



ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

COUNSEL SLIP/ENDORSEMENT

COURT FILE NO.: CV-23-00707394-00CL HEARING DATE: April 16, 2024

NO. ON LIST: 1

TITLE OF PROCEEDING: TACORA RESOURCES INC. v. FIRST INSURANCE FUNDING OF CANADA INC et al

BEFORE JUSTICE: KIMMEL

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

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For Defendant, Respondent, Responding Party, Defence:

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For Other, Self-Represented:

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ENDORSEMENT OF JUSTICE KIMMEL:

1. Tacora brought a motion seeking a determination by the Court regarding the royalty amounts claimed by 1128349 B.C. Ltd. ("112 Ltd."), which is an affiliate of the lessor under the Scully Mine Lease, 0778539 B.C. Ltd. ("077 Ltd.", together with 112 Ltd., "MFC"). That MFC Royalty Motion was heard on April 16, 2024 and the decision is under reserve.
2. Although Cargill is not a party to the MFC Royalty Dispute, certain confidential information related to the Cargill Offtake Agreement was included in the parties' materials for the MFC Royalty Motion because it was considered to be of central relevance to that motion. Cargill was given an opportunity to review the motion materials, cross-examination transcripts, and exhibits to the cross-examinations to identify confidential information in connection with the Cargill Offtake Agreement, and it did so.
3. Following consultation with the parties, on April 12, 2024 the Monitor served a notice of motion seeking an order (the "Sealing Order") permanently sealing: (i) certain portions of the motion materials as described in Schedule "A" to the Notice of Motion; and (ii) certain portions of the transcripts from the cross-examinations and certain of the documents (or portions of them) as described in Schedule "B" to the Notice of Motion (collectively, the "Confidential Material"). Highlighted excerpts of the Confidential Material, together with Schedules A and B of the Notice of Motion, were provided to the court in the Confidential Appendix A to the Monitor's Seventh Report to the Court dated April 14, 2024 (the "Seventh Report").
4. The Monitor was advised that the grounds of confidentiality are:
 - a. the documents contain commercially sensitive and confidential information pertaining to the terms of the Cargill Offtake Agreement, which is centrally relevant to the MFC Royalty Motion;
 - b. the Confidential Material, if publicly disclosed, could be used by competitors to harm Cargill's interests, both generally and in negotiations regarding a restructuring solution for Tacora; and
 - c. the Cargill Offtake Agreement contains a confidentiality clause to protect Cargill's commercially sensitive information (subject to limited exceptions, which have not been indicated to apply in the present circumstances).
5. The Monitor understands that the Confidential Material is limited to a subset of the materials filed and relied on in connection with the MFC Royalty Motion and that the parties believe that the limited redactions proposed are reasonable and required to avoid the disclosure of commercially sensitive and confidential information in connection with the Cargill Offtake Agreement. The Monitor is not aware of any party that will be prejudiced if the information is sealed or any public interest that will be served if such details are disclosed in full.
6. To grant this relief, the court must be satisfied of the test in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522, at para. 53, as modified by *Sherman Estate v. Donovan*, 2021 SCC 25, 72 C.R. (7th) 223, at paras. 38 and 43, having regard to:
 - a. The important public interest in the openness of courts and whether it poses a serious risk to some other important public interest;
 - b. Whether the order sought is necessary to prevent the risk to the other identified public interest because alternative measures are not available; and
 - c. As a matter of proportionality, the benefits of the sealing order outweigh its negative effects.
7. The Monitor is of the view that the sealing of the Confidential Material in the manner proposed is consistent with these criteria and recommends that the Sealing Order be made.
8. As was observed in an earlier endorsement in this case when a sealing order was sought in respect of a confidential exhibit pertaining the KERP that the court approved (See *Tacora Resources Inc. (Re)*, 2023 ONSC 6126, at para. 161), "courts have applied the *Sierra Club* and *Sherman Estate* tests in the insolvency context and authorized sealing orders over confidential or commercially sensitive documents.

See, for example, *Ontario Securities Commission v. Bridging Finance Inc.*, 2021 ONSC 4347, 90 C.B.R. (6th) 102, at paras. 23–28; see also *Just Energy Corp, Re*, 2021 ONSC 1793 at paras. 123–24."

9. The parties have minimized the material over which the Sealing Order is sought by redacting the Confidential Information in publicly filed documents for this MFC Royalty Motion. The confidential and commercial sensitive information relates to pricing that could impact Cargill's ongoing business and its negotiations with other counter-parties in the normal course of its business in addition to its position in this CCAA proceeding. Hence, time limiting the Sealing Order for the duration of these CCAA proceedings will not provide sufficient protection. That said, having heard the MFC Royalty Motion, I am satisfied that the Confidential Material is not required to be disclosed for any of the parties to the MFC Royalty Motion, or any member of the public interested in that motion, to understand the context and issues to be adjudicated on this motion.
10. Conversely, the requested sealing order is necessary to protect commercially sensitive information that could negatively impact Cargill. The proposed sealing order is appropriately restricted to minimally intrude upon the public interest in the openness of our courts and appropriately balances the open court principle and legitimate commercial requirements for confidentiality. The salutary effects of sealing the Confidential Material from the public record outweigh the deleterious effects of its inclusion in the public record under the circumstances.
11. I am satisfied that the limited nature and scope of the proposed Sealing Order is appropriate and satisfies the *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC requirements, as modified by the reformulation of the test in *Sherman Estate v. Donovan*, 2021 SCC 25, at para 38. The parties were advised of this at the conclusion of the hearing on April 16, 2024 and were advised that this endorsement and the signed order would follow.
12. The Sealing Order dated April 16, 2024 and signed by me today may be issued and entered.
13. The Monitor is directed to ensure that the sealed Confidential Material is provided to the court clerk at the filing office in an envelope with a copy of this endorsement and the signed order with the relevant provisions highlighted so that it can be physically sealed.
14. In terms of other housekeeping, the court has scheduled a further hearing on April 23, 2024 for two hours commencing at 10:00 a.m. to address other matters that Tacora may wish to bring forward for the court's consideration (including with respect to the Stay, the DIP financing and a proposed claims process). Counsel for Tacora undertook to notify the service list of this hearing date.
15. The April 23, 2024 hearing has been scheduled as in person/hybrid hearing but it may be converted to a zoom hearing if it is not expected to be opposed. Counsel for Tacora shall advise the court scheduling office accordingly.



KIMMEL J.
April 17, 2024