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 AD HOC GROUP OF NOTEHOLDERS (MOTION RETURNABLE OCTOBER 24, 2023)

October 23, 2023

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TO: SERVICE LIST

REPLY FACTUM OF THE AD HOC GROUP OF NOTEHOLDERS

1. ***Overview:*** This reply factum is submitted in response to the factum from Cargill (delivered at 5:30pm yesterday) and the two facta submitted by Tacora (delivered at 7:00pm yesterday). The fact that Tacora and Cargill, while taking identical positions, have filed three separate facta, and thereby extended the page limits, and did not serve them in a timely way, does not help these parties overcome the ineluctable facts that:

(a) The AHG followed the DIP Process in good faith, while also engaging in good faith negotiations / discussions with Tacora and Cargill toward a consensual resolution.

(b) Those good faith efforts were met with behind the scenes "offline" contact between senior Cargill and Tacora executives, during which Cargill was repeatedly withholding millions of dollars of payments owing to Tacora in order to leverage Cargill's position and put extreme pressure on Tacora.[1]

(c) The Cargill DIP was put forward after such events and after Cargill was able to review the AHG DIP. This should be contrasted to the DIP Process where a concerted effort was made to ensure parties did not see other parties' proposals.[2]

(d) The Board of Tacora did not even consider the relevant factors for approval of DIP financing before choosing the Cargill DIP, and Cargill's board appointee participated in all Board meetings with respect to the Cargill DIP.

(e) Tacora's CEO deleted all of his text messages exchanged with Cargill executives in respect of the Cargill DIP, and the Cargill employees produced only 5 documents

[1] Cargill's attempt to assert that it withheld payments from Tacora based on set-off rights has no legal basis. Cargill had no set-off rights at the time, as specifically noted in the demand letter sent to Cargill by Tacora's lawyers.
[2] Bhandari Cross Transcript, pgs. 68-69

in their examinations for this motion.

(f) The conduct of Cargill, including trying "very hard to keep Tacora out of CCAA" has been for its own benefit, primarily protecting its valuable Offtake Agreement (which the evidence establishes is problematic to a restructuring and protected by the Cargill DIP), rather than restructuring Tacora.

2. Approving the Cargill DIP would condone the above conduct, which not only gives rise to serious process, governance and substantive issues (including the unprecedented approval of a DIP that primes the senior secured Noteholders for more than $75 million when they offered reasonable DIP financing previously accepted by the Company), but breaches the statutory duty of good faith imposed on all participants in CCAA proceedings.[3]

3. Select issues raised by Tacora and Cargill in their collective three facta are discussed below. The remainder will be addressed in oral argument.

4. ***Evidentiary Foundation:*** Tacora and Cargill take issue with the evidence provided by the AHG. This CCAA proceeding was brought on an *ex parte* basis such that the onus was on Tacora to put forward all relevant evidence. On that view, it is surprising that the AHG had to put in any evidence at all, however the record put forward by Tacora was incomplete. Moreover, Tacora and Cargill had the same rights as the AHG to conduct cross-examinations and to conduct any Rule 39.03 examinations. The fact they chose not to do so cannot be held against the AHG.

5. ***Scope of Rule 39.03:*** Cargill's response to the inadequate information provided by its employees is that the scope of Rule 39.03 examinations is limited. However, the case cited by

[3] CCAA, s. 18.6.

Cargill involved a witness that was not a party to the proceeding,[4] and has been expressly distinguished on that basis:

> The applicants argue that, because David was examined as a "witness" under Rule 39.03, the scope of his examination is limited to matters within his personal knowledge, he is not required to inform himself or make inquiries of others, and he is not obliged to give undertakings. While the applicants have accurately stated the law as it applies to witnesses examined under Rule 39.03, I do not accept that the scope of the examination should be so limited where the witness being examined under this rule is a party.
>
> The principles upon which the applicants rely were first pronounced in *Magnotta Winery Corp. v. Ontario (Alcohol and Gaming Commission)*. In that case, a Crown employee was examined pursuant to this rule and certain questions were refused. Master McAfee (as she was then titled) noted that the employee was not providing evidence on behalf of the Crown, was not a party to the proceeding and did not swear an affidavit on the motion…
>
> Where, as here, a party to the proceeding is being examined under Rule 39.03, the scope of the examination should be the same as if that party was cross-examined on an affidavit. Non-parties should not be unduly inconvenienced with intrusive, onerous and time-consuming disclosure requirements. Parties, on the other hand, are obligated to consider the issues arising in an application and put all relevant evidence forward. They cannot shield relevant information from the Court and from other parties by choosing not to swear an affidavit in the proceeding.[5]

6. Cargill's employees did not comply with their obligations under the examination, and citing case law on the inappropriateness of "lengthy time periods" cannot support the assertion that only "the last sort of week and a bit"[6] were relevant on this motion. In fact, Cargill's alleged "fishing expedition" by the AHG actually resulted in, among other things: (a) evidence being unveiled on Cargill's inappropriate conduct (as set out in the AHG's factum); (b) the discovery of text messages being deleted;[7] and (c) improper refusals and limited disclosures[8] (contrary to the above law).

7. ***Business Judgment:*** Tacora incorrectly states that this Court should weigh the business judgment of the Board. *First*, the Ontario Court of Appeal has held that the Court cannot defer to

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[4] *Magnotta Winery Corp. v. Ontario (Alcohol and Gaming Commission)*, 2016 ONSC 3174 at para 11.
[5] *Arnold v. Arnold*, 2021 ONSC 7983 at paras 6-8 [emphasis added and citations omitted]; see also *Trade Capital Finance Corp v. Cook*, 2021 ONSC 7134 at para 46.
[6] Carrelo 39.03 Transcript, pg. 16
[7] Broking Cross Transcript, pg. 77, 81-82
[8] Davies 39.03 Transcript, pg. 16-17, 33, 36-37; 49; Carrelo 39.03 Transcript, pgs. 20, 29-31, 39

the Board and must make an independent determination; the Court "may consider, but not defer to, and is not fettered by, the recommendation of the Board."[9] *Second*, what may also be considered, and is relevant in this case, "is the exercise or lack thereof of business judgment."[10]

8. Business judgment requires, among other things, a decision made independently and without a conflict of interest, in good faith, and on a reasonably informed basis.[11] In this case, the Board did not consider the relevant factors in ss. 11.2(4) of the CCAA, including the issue of material prejudice. It was not informed *at all* on the requirements, let alone reasonably informed.

9. The decision was also not made in good faith, independently and without a conflict of interest. The pressure put on the Board by Cargill, and the involvement of Cargill's appointee in the deliberations leading to the vote, raise serious concerns in this respect. Tacora states that the Cargill nominee was not required to recuse himself from the Board meeting (citing s. 132 of the OBCA). However, ss. 132(5) states that a director with such a conflict "shall not attend any part of a meeting of directors during which the contract or transaction is discussed and shall not vote on any resolution to approve the contract or transaction".[12] Mr. Davies did not vote, which confirms that Tacora and Mr. Davies accepted there was a conflict requiring him not to vote, but they did not comply with the conflict provisions which also require him not to attend the meeting.

10. Even if this Court were to consider the Board's decision, the Board has not met the business judgment rule. If anything, this Court should consider the lack of proper decision making, and the lack of meeting the business judgment rule, in respect of the approval of the Cargill DIP.

11. ***Material Prejudice:*** As set out in the AHG's factum, the law on material prejudice requires

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[9] *Crystallex International Corp., Re*, 2012 ONCA 404 at para 85.
[10] *Crystallex International Corp., Re*, 2012 ONSC 2125 at para 35 [emphasis added] (affirmed: 2012 ONCA 404).
[11] *Victorian Order of Nurses for Canada, Re*, 2016 ONSC 5540 at para 40.
[12] *Business Corporations Act*, RSO 1990, c B.16, ss. 132(5).

this Court to balance the benefits of DIP financing with the potential prejudice to creditors. The *only* two creditors that are expected to suffer prejudice as a result of DIP financing are the Noteholders and Cargill, and Cargill is of course not prejudiced by the Cargill DIP. Therefore, the consideration of material prejudice requires a consideration of the impact on the Noteholders. The Board failed to give any consideration to that fact. This Court must do so prior to coming to an independent determination on the appropriateness of the Cargill DIP versus the AHG DIP, and ensure that this factor in ss. 11.2(4) is satisfied.

12. ***Appointment of CRO:*** Tacora submits that the appointment of a CRO is akin to the removal of directors from the Board and therefore must meet the test under ss. 11.5(1) of the CCAA, despite the fact that a significant number of cases have appointed CROs in CCAA proceedings and have *not* applied the factors under ss. 11.5(1),[13] nor does Tacora cite any such case. Should this Court agree that a CRO would be useful in the circumstances to assist with the restructuring, it can direct Tacora and the Monitor to take steps to identify appropriate parties with the necessary expertise, experience and independence.

13. ***Identity of the AHG:*** Cargill and Tacora suggest some mal-intent in respect of the identity of the members of the AHG and their holdings. The AHG is confused by such suggestion given that (a) the AHG DIP lists the directing funds at section 2, and (b) Tacora knows precisely the identity and holdings of the AHG. Lastly, Cargill asserted confidentiality with respect to various of its financial interests in Tacora.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of October, 2023.

Sean Zweig

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[13] As only a few recent examples: *Boreal Capital Partners Ltd et al. (Re)*, 2021 ONSC 7802 at paras 31-32; *PricewaterhouseCoopers Inc. v. MJardin Group, Inc.*, 2022 ONSC 3603; *JTI-Macdonald Corp., Re*, 2019 ONSC 1625 at paras 26-27. See also the cases cited at para 74 of AHG's Factum.

SCHEDULE "A"

LIST OF AUTHORITIES

Cases Cited

1. *Arnold v. Arnold*, 2021 ONSC 7983

2. *Boreal Capital Partners Ltd et al. (Re)*, 2021 ONSC 7802

3. *Crystallex International Corp., Re*, 2012 ONCA 404

4. *Crystallex International Corp., Re*, 2012 ONSC 2125

5. *JTI-Macdonald Corp., Re*, 2019 ONSC 1625

6. *Magnotta Winery Corp. v. Ontario (Alcohol and Gaming Commission)*, 2016 ONSC 3174

7. *PricewaterhouseCoopers Inc. v. MJardin Group, Inc.*, 2022 ONSC 3603

8. *Trade Capital Finance Corp v. Cook*, 2021 ONSC 7134

9. *Victorian Order of Nurses for Canada, Re*, 2016 ONSC 5540

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY – LAWS

COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C., 1985, C. C-36

Interim financing

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Priority — secured creditors

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Priority — other orders

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

(4) In deciding whether to make an order, the court is to consider, among other things,

> (a) the period during which the company is expected to be subject to proceedings under this Act;
>
> (b) how the company's business and financial affairs are to be managed during the proceedings;
>
> (c) whether the company's management has the confidence of its major creditors;
>
> (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (e) the nature and value of the company's property;
>
> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

[...]

Removal of directors

11.5 (1) The court may, on the application of any person interested in the matter, make an order removing from office any director of a debtor company in respect of which an order has been made under this Act if the court is satisfied that the director is unreasonably impairing or is likely to unreasonably impair the possibility of a viable compromise or arrangement being made in respect of the company or is acting or is likely to act inappropriately as a director in the circumstances.

[...]

Disclosure of financial information

11.9 (1) A court may, on any application under this Act in respect of a debtor company, by any person interested in the matter and on notice to any interested person who is likely to be affected by an order made under this section, make an order requiring that person to disclose any aspect of their economic interest in respect of a debtor company, on any terms that the court considers appropriate.

Factors to be considered

(2) In deciding whether to make an order, the court is to consider, among other things,

(a) whether the monitor approved the proposed disclosure;

(b) whether the disclosed information would enhance the prospects of a viable compromise or arrangement being made in respect of the debtor company; and

(c) whether any interested person would be materially prejudiced as a result of the disclosure.

Meaning of economic interest

(3) In this section, economic interest includes

(a) a claim, an eligible financial contract, an option or a mortgage, hypothec, pledge, charge, lien or any other security interest;

(b) the consideration paid for any right or interest, including those referred to in paragraph (a); or

(c) any other prescribed right or interest.

[...]

Good faith

18.6 (1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.

***BUSINESS CORPORATIONS ACT*, RSO 1990, C B.16**

Disclosure: conflict of interest

132 (1) A director or officer of a corporation who,

(a) is a party to a material contract or transaction or proposed material contract or transaction with the corporation; or

(b) is a director or an officer of, or has a material interest in, any person who is a party to a material contract or transaction or proposed material contract or transaction with the corporation,

shall disclose in writing to the corporation or request to have entered in the minutes of meetings of directors the nature and extent of his or her interest.

by director

(2) The disclosure required by subsection (1) shall be made, in the case of a director,

(a) at the meeting at which a proposed contract or transaction is first considered;

(b) if the director was not then interested in a proposed contract or transaction, at the first meeting after he or she becomes so interested;

(c) if the director becomes interested after a contract is made or a transaction is entered into, at the first meeting after he or she becomes so interested; or

(d) if a person who is interested in a contract or transaction later becomes a director, at the first meeting after he or she becomes a director.

[...]

Director not to vote

(5) A director referred to in subsection (1) shall not attend any part of a meeting of directors during which the contract or transaction is discussed and shall not vote on any resolution to approve the contract or transaction unless the contract or transaction is,

(a) one relating primarily to his or her remuneration as a director of the corporation or an affiliate;

(b) one for indemnity or insurance under section 136; or

(c) one with an affiliate.

[...]

Court setting aside contract

(9) Subject to subsections (7) and (8), where a director or officer of a corporation fails to disclose his or her interest in a material contract or transaction in accordance with this section or otherwise fails to comply with this section, the corporation or a shareholder of the corporation, or, in the case of an offering corporation, the Commission may apply to the court for an order setting aside the contract or transaction and directing that the director or officer account to the corporation for any profit or gain realized and upon such application the court may so order or make such other order as it thinks fit.

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PROCEEDINGS COMMENCED AT TORONTO

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