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No. 226670  
Vancouver Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

**IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,  
RSC 1985, C C-36, AS AMENDED**

**AND**

**IN THE MATTER OF THE BUSINESS CORPORATIONS ACT, SBC 2002, C 57, AS  
AMENDED AND THE BUSINESS CORPORATIONS ACT, SNB 1981, C B-9.1, AS  
AMENDED**

**AND**

**IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF  
TREVALI MINING CORPORATION AND TREVALI MINING (NEW BRUNSWICK)  
LTD.**

**PETITIONERS**

**APPLICATION RESPONSE  
(CCAA Shareholder Representation)**

**Application Response of:** the Trevali Mining Corporation board of directors (the "**Board**").

THIS IS A RESPONSE TO the Notice of Application of Michael Demmer, Rodney Brunk, Tim Kempter, and William Williamson (collectively, the "**Ad Hoc Committee of Trevali Shareholders**" or "**Applicants**") dated August 25, 2022.

**Part 1: ORDERS CONSENTED TO**

The Board consent to the granting of **NONE** of the orders set out in paragraphs 1 and 2 of Part 1 of the Notice of Application.

**Part 2: ORDERS OPPOSED**

The Board opposes the granting of **ALL** of the orders set out in paragraphs 1 and 2 of Part 1 of the Notice of Application.

**Part 3: ORDERS ON WHICH NO POSITION IS TAKEN**

The Monitor takes no position on the granting of the orders set out in the following paragraphs.

of Part 1 of the Notice of Application: **NONE**.

**Part 4: FACTUAL BASIS**

**A. Background**

1. On August 19, 2022, Trevali Mining Corporation (“**Trevali**”) and Trevali Mining (New Brunswick) Ltd. (the “**Petitioners**”) were granted an initial order (the “**Initial Order**”) by the Supreme Court of British Columbia to commence proceedings (“**CCAA Proceedings**”) under the Companies’ Creditors Arrangement Act, RSC 1985, c C-36, as amended (the “**CCAA**”).
2. The Initial Order appointed FTI Consulting Canada Inc. as Monitor in the CCAA Proceedings (the “**Monitor**”) and established a stay of proceedings (the “**Stay of Proceedings**”) in favour of the Applicants until August 29, 2022. The Stay of Proceedings has since been extended until and including October 6, 2022 by an Amended and Restated Initial Order (the “**ARIO**”) granted by this Honourable Court on August 29, 2022.
3. On September 14, 2022, the Petitioners obtained an order from this Court (the “**SISP Order**”) approving procedures for a sales and investment solicitation process (the “**SISP**”) and a sales agent agreement (the “**Sales Agent Agreement**”) between the Trevali corporations and National Bank Financial Inc. (the “**Sales Agent**”) and granting a charge to secure the Sales Agent's fees (the “**Sales Agent Charge**”).
4. On September 14, 2022, the Petitioners obtained an order from this Court (the “**KERP Order**”) approving a key employee retention plan (the “**KERP**”) and granting a charge over the Applicants' property in favour of certain KERP employees as security for the amounts payable under the KERP in the amount of US \$800,000 (the “**KERP Charge**”).
5. On September 29, 2022, the Petitioners filed a Notice of Application returnable October 11, 2022 seeking an extension of the Stay of Proceedings.

**B. The Representative Counsel Application**

6. The Applicants of the within application are the Ad Hoc Committee of Trevali Shareholders, composed of three individuals who purportedly represent the interests of common shareholders of Trevali.

7. In the Representative Counsel Application, the Ad Hoc Committee of Trevali Shareholders seek an order that, among other things:

- (a) the Ad Hoc Committee of Trevali Shareholders (the “**CCAA Representatives**”) be appointed to represent the interests of all common shareholders of Trevali, with exceptions, as of the close of trading on the Toronto Stock Exchange on April 14, 2022 and/or August 15, 2022 (“**Trevali Shareholder Class**”) in these CCAA Proceedings with respect to any claims against Trevali and/or its current and/or former directors and officers arising out of or relating to their transactions in common shares of Trevali;
- (b) the law firm of KND Complex Litigation (“**KND**”) be appointed as Counsel to the CCAA Representatives in these CCAA Proceedings; and
- (c) KND be authorized to collaborate with other counsel as necessary or desirable to give effect to the sought Order and take all steps and to do all acts necessary or desirable to carry out the terms of the sought Order  
  
(the “**CCAA Representation Order**”).

8. In the Representative Counsel Application, the Ad Hoc Committee of Trevali Shareholders refer to a proposed multijurisdictional class proceeding related to claims for the alleged violation of securities laws (the “**Proposed Securities Class Action**”). The Proposed Securities Class Action is intended to be brought against the Board, including current and former directors.

## **Part 5: LEGAL BASIS**

### **A. This Court has discretion to appoint representative counsel**

9. Section 11 of the *CCAA* grants this Court the discretion to appoint a representative counsel:

#### **General power of court**

**11** Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the

restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

*CCAA, s. 11 League Assets Corp, Re, 2013 BCSC 2043 at para 70, 1057863 BC Ltd (Re), 2020 BCSC 1359 at para 124 Mountain Equipment Co-Operative (Re), 2020 BCSC 2037 at para 22*

### **B. The test for the appointment of representative counsel**

10. In deciding whether to exercise its discretion to appoint a representative counsel, courts evaluate the following two considerations: (i) whether the persons to be represented by the representative counsel have a commonality of interest, and (ii) whether it is fair and reasonable in the circumstances to appoint the representative counsel.
  
11. Commonality of interest is evaluated with regard to the following six considerations:
  - (a) commonality of interest is assessed based on the non-fragmentation test, not on an identity of interest test;
  - (b) the interests to be considered are the legal interests that a creditor holds *qua* creditor in relationship to the debtor company prior to and under the plan as well as on liquidation;
  - (c) the commonality of interests is to be viewed purposively, bearing in mind the object of the *CCAA*, namely to facilitate reorganizations if possible;
  - (d) in placing a broad and purposive interpretation on the *CCAA*, the court should be careful to resist classification approaches that would potentially jeopardize viable plans;
  - (e) absent bad faith, the motivations of creditors to approve or disapprove of a plan are irrelevant; and
  - (f) the requirement of creditors being able to consult together means being able to assess their legal entitlement as creditors before or after the plan in a similar manner.

*Nortel Networks Corp, Re (2009), 53 CBR (5th) 196 at para 62, 2009 CanLII 26603 (ONSC)*

*Stelco Inc, Re (2005)*, 78 OR (3d) 241 (CA)  
at para 23

12. Where the parties to be represented by the representative counsel have a commonality of interest in light of the factors outlined above, this Court has considered the following in deciding whether it is fair and reasonable to exercise its discretion to appoint a representative counsel:

- (a) the vulnerability and resources of the group to be represented;
- (b) any benefit to the companies under *CCAA* protection;
- (c) any social benefit to be derived from representation of the group;
- (d) the facilitation of the administration of the proceedings and efficiency;
- (e) the avoidance of a multiplicity of legal retainers;
- (f) the balance of convenience and whether it is fair and just including to the creditors of the estate;
- (g) whether representative counsel has already been appointed for those who have similar interests to the group seeking representation and who is also prepared to act for the group seeking the order; and
- (h) the position of other stakeholders and the Monitor.

*1057863* at paras 125 – 129  
*League Assets* at paras 71 – 75  
*Mountain Equipment Co-Operative (Re)*,  
2020 BCSC 2037 at para 23

**C. The test has not been satisfied**

13. The Applicants have failed to establish that the *CCAA* Representation Order is warranted and satisfies the applicable test.
14. First, it is unclear whether the Applicants and the Trevali Shareholder Class have a commonality of interest such that the relief sought in the Representative Counsel Application would assist in these *CCAA* Proceedings.

15. Second, it is not apparent that the Applicants or the Trevali Shareholders Class more broadly are vulnerable or otherwise lack the resources to retain counsel themselves in these CCAA Proceedings. This is quite unlike a proceeding where former employees are placed in a vulnerable financial position and have lost their source of income. Instead, these are individuals and potentially corporate entities who have made a risk-based decision to invest in a company. Further, the Applicants have provided no evidentiary support for the bald statement that most of the members of the Trevali Shareholders Class are retail investors who “likely” lack the financial and other resources to appear in this proceeding to represent their own interests, or to otherwise individually advance their own claims.
16. It is also unclear whether the Trevali Shareholders Class members support the relief sought in the Representative Counsel Application. There is no evidentiary support to suggest this and the Representative Counsel Application is silent on this. It is, therefore, not apparent that the relief sought in the Representative Counsel Application will, in fact, avoid a multiplicity of legal retainers.
17. Although the Applicants claim that they do not have a conflict of interests with the other members of the Trevali Shareholders Class, they also claim that “the Securities Claimants cannot be readily ascertained or found”. If the class cannot be determined or ascertained, it can likewise not be determined at this juncture whether the Applicants’ interests are in conflict with them.
18. Furthermore, the Applicants have not established that the relief sought in the Representative Counsel Application would lead to any meaningful benefit to the Petitioners, or a social benefit more generally.
19. In addition, KND seeks to be counsel for the Proposed Securities Class Action. The creation of a right or identity of the proposed class is inappropriate and not necessary in the CCAA Proceedings. Further, it could potentially result in confusion and risk inconsistent findings if the Proposed Securities Class Action is filed.
20. Finally, in considering the balance of convenience, there is nothing to suggest that the Applicants or the Trevali Shareholders Class members will be prejudiced by participating in, and having their claims evaluated and resolved through, the claims process.

21. For these reasons, the Board opposes the relief sought in the Representative Counsel Application.


**Part 6: MATERIAL RELIED ON**

1. Affidavit No. 1 of Michael Demmer, affirmed August 23, 2022;
2. Affidavit No. 1 of Hadi Davarinia, affirmed August 24, 2022;
3. Affidavit No. 1 of Hadi Davarinia, affirmed October 3, 2022; and
4. Such further and other material as counsel may advise and this Honourable Court may permit.

The application respondent estimates that the application will take 20 minutes.

The application respondent has filed in this proceeding a document that contains the application respondent's address for service.

Dated: October 4, 2022

  
Mary Buttery, K.C. / Amanda G. Manasterski,  
Counsel for the Application Respondent