



No. S-226670
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

AND

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*, S.B.C. 2002, c. 57, AS AMENDED AND THE *BUSINESS CORPORATIONS ACT*, S.N.B. 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

NOTICE OF APPLICATION

Name of applicant: His Majesty the King in Right of the Province of New Brunswick, as represented by the Department of Natural Resources and Energy Development ("DNRED")

To: THE SERVICE LIST

TAKE NOTICE that an application will be made by the applicant to the Honourable Madam Justice Fitzpatrick at the courthouse at 800 Smithe Street, Vancouver, British Columbia on January 9, 2023 at 9:00 am for the orders set out in Part 1 below.

(0:00)

Part 1: ORDERS SOUGHT

1. An order substantially in the form attached as Schedule "A" providing that:
 - (a) the Stay Period in respect of Trevali Mining (New Brunswick) Ltd. ("Trevali NB") as defined in paragraph 15 of the Amended and Restated Initial Order of this Court pronounced on August 29, 2022 (the "ARIO"), and set to expire on January 10, 2023 shall be extended until January 24, 2023;
 - (b) DNRED shall rent the equipment currently owned or leased by Trevali NB (the "Equipment") from the Petitioners for the sum of \$198,000 USD (the "Rental Fee"), provided that:
 - (i) the rental term shall be from January 9, 2023 until March 31, 2023;

- (ii) DNRED's right to use the Equipment shall be binding on any trustee in bankruptcy, liquidator, or receiver that may be appointed in respect of Trevali NB or its property, business or undertakings;
 - (iii) nothing in the order shall be interpreted to detract from the powers, responsibilities and authority of the Minister or the Government of the Province of New Brunswick as regulator under applicable law, including but not limited to any applicable Environmental Legislation (as defined in the ARIO).
2. Such further orders as counsel may advise and this Honourable Court may deem just.

Part 2: FACTUAL BASIS

1. On August 19, 2022, this Court granted an initial order pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"), which granted, *inter alia*, a stay of proceedings (the "Stay") in favour of the Petitioners.
2. On December 14, 2022, this Court extended the Stay of Proceedings with respect to Trevali NB until January 10, 2023.
3. Since that date, the Petitioners have been working towards their restructuring goals and seeking to maximize value for their stakeholders, including seeking an order approving the sale of the Rosh Pinah Mine in Namibia, which was granted by this Court on December 21, 2022.
4. In respect of Trevali NB, DNRED has been in discussions with the Monitor and its counsel regarding the future of the Mines (as defined below) given that no bids were received for the assets and undertakings of Trevali NB.
5. While parties were close to a consensual path forward at the end of December, that consensus has not come together, which led to DNRED's filing this application to enable an urgent but orderly transition of the environmental responsibilities related to the Mines to DNRED, with minimal (if any) prejudice to other stakeholders.

The Mine Sites

6. Trevali NB holds mining leases in regard to the Caribou and Restigouche mines in northeastern New Brunswick and the Halfmile mine near Miramichi, New Brunswick (together, the "Mines").
7. Trevali NB owns and leases land in regard to the Mines. Upon the land currently owned and leased by Trevali NB, there is equipment currently owned by Trevali NB along with other structures.

8. Trevali NB owes environmental obligations in respect of the Mines, as outlined in the Affidavit of Cory Neumann dated January 3, 2023 (the “**Neumann Affidavit**”).
9. As the Government of the Province of New Brunswick understood these obligations were being fulfilled during the CCAA process, representatives of DNRED or the Department of the Environment and Local Government (“**ELG**”) have not been at the mine sites recently to directly confirm the environmental condition of the Mines.
10. Environmental obligations at the Mines include monitoring tailings ponds, treating mine-impacted water prior to discharge into the environment, de-watering, and maintaining ongoing water treatment.
11. Any gaps in providing water treatment, which could be caused by damage, vandalism or other issues with the electrical grid, along with missed obligations due to a chaotic transition increases the risk of environmental damage to the area.
12. Any gaps in security also increases the risk of damage to the Equipment.

Since the Failure of the SISP

13. DNRED and the Monitor have been in discussions regarding options to facilitate an orderly transition of care and maintenance activities in respect of the Mines since the SISP failed to garner any bids.
14. From October 13, 2022 to December 22, 2022, the path that DNRED worked towards, based on presentations and conversations with the Monitor, was a longer extension of the CCAA to be funded by DNRED combined with the Monitor taking on expanded powers.
15. DNRED obtained government approval for funding an extension of the CCAA on certain terms.
16. On or about December 22, 2022, the Monitor advised that it was not willing to take on expanded powers with respect to Trevali NB, even after DNRED obtained government approval for funding for same.
17. As a result, the only option was a transition to bankruptcy or receivership. However, the transition to bankruptcy or receivership – and in particular the transition of obligations to DNRED for both security and environmental – need not be chaotic. Rather the transition can occur in an orderly manner taking into consideration the interests of all stakeholders, including DNRED.
18. As set out in the Neumann Affidavit, a sudden cessation of the performance of environmental obligations at the Mines creates environmental risk.
19. This risk is not limited to the period of time required for a contractor hired by DNRED to get to site. Rather, the lack of appropriate handover procedures and

- briefings creates a risk that some duties and activities will be missed and environmental damage will result.
20. Damage to the Equipment or the Mines may also result from a sudden bankruptcy or receivership on January 10 if there is a gap in security at the Mines, including to the electrical grid.
 21. Further, appointment of a receiver on January 10 does not mean that the Equipment could be liquidated on or about that date. Weather conditions and restrictions on road access will delay liquidation of Equipment, and ELG has requirements prior to the decommissioning and removal of the water treatment plant and Equipment used for water treatment. In other words, delaying a receivership from on January 10 to a later date does not harm any secured creditors of Trevali NB.
 22. DNRED is willing to provide US\$198,000 in funding to rent the Equipment for a period of time that will enable DNRED to inspect all equipment on site, formulate an initial plan for reclamation, and allow DNRED time to negotiate the purchase of any Equipment that would be useful for reclamation of the Mines.
 23. According to the cash flow projections provided by the Monitor, the funding will cover the additional costs of the stay extension requested by this application.
 24. As a result, the only arguable detriment to any secured creditors of Trevali NB in respect of the value of Trevali NB's personal property is the delay in ability to appoint a receiver over the Equipment. DNRED submits that this is not a real detriment given the challenges a receiver will face in liquidating the equipment over the winter and early spring months in New Brunswick.
 25. A two-week extension is reasonable in the circumstances, giving sufficient time for an urgent but orderly transition of responsibility for the Mines. At the same time, the proposed terms of such extension – namely the Rental Fee – minimizes any potential impact on the Petitioners or their stakeholders.
 26. In fact, the short stay period coupled with the Rental Fee means that the extension will cause no adverse affect on stakeholders; whereas not granting an extension risks harm to the environment and DNRED.

Part 3: LEGAL BASIS

The Stay Extension Should Be Granted

1. The CCAA provides that, on an application in respect of a debtor company, the court may extend a stay provided that it is satisfied that the order is appropriate in the circumstances and that the applicant acts and has acted in good faith and with due diligence.

CCAA s. 11.02(2); s. 11.02(3)

2. Where such an application is brought by an applicant other than the debtor company, the term “applicant” in s. 11.02(3)(b) refers to the debtor company.

Envision Engineering & Contracting Inc., Re, 2011 ONSC 631 at para 21

3. Section 11 of the CCAA provides courts with broad discretion. This discretion should be exercised in accordance with the policy objectives underlying the CCAA.

9354-9186 Québec inc. v. Callidus Capital Corp.,
2020 SCC 10 at paras 48, 67 [*Callidus*];
Century Services Inc. v. Canada (Attorney General),
2010 SCC 60 at para 70 [*Century*]

4. Extending the stay in this case is appropriate as it will give the Province of New Brunswick and Trevali NB sufficient time to ensure that there is an orderly transition of responsibilities at the Mines. Further, the length of the extension and the terms related thereto minimizes prejudice other stakeholders.

5. In *Worldspan Marine Inc. (Re)*, the Court stated that:

In considering whether “circumstances exist that make the order appropriate”, the court must be satisfied that an extension of the Initial Order and stay will further the purposes of the CCAA.

Worldspan Marine Inc. (Re), 2011 BCSC 1758 at para 13 [*Worldspan*]

6. The Court continued on to list factors to be considered on a stay application which include:

- (a) the debtor’s progress during the previous stay period toward a restructuring;
- (b) whether creditors will be prejudiced if the court grants the extension; and
- (c) the comparative prejudice to the debtor, creditors and other stakeholders in not granting the extension.

Worldspan at para 22

7. The Court in *Tepper Holdings Inc., Re* discussed the test and held that:

When deciding whether to terminate or extend a stay, a court must balance the interests of all affected parties, including secured and unsecured creditors, preferred creditors, contractors and suppliers, employees, shareholders, and the public generally.

Tepper Holdings Inc., Re, 2011 NBQB 211 at para 34 [*Tepper Holdings*]

8. The remedial purpose of the CCAA has been described by the Supreme Court of Canada as to avoid “the social and economic losses resulting from liquidation of

an insolvent company”. However, “the CCAA is fundamentally insolvency legislation, and thus it also ‘has the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm’s financial distress . . . and enhancement of the credit system generally”.

Century at para 70
Callidus at para 42 (citations omitted)

9. An application for extension of a stay does not need to have the goal of “the emergence of the pre-filing debtor company in a restructured state”. Rather, in this case, this particular application for the extension of a stay has as its goal the preservation of the community and environment affected by Trevali NB’s financial distress.

Callidus at para 42

10. Both the *Worldspan* and *Tepper Holdings* decisions speak to a balancing of prejudice between parties. In the instant case, balancing prejudice clearly favours granting a stay.

- (a) With the Rental Fee being paid, the creditors will be minimally impacted by the extension. There will be little—if any—prejudice to them.
- (b) On the other hand, if care and maintenance ceases, the Petitioners will potentially become liable for fines and penalties related to any environmental degradation.
- (c) DNRED, as a stakeholder, will be left with addressing any environmental damage caused by a lapse in care and maintenance. Not granting the extension would greatly prejudice them.
- (d) *Tepper Holdings* expressly lists the public as an affected party whose interests must be balanced. It is certainly in the public’s interest to minimize the risk of environmental damage.

11. It is expected that certain creditors of the Petitioners will argue that the extension of the stay until January 10, 2023, should have provided sufficient time to transition the Mines. However, such argument ignores the efforts of DNRED, the Monitor, and the Petitioners to secure consensus for longer extension of the CCAA, with the Monitor taking on expanded powers. By the time that option was determined to be unworkable – December 22, 2022 – DNRED acted with due diligence to get its contractor on site, but has been unable to do so as of the date of filing this Application.

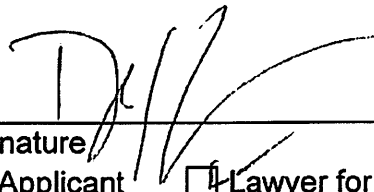
12. In addition, the test is whether the Petitioners, not DNRED as applicant, have been acting with good faith and due diligence. There is no evidence that they have not done so.
13. DNRED submits that the requested stay extension, on the terms related thereto, are appropriate in the circumstances because:
 - (a) the Petitioners made progress during the previous stay period towards a sale of the assets of Trevali Mining Corporation and are operating in good faith and with due diligence;
 - (b) creditors will not be prejudiced if the Court grants the extension on the terms requested because:
 - (i) any receiver will not be able to liquidate the Equipment until the spring at the earliest,
 - (ii) the Rental Fee will replace the funds expected to be spent during the requested extension; and
 - (iii) an orderly handover reduces risk to the value of the Equipment.
 - (c) in comparison with the lack of prejudice to creditors from granting the extension, not granting the extension increases risks to the environment, harms the interests of the Province of New Brunswick in minimizing such risk, and potentially reduces the value of the Equipment.
14. The requested relief is, therefore, appropriate in the circumstances and should be granted.

Part 4: MATERIAL TO BE RELIED ON

1. Fifth Report of the Monitor, dated December 12, 2022;
2. Affidavit #1 of Cory Neumann, dated January 3, 2023;
3. Affidavit #1 of Christopher Whibbs, dated January 3, 2023;
4. Seventh Report of the Monitor, to be filed;
5. Such other materials and evidence as this Court may admit.

The applicant estimates that the application will take one hour. Justice Fitzpatrick is seized of this matter.

Dated: 03/01/2023



Signature
 Applicant Lawyer for
applicant(s)
Tevia Jeffries

THIS NOTICE OF APPLICATION is prepared and delivered by Tevia Jeffries of the firm Farris LLP, Barristers & Solicitors, whose place of business and address for service is 2500 – 700 West Georgia Street, Vancouver, British Columbia, V7Y 1B3. Telephone: (604) 684-9151. Facsimile: (604) 661-9349. Email: tjeffries@farris.com. **Attention: Tevia Jeffries.**

Appendix

[The following information is provided for data collection purposes only and is of no legal effect.]

THIS APPLICATION INVOLVES THE FOLLOWING:

- discovery: comply with demand for documents
- discovery: production of additional documents
- other matters concerning document discovery
- extend oral discovery
- other matter concerning oral discovery

- amend pleadings
- add/change parties
- summary judgment
- summary trial
- service
- mediation
- adjournments
- proceedings at trial
- case plan orders: amend
- case plan orders: other
- experts
- other

Schedule "A"

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

PETITIONERS

ORDER MADE AFTER APPLICATION

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| |) | THE HONOURABLE |) | |
| BEFORE |) | JUSTICE FITZPATRICK |) | January 9, 2023 |
| |) | |) | |

ON THE APPLICATION of the His Majesty the King in Right of the Province of New Brunswick, as represented by the Department of Natural Resources and Energy Development ("DNRED") coming on for hearing at Vancouver, British Columbia, on the 9th day of January, 2023; AND ON HEARING Tevia Jeffries, counsel for DNRED, and those other counsel listed on Schedule "A" hereto; AND UPON READING the material filed, including the First Affidavit of Cory Neumann made January 3, 2023, the First Affidavit of Christopher Whibbs made January 3, 2023, the Fifth Report of FTI Consulting Canada Inc. (in its capacity as court-appointed monitor of the Petitioners (the "Monitor") dated December 12, 2022, and the Seventh Report of the Monitor dated January __, 2023; AND pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36 as amended, the *British Columbia Supreme Court Civil Rules* and the inherent jurisdiction of this Honourable Court;

THIS COURT ORDERS that:

1. The time for service of this Notice of Application and supporting materials is hereby abridged such that the Notice of Application is properly returnable today and service thereof upon any interested party other than those parties on the Service List maintained by the Monitor is hereby dispensed with.
2. The Stay Period (as defined in the Amended and Restated Initial Order of this Court pronounced on August 29, 2022 (the "ARIO")), in respect of Trevali Mining (New Brunswick) Ltd. ("Trevali NB"), its property, business and undertakings is hereby be extended until and including January 24, 2023;
3. DNRED shall rent the equipment currently owned or leased by Trevali NB (the "Equipment") from the Petitioners in exchange for a payment of \$198,000 USD (the "Rental Fee").
4. Upon payment by DNRED of the Rental Fee, DNRED and its approved contractors shall have the right to use the Equipment until and including March 31, 2023.
5. DNRED's right to use the Equipment until March 31, 2023, as set out herein shall be binding on any trustee in bankruptcy, liquidator, or receiver that may be appointed in respect of Trevali NB or its property, business or undertakings.
6. Nothing in the order shall be interpreted to detract from the powers, responsibilities and authority of the Minister or the Government of the Province of New Brunswick as regulator under applicable law, including but not limited to any applicable Environmental Legislation (as defined in the ARIO).
7. THIS COURT REQUESTS the aid and recognition of other Canadian and foreign Courts, tribunal, regulatory or administrative bodies, including any Court or administrative tribunal of any federal or State Court or administrative body in the United States of America, Burkina Faso, and Namibia to act in aid of and to be complementary to this Court in carrying out the terms of this Order where required. All courts, tribunals, regulatory and administrative bodies are hereby respectfully

requested to make such orders and to provide such assistance to the Petitioner and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Petitioner and the Monitor and their respective agents in carrying out the terms of this Order.

8. Endorsement of this Order by counsel appearing on this application other than counsel for DNRED is hereby dispensed with.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT.

Signature of

Lawyer for His Majesty the King in Right of
the Province of New Brunswick, as
represented by the Department of Natural
Resources and Energy Development

Tevia Jeffries

By the Court

Registrar