.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of April, 2024.

/s Stikeman Elliott LLP

STIKEMAN ELLIOTT LLP
Counsel for the Applicant

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[29] Affidavit of Joe Broking sworn March 28, 2024 ("**Broking Affidavit #2**") at para 20.
[30] Broking Affidavit, Exhibit "A", s. A.8 and A.9.
[31] Persampieri Transcript at Qs. 191-192, pp. 56-57.
[32] Broking Affidavit #2 at para 19.
[33] Broking Transcript Q307, pp. 125-126.
[34] Broking Transcript, Q. 311, pp. 127-130.
[35] MFC Factum at para 157.

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Canada v McLarty*, 2008 SCC 26.
2. *Doyle Salewski Inc v Scott*, 2019 ONSC 5108
3. *Gingras, Robitaille, Marcoux Ltée v Beaudry*, 1980 CarswellQue 59 36 CBR (NS) 111
4. *Montor Business Corporation v Goldfinger*, 2016 ONCA 406
5. *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53

Appendix "A"
Party's Positions on Royalty Payments Owed

	Arm's Length Calculation		MFC Calculation[36]	Δ of Calculations
	CA$	Paid?	CA$	CA$
2020				
Q1	4,514,006.09	Y	5,310,839.93	796,833.84
Q2	6,329,255.12	Y	7,161,599.97	832,344.85
Q3	7,099,904.74	Y	6,908,874.04	-191,030.70
Q4	12,635,189.39	Y	9,515,775.29	-119,414.10
2021				
Q1	12,884,577.98	Y	11,933,757.67	-950,820.31
Q2	18,410,285.47	Y	14,519,013.60	-3,891,271.87
Q3	844,907.10	Y	8,903,879.29	8,058,972.19
Q4	7,296,659.08	Y	6,403,967.88	-892,691.20
2022				
Q1	11,789,584.67	Y	9,518,522.20	-2,271,062.47
Q2	5,889,939.23	Y	9,967,521.41	4,077,582.18
Q3	3,408,429.22	Y	5,529,407.91	2,120,978.69
Q4	7,200,288.89	Y	5,431,611.74	-1,768,677.15
2023				
Q1	8,727,175.84	Y	8,888,036.24	160,860.40
Q2	5,865,004.23	N	7,732,031.14	1,867,026.91
Q3	7,962,729.76	N	7,832,201.95	-130,527.81
Pre-Filing Q4	1,614,456.81	N	Not Calculated	N/A
Post-Filing Q4	10,287,336.10	Y	Not Calculated	N/A
Pre-Filing Total	122,287,336.10	partial	$125,557,040.27 (plus pre-filing Q4 '23)	$4,699,103.46 (plus Δ pre-filing Q4 '23)

Note: Highlighted quarters were audited by MFC's auditor who found the data supported Tacora's calculations.

	CA$
Pre-Filing Amount Acknowledged to be Owed by Tacora	15,442,190.80
Additional Pre-filing Amount Claimed by MFC	4,699,103.46 (plus Δ Q4 '23)

[36] This calculation uses the values set out in the report of MFC's expert David Persampieri less credit for the Knoll Lake Royalty that MFC agrees in its Responding Factum should be credited. MFC states in its Factum that the balance payable it is seeking is now $4,699,103.46 (see para 169).

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