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.

APPLICANTS

REPLY FACTUM OF THE CONSORTIUM OF NOTEHOLDERS
(RE: APPROVAL OF SUCCESSFUL BID)

April 9, 2024

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1. This factum is filed by the Consortium in reply to Cargill's April 6th Responding Factum to address Cargill's arguments that a different transaction structure would provide improved recoveries for unsecured creditors because of the ability to monetize Tacora's tax losses.[1]

2. Cargill's arguments on this point are misconceived. These losses have little to no value to a hypothetical third-party purchaser, and structuring the Consortium Transaction in two stages would not generate any higher recoveries for unsecured creditors.

A. Consortium is Paying for Tax Losses, Which Have No Independent Value

3. Cargill's position that this Court should reject the proposed RVO is premised on the misleading contention that the RVO deprives Tacora's unsecured creditors, including Cargill, of the benefit of Tacora's tax losses. Cargill's argument is based on two false premises: (i) the Consortium is not paying for the value of the tax losses as part of the RVO transaction; and (ii) assuming the RVO is not granted, the tax losses could be easily monetized for a significant amount following an AVO transaction for the benefit of Tacora's unsecured creditors, including Cargill.

4. First, the evidence is that the Consortium is paying for the benefit of Tacora's tax losses as part of its transaction. The tax advantages of an RVO structure were an important consideration for the Consortium in pricing the Successful Bid.[2] The ability to preserve tax losses for the purchaser is a well-accepted benefit of an RVO structure that is recognized in the RVO case law.[3]

5. The Subscription Agreement expressly contemplates that, if the RVO is not granted, the Consortium Transaction can be restructured as an AVO. However, if the Consortium's transaction

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1 Capitalized terms not otherwise defined have the meaning set out in the Consortium's factum of March 27, 2024.

2 Sale Approval Affidavit at para. 52 [CL pp. A2545;A2545]. The tax losses are of value under the RVO structure since Tacora will continue to carry on the loss business.

3 See, for instance, *Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al.*, 2022 ONSC 6354 at paras. 34, 56; *Rambler Metals and Mining Limited, Re CCAA*, 2023 NLSC 134 at para. 64; *Acerus Pharmaceuticals Corporation (Re)*, 2023 ONSC 3314 at para. 21.

is required to be restructured as an asset sale such that it adversely impacts the tax attributes of the transaction, the parties would be required to negotiate, in good faith, a purchase price reduction to reflect the decrease in value of the tax attributes in an asset sale scenario.[4] The inclusion of this clause in the Subscription Agreement supports the fact that the purchase price under the Consortium Transaction attributes value to the tax losses.

6. Second, even if the Consortium Transaction is restructured as an AVO with a purchase price reduction, the tax losses remaining with the Company would, as a practical matter, have no material standalone value, let alone value that would flow to unsecured creditors such as Cargill.

7. It is true, in theoretical terms, that other transaction structures might result in different treatment of the tax losses, as Tacora's witness testified in cross-examination. However, as this witness correctly acknowledged, the use of tax attributes is strictly limited under the tax laws.[5] As the Monitor stated in its Supplement to the Fourth Report, there would be considerable uncertainty regarding the ability to monetize Tacora's tax losses after its assets had been sold to a purchaser.[6]

8. In practical terms, there is no loss monetization transaction, either involving a third-party purchaser or involving the Consortium, that would generate better recoveries for unsecured creditors. Moreover, there is no such transaction before this Court for approval.

(a) No Third Party Purchaser Would Enter into a Tax Loss Transaction

9. In order to monetize tax losses in a corporation that no longer carries on business because its assets have been sold, it would be necessary to carry out a separate tax loss monetization

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4 Subscription Agreement dated January 29, 2024, Exhibit "G" to Sale Approval Affidavit at s. 10.3 [CL pp. A2691;A2691].

5 Broking Cross, p. 125-126, q. 379 [CL pp. A1113;A1113]. Mr. Broking was not asked whether this could occur in practice as this was not within his knowledge.

6 Supplement to the Fourth Report of FTI Consulting Canada Inc., in its Capacity as Court-Appointed Monitor dated March 26, 2024 at para. 31 [CL pp. E97;E97].

transaction. This cannot be simply achieved by a purchaser acquiring all of Tacora's shares for the sole purpose of using the tax losses. Such a transaction would not be legally viable because it would result in an acquisition of control ("**AOC**") of Tacora and the *Income Tax Act* (the "**ITA**")[7] severely limits the uses of losses after any AOC.[8]

10. Subsection 111(5) of the ITA provides that a corporation's business losses can only be used after an AOC if it continues to carry on the loss business with a reasonable expectation of profit.[9] After an asset sale, Tacora's operations would not satisfy this test since Tacora would no longer carry on its loss business – that business would be carried on by the purchaser.

11. Cargill's factum asks this Court to infer that Tacora's losses could be easily monetized after an asset sale if there was no AOC. This is simply incorrect. In the past, tax loss monetization transactions were structured in a manner that did not involve an AOC of the loss company so that the restrictions on the use of tax losses set out in subsection 111(5) of the ITA did not apply. These types of transactions have now been severely curtailed, if not entirely foreclosed, by the 2023 decision of the Supreme Court of Canada in *Deans Knight.*[10]

12. In *Deans Knight*, the Supreme Court considered the application of the general anti-avoidance rule (the "**GAAR**") to transactions that were designed to avoid the restrictions in subsection 111(5) of the ITA by avoiding an AOC. The Court held that the spirit, purpose and object of subsection 111(5) is to prevent the shares of corporations from being acquired by unrelated parties in order to deduct their unused losses against income from another business for

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7 *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.).

8 For purposes of the ITA and subject to certain exceptions, an AOC of a corporation generally results in a "loss restriction event" and the occurrence of a loss restriction events causes subsection 111(5) to apply.

9 See paragraph 111(5)(a) of the ITA. Subsection 111(5) sets out the specific and very restricted circumstances in which a corporation may deduct non-capital losses after an acquisition of control of the corporation.

10 *Deans Knight Income Corp. v. Canada*, 2023 SCC 16 [*Deans Knight*]. Even prior to *Deans* Knight, loss monetization transactions had also been curtailed by s. 256.1 of the ITA, which explicitly prohibited certain types of tax loss monetization transactions.

the benefit of new shareholders.[11] The Court further held that the GAAR is intended to deny the tax benefit of transactions that frustrate the spirit, purpose and object of the tax provisions that the taxpayer is seeking to avoid. Since the transactions in *Deans Knight* technically complied with subsection 111(5) of the ITA, but were, in reality, mere devices to allow a corporation's losses to be used by an entirely unrelated business owned by unrelated persons, the Court held that the transactions resulted in an abuse and the deductions of the losses were denied.

13. A loss monetization transaction involving an AOC by a third-party purchaser would involve attempting to use Tacora's business losses to shelter income from the unrelated third party's business for the benefit of the unrelated third party. This would be prohibited by subsection 111(5) of the ITA, and the Supreme Court's finding in *Deans Knight* now precludes structuring a transaction to avoid an AOC and the restrictions in subsection 111(5) of the ITA.

14. At a minimum, the *Deans Knight* case, as well as the potentially severe consequences of a finding of abusive tax avoidance, have injected very significant uncertainty and risk into any tax loss transaction such that a transaction of this nature is unlikely to be of interest to any purchaser.[12]

(b) Two-Stage Consortium Transaction Would Not Provide Greater Recoveries

15. Perhaps in recognition of the difficulties of loss monetization*,* Cargill suggests that the Consortium Transaction could be structured as a two-stage transaction: the Consortium would *first* acquire Tacora's assets and *then* acquire Tacora's shares by way of a subsequent transaction.[13]

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[11] *Deans Knight* at para. 113.

[12] Cargill speculates that it could use Tacora's tax losses itself, since it is a part owner. There is no legal basis for this contention, as Cargill owns less than 50% of Tacora's equity. If Cargill is suggesting it could transfer income earning assets to Tacora and access the losses, that suggestion is clearly incorrect based on ss. 111(5) of the ITA and *Deans Knight*. If Cargill is suggesting Tacora's existing shareholders (including itself) would pay cash for the ability to together transfer income earning assets to Tacora (in close proportion to their existing share ownership) to use the losses, the possibility of implementing such a transaction can best be described as "fanciful".

[13] Responding Factum of Cargill, Incorporated and Cargill International Trading PTE Ltd. Re: RVO Motion dated

16. Cargill's suggestion is based on the false premise that a bifurcated transaction would somehow generate greater value for Tacora's tax losses than has already been provided under the Consortium Transaction, presumably because the Consortium would pay more for the tax losses in the second transaction. However, this completely ignores the fact that the Consortium's bid price takes into account the fact that it will be able to use Tacora's losses and provides for a reduction in purchase price if the transaction must be converted to an AVO. The Consortium's bid provided the highest bid value under the SISP, which fully canvassed the market. There is no basis on which this Court could assume that the Consortium would be prepared to pay an even higher price if the Consortium Transaction was bifurcated into two transactions.

17. If forced to convert to an AVO, the Consortium would reduce its price by, for example, not credit bidding the entirety of its secured notes. As a result, a certain amount of secured notes would remain outstanding against old Tacora. As was the case in *Bellatrix*, the proceeds of a loss monetization transaction would be contributed to Tacora by the purchaser. Such amounts would be payable to the Noteholders as secured creditors, in priority to the unsecured creditors. There would be no proceeds available from a second-stage tax loss monetization transaction to satisfy claims of unsecured creditors such as Cargill, particularly in light of the low value generally attributed to tax losses, as discussed below.

18. Cargill relies on the transaction history in *Bellatrix* as support for its two-stage transaction approach. *Bellatrix* was decided on entirely different facts and is not relevant. *Bellatrix* did not involve deliberately structuring one transaction as a two-stage transaction in order to make proceeds available to unsecured creditors from the subsequent tax loss acquisition. Instead, the

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April 6, 2024 at paras. 114-115 [CL pp. F1132;F1132]. Cargill relies on *Bellatrix Exploration Ltd. (Re),* 2020 ABQB 332 and *Bellatrix Exploration (Re)* (7 July 2022), Calgary 1901-13767 (Alta. Q.B.), Cargill BOA, Tab 2 (the "***Bellatrix* RVO**") in support of this type of "two stage" transaction.

transaction in *Bellatrix* proceeded first as an asset sale, with a purchase price that was based on the value of those assets. Several years later, after failing to close a separate transaction with a third party, the asset purchaser acquired the shares of the now-inactive debtor company by way of an RVO, thereby reuniting the loss business with the assets and allowing the purchaser to use the tax losses. The proceeds of the RVO transaction were paid out to the secured second lien noteholders.[14]

19. The key distinction is that, at the time of the second transaction, the purchaser of the assets in *Bellatrix* had not *already* provided value for the tax losses in the first transaction. As a result, the purchaser was prepared to pay additional value for the tax losses. This is not the case here, where the Consortium has already provided value for the tax losses as part of its RVO transaction.

20. In any event, the suggestion that Tacora should complete two transactions to achieve the same result as one RVO is impractical and inefficient. It would further delay Tacora's exit from these CCAA proceedings and would require additional professional fees to execute two transactions, instead of one, without any incremental benefit for Tacora or its stakeholders.

(c) Fractional Value of Tax Losses

21. Finally, contrary to the impression that Cargill seeks to create, the total amount of Tacora's tax losses, even if these were capable of being monetized (which is denied for the reasons set out above), would not generate significant value that could be applied on a dollar-for-dollar basis to claims against Tacora. First, if the Consortium Transaction is implemented through an AVO, Tacora's tax losses would be reduced by the gains realized on the sale and debt forgiveness.

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[14] Bench Brief of the Applicant dated June 29, 2022 at paras. 5, 12-18, 22-26, 55 (the "***Bellatrix* Bench Brief**"); *Bellatrix* RVO. The second stage transaction that was proposed with a third party was on substantially similar terms and structure: *Bellatrix* Bench Brief at para. 5.

22. Second, the value that could theoretically be obtained from any monetization transaction would be far less than the face amount of the remaining tax losses. For instance, in *Bellatrix* – which is relied upon by Cargill as supporting a two-stage transaction to monetize tax losses – the second stage RVO transaction resulted in the purchaser acquiring approximately $600 million of non-capital loss taxes (estimated to be available for use as of the closing date) for $6 million.[15]

23. The net amount of any value obtained certainly would not be sufficient to "pay off" the potential damages liability under the Offtake Agreement and would be unlikely even to substantially reduce it.

24. For all of these reasons, it was not improper, and was a reasonable decision, for the Board to accept the Consortium Transaction as the Successful Bid even though it is implemented through an RVO structure under which the benefit of the unused tax losses accrue to the Consortium and were an important consideration in the pricing of its bid.[16] It was equally appropriate to reject Cargill's non-qualifying bid which was structured as an asset sale, but required assurances that Tacora's tax losses would be available to it.[17]

25. None of the cases in which an RVO has been approved suggest that a different transaction structure should have been chosen in order to make it possible for a tax loss monetization transaction to be undertaken to generate value to satisfy unsecured claims. This is telling, since most insolvent companies have tax losses, often material losses, and most, if not all, RVO cases have involved significant unsecured claims (separately or in the aggregate) that have been transferred to a residualCo without being paid.

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[15] *Bellatrix* Bench Brief at para. 23; Spartan Delta Corp., "Spartan Delta Corp. Announces Record Second Quarter 2022 Results, Closing of Strategic Acquisition and Updated Guidance For 2022" (8 August 2022), *Cision*.
[16] Sale Approval Affidavit at paras. 52-53 [CL pp. A2545;A2545].
[17] Cargill Phase 2 Bid dated January 19, 2024, Exhibit "G" to Lehtinen Affidavit at s. 2.5 [CL pp. F383;F383].

26. The Consortium Transaction is the product of a full and fair process that canvassed the market. It has the support of the Board and the Monitor and is the best and only option to restructure Tacora's business as a going concern for the benefit of stakeholders as a whole. As the Consortium submitted in its main factum, this Court has the jurisdiction to approve the implementation of the Consortium through an RVO. This Court should exercise its discretion to do so, as numerous other CCAA courts have done where this transaction structure is justified and appropriate, as it is here. Cargill has failed to raise any legal or practical impediment to doing so. The Consortium Transaction should be approved and the RVO granted, allowing Tacora to emerge from these proceedings as soon as possible, as is urgently required.

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

OSLER, HOSKIN & HARCOURT LLP/
BENNETT JONES LLP

Lawyers for the Consortium Noteholder Group

SCHEDULE "A"
LIST OF AUTHORITIES

Case Law	
1.	*Acerus Pharmaceuticals Corporation (Re)*, 2023 ONSC 3314
2.	*Bellatrix Exploration Ltd. (Re),* 2020 ABQB 332
3.	*Bellatrix Exploration (Re)* (7 July 2022), Calgary 1901-13767 (Alta. Q.B.)
4.	*Deans Knight Income Corp. v. Canada*, 2023 SCC 16
5.	*Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al.*, 2022 ONSC 6354
6.	*Rambler Metals and Mining Limited, Re CCAA*, 2023 NLSC 134

SCHEDULE "B"
TEXT OF STATUTES, REGULATIONS & BY-LAWS

***Income Tax Act*, R.S.C. 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.

256.1 (1) The following definitions apply in this section.

attribute trading restriction means a restriction on the use of a tax attribute arising on the application, either alone or in combination with other provisions, of any of this section, subsections 10(10) and 13(24), section 37, subsections 66(11.4) and (11.5), 66.7(10) and (11), 69(11) and 88(1.1) and (1.2), sections 111 and 127, subsections 181.1(7), 190.1(6) and 249(4), section 251.2 and subsection 256(7). (*restriction au commerce d'attributs*)

person includes a partnership. (*personne*)

specified provision means any of subsections 10(10) and 13(24), paragraph 37(1)(h), subsections 66(11.4) and (11.5), 66.7(10) and (11), 69(11) and 111(4) to (5.3), paragraphs (j) and (k) of the definition *investment tax credit* in subsection 127(9), subsections 181.1(7) and 190.1(6), section 251.2 and any provision of similar effect. (*dispositions déterminées*)

Application of subsection (3)

(2) Subsection (3) applies at a particular time in respect of a corporation if

(a) shares of the capital stock of the corporation held by a person, or the total of all shares of the capital stock of the corporation held by members of a group of persons, as the case may be, have at the particular time a fair market value that exceeds 75% of the fair market value of all the shares of the capital stock of the corporation;

(b) shares, if any, of the capital stock of the corporation held by the person, or the total of all shares, if any, of the capital stock of the corporation held by members of the group, have immediately before the particular time a fair market value that does not exceed 75% of the fair market value of all the shares of the capital stock of the corporation;

(c) the person or group does not control the corporation at the particular time; and

(d) it is reasonable to conclude that one of the main reasons that the person or group does not control the corporation is to avoid the application of one or more specified provisions.

Deemed acquisition of control

(3) If this subsection applies at a particular time in respect of a corporation, then for the purposes of the attribute trading restrictions,

(a) the person or group referred to in subsection (2)

(i) is deemed to acquire control of the corporation, and each corporation controlled by the corporation, at the particular time, and

(ii) is not deemed to have control of the corporation, and each corporation controlled by the corporation, at any time after the particular time solely because this paragraph applied at the particular time; and

(b) during the period that the condition in paragraph (2)(a) is satisfied, each corporation referred to in paragraph (a) — and any corporation incorporated or otherwise formed subsequent to that time and controlled by that corporation — is deemed not to be related to, or affiliated with, any person to which it was related to, or affiliated with, immediately before paragraph (a) applies.

Special rules

(4) For the purpose of applying paragraph (2)(a) in respect of a person or group of persons,

(a) if it is reasonable to conclude that one of the reasons that one or more transactions or events occur is to cause a person or group of persons not to hold shares having a fair market value that exceeds 75% of the fair market value of all the shares of the capital stock of a corporation, the paragraph is to be applied without reference to those transactions or events; and

(b) the person, or each member of the group, is deemed to have exercised each right that is held by the person or a member of the group and that is referred to in paragraph 251(5)(b) in respect of a share of the corporation referred to in paragraph (2)(a).

Deeming rules — if share value nil

(5) For the purposes of subsections (2) to (4), if the fair market value of the shares of the capital stock of a corporation is nil at any time, then for the purpose of determining the fair market value of those shares, the corporation is deemed, at that time, to have assets net of liabilities equal to $100,000 and to have $100,000 of income for the taxation year that includes that time.

Deemed acquisition of control

(6) If, at any time as part of a transaction or event or series of transactions or events, control of a particular corporation is acquired by a person or group of persons and it can reasonably be concluded that one of the main reasons for the transaction or event or any transaction or event in the series of transactions or events is so that a specified provision does not apply to one or more corporations, the attribute trading restrictions are deemed to apply to each of those corporations as if control of each of those corporations were acquired at that time.

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

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SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT TORONTO

RESPONDING FACTUM OF THE CONSORTIUM OF NOTEHOLDERS TO CARGILL'S PRELIMINARY MOTION AND CROSS-MOTION

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