



FORCE FILED

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: FTI Consulting Canada Inc., in its capacity as court-appointed
monitor of Trevali Mining Corporation (in that capacity, the "Monitor"
or the "Applicant")

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 April 26, 2024, at 10:00 a.m. for the orders set out in Part 1 below.

The Applicant estimates that the application will take 1.5 hours.

- This matter is within the jurisdiction of an associate judge.
- This matter is not within the jurisdiction of an associate judge.

Part 1: ORDERS SOUGHT

1. The Applicant seeks directions regarding the adjudication of the proof of claim submitted by the Ad Hoc Committee of Shareholders of Trevali Mining Corporation (the "**Shareholders' Claim**"), including, but not limited to, an order that the Shareholders'

Claim, having been referred to the Court as permitted by the Claims Process Order granted by this Court on March 29, 2023 (the "**CPO**"), shall not be adjudicated pursuant to the CPO.

2. Procedural directions to adjudicate the Shareholders' Claim as this Court may deem appropriate.
3. Such further orders as counsel for the Applicant may advise and this Court may deem appropriate in the circumstances.

Part 2: FACTUAL BASIS

4. The Monitor currently has expanded powers with respect to Trevali Mining Corporation ("**Trevali**"). The Monitor seeks directions regarding the adjudication of the Shareholders' Claim so that it can be determined by this Court.

Background

5. On August 19, 2022, this Court granted an Initial Order (the "**Initial Order**") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), granting relief in favour of Trevali and Trevali Mining (New Brunswick) Ltd. ("**Trevali NB**"), which was subsequently amended and restated by further order of this Court on August 29, 2023 (the "**ARIO**").
6. Since being granted protection under the CCAA, both Trevali and Trevali NB have worked to restructure their affairs for the benefit of their stakeholders and to maximize recovery for creditors.
7. On September 14, 2022, this Court approved a Sales and Investment Solicitation Process (the "**SISP**") to solicit offers for, among other things, the purchase of Trevali's interest in the Rosh Pinah mine in Namibia.
8. The SISP resulted in a sale (the "**Appian Transaction**") of Trevali's 90% interest in the Rosh Pinah mine, Trevali's primary asset of value, by way of a sale of the shares of GLCR Limited, to Appian Natural Resources Fund III LP and Appian Natural Resources (UST) Fund III LP (collectively, "**Appian**") pursuant to a Share and Asset Purchase Agreement dated December 15, 2022 (the "**Appian SPA**"), as subsequently assigned pursuant to an assignment agreement dated June 2, 2023, to ANR RP Limited, an Appian affiliate, as authorized in the Appian SPA.
9. On December 21, 2022, this Court approved the Appian Transaction.

10. On April 24, 2023, this Court approved a distribution order (the "**Distribution Order**") authorizing the distribution by Trevali of available funds including in respect of the Immediately Available Sale Proceeds (as defined in the Distribution Order) arising from the Appian Transaction. The Distribution Order authorizes the distribution of funds as more particularly set out in that order including distribution on account of the Outstanding Interim Financing Balance, the Revolving Credit Facility and the Glencore Facility (each as defined in the Distribution Order), subject to certain required holdbacks, as further defined and described in the Distribution Order.
11. On June 23, 2023, the Appian Transaction closed. On closing of the Appian Transaction, funds were distributed on account of the Outstanding Interim Financing Balance, the Revolving Credit Facility and the Glencore Facility as authorized in the Distribution Order. The Outstanding Interim Financing Balance, the Revolving Credit Facility and the Glencore Facility have been repaid in full.
12. The vast majority of Trevali's assets have been sold or otherwise liquidated/restructured as part of this CCAA proceeding or other court processes. There are certain remaining non-core assets that are expected to further maximize value for Trevali's stakeholders.
13. Trevali's remaining employees ceased their employment with Trevali on or prior to June 30, 2023. In addition, Trevali's one remaining director also resigned prior to June 30, which was also when Trevali's directors' and officers' insurance expired.
14. Given the status of Trevali's restructuring efforts, the nature of its remaining assets, and the reduction of its employees and management, Trevali brought an application to expand the Monitor's powers regarding Trevali.
15. On June 28, 2023, this Court granted an order expanding the powers of the Monitor with respect to Trevali and its property (the "**EMP Order**").

Claims Process

16. On March 29, 2023, this Court approved the CPO. As is discussed in the Monitor's reports filed in this CCAA proceeding, the Monitor continues to implement and adjudicate the Claims Process (as defined in the CPO).
17. In summary, pursuant to the CPO the Monitor has:
 - (a) issued 13 Notices of Revision or Disallowance; and
 - (b) extended the applicable timelines in respect of seven claims due to the contingent nature of these claims.

18. The Monitor initially extended the applicable timelines in respect of 10 claims. Following the receipt of further evidence, the Monitor accepted one of the extended claims and issued Notices of Revision or Disallowance with respect to two extended claim.
19. There are no disputes with respect to any of the Notices of Revision or Disallowance. All such claims have been deemed accepted at the amount, secured status and priority set forth in the Notices of Revision or Disallowance pursuant to the CPO.

Shareholders' Claim

20. On October 7, 2022, the members of the Ad Hoc Committee of Trevali shareholders (the "**Shareholder Representatives**") filed a notice of civil claim with respect to the allegations set out in the Shareholders' Claim. This notice of civil claim is subject to the stay of proceedings in the ARIO, as currently extended to April 26, 2024.
21. On March 29, 2023, the same day the CPO was approved, this Court ordered that the Shareholder Representatives be appointed to represent the interests of certain securities claimants (the "**Shareholder Representation Order**"). Further, the Shareholder Representation Order, among other things:
 - (a) appointed KND Complex Litigation (the "**Shareholder Representatives Counsel**") as counsel to the Shareholder Representatives in this CCAA proceeding; and
 - (b) authorized the Shareholder Representatives and the Shareholder Representatives Counsel to take all steps and all acts necessary and desirable to carry out the terms of the Shareholder Representation Order.
22. The Shareholders' Claim is comprised of four separate, but overlapping, proofs of claim, all of which were submitted by Shareholder Representatives Counsel pursuant to the CPO. These claims include:
 - (a) *Securities Act* claim against Trevali pursuant to ss. 131, 140.3 and 140.5 of the *Securities Act*, R.S.B.C. 1996, c. 418, alleging an unsecured claim of C\$56 million;
 - (b) Oppression claim against Trevali pursuant to s. 227 of the *Business Corporation Act*, R.S.B.C. 2002, c. 57, alleging an unsecured claim of C\$56 million
 - (c) *Securities Act* claim against the directors and officers of Trevali (the "**Directors and Officers**") pursuant to ss. 131, 140.3 and 140.5 of the *Securities Act*, R.S.B.C. 1996, c. 418, alleging a claim of C\$11,362,673.00, being an insurer equity claim; and

- (d) Oppression claim against the directors and officers of Trevali pursuant to s. 227 of the *Business Corporation Act*, R.S.B.C. 2002, c. 57, alleging a claim of C\$56 million, being an insurer equity claim.

23. As set out in the Shareholders' Claim:

The claims stem from the allegation that [the Directors and Officers of Trevali] failed to exercise care and oversight over core, mission-critical risk management and compliance affairs of Trevali with respect to:

1. Health and safety
2. Corporate governance and risk management
3. Internal control systems and disclosure controls and procedures

In light of the [Directors' and Officers'] failure to exercise care and oversight over the mission critical aspects of Trevali's business and compliance affairs, specific statements made in Trevali's core disclosure documents filed between October 9, 2020 and August 15, 2022 constituted a misrepresentation within the meaning of the *Securities Act*.

C. Legal Basis

A claim for damages has been asserted against Trevali and the [Directors and Officers] for misrepresentation in prospectuses, which is the subject of section 131 of the *Securities Act*.

A claim for damages has been asserted against Trevali and the [Directors and Officers] for misrepresentation in the secondary market, which is the subject of sections 140.3 and 140.5 of the *Securities Act*.

A claim for compensation and other relief to rectify the effect of oppressive conduct has been asserted against Trevali and the [Directors and Officers] for: (a) failing to conduct their duties which are the subject of section 142 of the *Business Corporations Act*, SBC 2002, c 57; and (b) acting on conflicts of interests.

24. As noted in the Shareholders' Claim, the claim against the Directors and Officers is an insured claim, which is alleged to have arisen prior to this CCAA proceeding.
25. The Directors and Officers are represented by Osler, Hoskin & Harcourt LLP ("**Osler**").
26. The Monitor has requested that Osler act on behalf of Trevali with respect to the Shareholders' Claim, given synergies and alignment between any defenses that may be raised by Trevali and the Directors and Officers. The Monitor understands that the insurer is funding Osler's representation of Trevali and it was agreed as part of the engagement that the estate would not have to fund the fees of Osler in representing Trevali.

27. The Shareholders' Claim is one of the claims for which the Monitor extended the applicable timelines under the CPO. Most recently, the Monitor extended the applicable timelines for the Shareholders' Claim to April 26, 2024.
28. The extended deadline of April 26, 2024, is the date by which the Monitor must send a Notice of Revision or Disallowance to the Shareholder Representatives and the Shareholder Representatives Counsel, unless otherwise extended. If the Monitor does not send a Notice of Revision or Disallowance, subject to being referred to this Court, the Shareholders' Claim shall be a proven claim, unless otherwise provided in a subsequent order of this Court.
29. Accordingly, on April 19, 2024, the Monitor issued a Notice of Referral to the Court in respect of the Shareholders' Claim.

Part 3: LEGAL BASIS

30. The Monitor relies on:
 - (a) CCAA, in particular, sections 11, 20 and 23(1)(k);
 - (b) *Supreme Court Civil Rules*, B.C. Reg. 168/2009 (the "**Rules**"), in particular Rules 8-1 and 13-1;
 - (c) the inherent and equitable jurisdiction of this Court; and
 - (d) such further and other legal bases and authorities as counsel may advise and this Court may permit.
31. Pursuant to the EMP Order, the Monitor is authorized and empowered to, among other things:
 - (a) "administer the claims process authorized by the [CPO] notwithstanding any obligation in the CPO to consult with, take steps in conjunction with, or obtain the consent or approval of, the Petitioner" (paragraph 4(n)); and
 - (b) "apply to this Court for advice and directions in respect of the exercise and discharge of its powers and duties hereunder" (paragraph 4(w)).
32. The CPO permits the Monitor to, at any time and among other things:
 - (a) "refer a Claim for resolution to this Court for any purpose where in the Monitor's discretion ... such a referral is preferable or necessary for the resolution or valuation of the Claim" (paragraph 30(a)); and

(b) “extend the time period within which the Monitor ... is to take any step related to adjudication of Claims pursuant to the [CPO]” (paragraph 30(d)).

33. The Shareholders’ Claim is an “equity claim” under the CCAA. Pursuant to s. 6(8) of the CCAA:

No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

CCAA, ss. 2(1) “equity claim”, 6(8).

34. There will not be sufficient recovery in this proceeding to pay all claims that are not equity claims in full. As a result, even if a valid claim, there will be no recovery from the estate of Trevali for the Shareholders’ Claim.

35. Since the Shareholders’ Claim, as alleged, arose prior to the commencement of this CCAA proceeding, any recovery against the Directors and Officers would not be subject to the D&O Charge, as approved by and defined in ARIO.

36. Given the Shareholders’ Claim is an “equity claim”, the Monitor is of the view that it is not in the interests of Trevali’s stakeholders generally for the Monitor to adjudicate the Shareholders’ Claim under the CPO and spend estate resources dealing with what is a very complex and factually dependent claim. Adjudicating the Shareholders’ Claim under the CPO would result in the Monitor incurring significant costs. Such costs would not benefit Trevali’s stakeholders generally and “unnecessary expense should best be avoided.”

***Re Crystallex International Corporation, 2012
ONSC 6812 at para. 5.***

37. Having the Monitor adjudicate the Shareholders’ Claim under the CPO, or be extensively involved in the adjudication of the Shareholders’ Claim (beyond its powers under the EMP Order to exclusively act on behalf of Trevali), would be inconsistent with “the statutory objectives of the CCAA toward a timely and inexpensive resolution of claims and distribution to creditors”. Since there will be no distribution from the Trevali estate with respect to the Shareholders’ Claim, if valid, adjudication of the Shareholders’ Claim by the Monitor does not result in an inexpensive distribution to other creditors.

***Walter Energy Canada Holdings, Inc. (Re), 2017
BCSC 709 at para. 24.***

38. Further, given the nature and complexity of the Shareholders’ Claim, it is necessary that this Court, not the Monitor, resolve the Shareholders’ Claim. Specifically, the Claims

Process is not a sufficiently robust process to adjudicate the Shareholders' Claim. Among other limitations:

- (a) the Directors and Officers are a party to the claim and the Claims Process does not contemplate third party participation;
- (b) the nature of the Shareholders' Claim does not lend itself to a matter of accounting on the face of existing documentation; and
- (c) resolution of the Shareholders' Claim will likely require further litigation steps as may be directed by the Court to ensure "a 'just, speedy and inexpensive determination' of the issues in a proportionate manner" and in "a manner that is fair to all of the litigants."

Rules, R. 1–3.
***Alderbridge Way GP Ltd. (Re)*, 2024 BCSC 382 at paras. 35, 42–43, 49.**
***Alderbridge Way GP Ltd. (Re)*, 2023 BCSC 1718 at paras. 55, 117.**
***Walter Energy Canada Holdings, Inc. (Re)*, 2017 BCSC 709 at para. 24.**

39. The adjudication of claims "within the ambit of CCAA proceedings does not ... preclude any procedural rights".

***Alderbridge Way GP Ltd. (Re)*, 2023 BCSC 1718 at para. 86.**

40. In any event, even if the Claims Process was a sufficiently robust process to adjudicate the Shareholders' Claim, it does not benefit the stakeholders of Trevali generally for the Monitor to expend estate resources to adjudicate the Shareholders' Claim.
41. As a result, the Monitor referred the Shareholders' Claim to the Court pursuant to the CPO because it was both preferable and necessary for the resolution of the Shareholders' Claim.
42. The Monitor seeks directions from this Court regarding the adjudication of the Shareholders' Claim in light of the referral to the Court, and in particular, the Monitor's role, if any, in such process.
43. With respect to any direction from this Court, the Monitor notes:
- (a) Notwithstanding the CPO, "the court retains its discretion to address the application of the claims process order". No provision of the CPO, or absence

thereof, "is sufficient to oust the statutory jurisdiction of the court in appropriate circumstances."

***Bul River Mineral Corporation (Re)*, 2014 BCSC 1732 at para. 33, citing *Timminco Limited (Re)*, 2014 ONSC 3393 at para. 38.**

- (b) Further, the CPO "does not preclude the court from considering the issues on their merits", and the adjudication of the Shareholders' Claim should be resolved in a "fair, reasonable and transparent" for all interested parties.

***Bul River Mineral Corporation (Re)*, 2014 BCSC 1732 at paras. 32, 54–55.
Steels Industrial Products Ltd. (Re), 2012 BCSC 1501 at para. 38.**

- (c) There is no statutory requirement for the Monitor to be involved in a claims process.

See for example, *Bul River Mineral Corporation (Re)*, 2014 BCSC 1732 at paras. 28, 51.

- (d) Claims in CCAA proceedings are adjudicated on a summary basis, subject to further order of the CCAA court regarding the appropriate procedures.

**CCAA, s. 20.
Alderbridge Way GP Ltd. (Re), 2023 BCSC 1718 at paras. 29–30**

- (e) Section 11 of the CCAA "endows the CCAA court with broad jurisdiction to advance the purposes of the statute by making any order that it considers 'appropriate'", which includes how disputes will be resolved.

***Alderbridge Way GP Ltd. (Re)*, 2023 BCSC 1718 at para. 31.
Alderbridge Way GP Ltd. (Re), 2024 BCSC 382 at paras. 29, 35.**

Part 4: MATERIAL TO BE RELIED ON


1. Eleventh Report of the Monitor, dated May 31 2024;
2. Twelfth Report of the Monitor, dated June 26, 2023;
3. Fourteenth Report of the Monitor, dated October 18, 2023;
4. Sixteenth Report of the Monitor, dated April 22, 2024;
5. Order of this Court granted August 29, 2022 (ARIO);

- 6. Order of this Court granted March 29, 2023 (CPO);
- 7. Order of this Court granted March 29, 2023 (Shareholder Representation Order);
- 8. Order of this Court granted June 28, 2023 (EMP Order); and
- 9. Such further and other material as counsel for the Applicants may advise.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this Notice of Application, you must, within 5 business days after service of this Notice of Application or, if this application is brought under Rule 9-7, within 8 business days of service of this Notice of Application,

- (a) file an Application Response in Form 33,
- (b) file the original of every affidavit, and of every other document, that
 - (i) you intend to refer to at the hearing of this application, and
 - (ii) has not already been filed in the proceeding, and
- (c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
 - (i) a copy of the filed Application Response;
 - (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
 - (iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Date: 22/APR/2024



 Signature of lawyer for Applicant
 Eamonn Watson

<i>To be completed by the court only:</i>	
Order made	
<input type="checkbox"/>	in the terms requested in paragraphs _____ of Part 1 of this Notice of Application
<input type="checkbox"/>	with the following variations and additional terms:
_____ _____ _____	
Date:	_____ Signature of <input type="checkbox"/> Judge <input type="checkbox"/> Associate Judge

APPENDIX

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
- none of the above