



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**

**THIRTEENTH REPORT OF THE MONITOR**

**July 25, 2023**

# THIRTEENTH REPORT OF THE MONITOR

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## INTRODUCTION

1. On August 19, 2022, Trevali Mining Corporation (“**Trevali Corp.**”) and Trevali Mining (New Brunswick) Ltd. (“**Trevali NB**” and collectively, “**Trevali**” or the “**Applicants**”) commenced proceedings (the “**CCAA Proceedings**”) under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”) pursuant to an order granted by this Honourable Court, which was subsequently amended and restated on August 29, 2022 (the “**ARIO**”).
2. The ARIO 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 October 6, 2022. The Stay of Proceedings has since been extended until and including October 27, 2023, in respect of Trevali Corp. The Stay of Proceedings in respect of Trevali NB expired on January 24, 2023.
3. On September 14, 2022, this Honourable Court granted an order approving procedures for a sales and investment solicitation process (the “**SISP**”).
4. On October 11, 2022, this Honourable Court granted an order authorizing and approving a settlement agreement (the “**Settlement Agreement**”) between the Applicants, the RCF Lenders (as defined in the First Report of the Monitor dated August 26, 2022 (the “**First Report**”)), Glencore International AG, Glencore AG and Glencore Canada Corporation (“**Glencore Canada**”, and collectively with Glencore International AG and Glencore AG, “**Glencore**”) addressing the issues which arose in response to Glencore declining to advise whether they would assert a right of set-off against amounts owing by them for delivery under the Off-Take Agreements (as defined in the Settlement Agreement) with the Applicants and certain affiliated entities.
5. On December 21, 2022, in connection with the SISP and relating to the Rosh Pinah mine, this Honourable Court granted an order, among other things, approving Trevali Corp.’s execution of a Share and Asset Purchase Agreement dated December 15, 2022, between Trevali Corp., as vendor, and Appian Natural Resources Fund III LP and Appian Natural

Resources (UST) Fund III LP, as purchasers (as amended from time to time, the “**Appian SPA**”).

6. On April 24, 2023, this Honourable Court granted an order (the “**Distribution Order**”) authorizing Trevali Corp. to distribute the net proceeds resulting from the transaction contemplated by the Appian SPA (the “**Appian Transaction**”), and any other available proceeds, to the RCF Administrative Agent (as defined in the Fourth Report of the Monitor dated October 11, 2022 (the “**Fourth Report**”)) for distribution in accordance with the Settlement Agreement in an amount not to exceed the Outstanding Interim Financing Balance (as defined in the Settlement Agreement), plus the aggregate amounts owing under the Revolving Credit Facility and the Glencore Facility (each as defined in the Settlement Agreement), subject to maintaining a holdback reserve and certain other conditions. The parties agreed at that hearing that the distribution pursuant to the Distribution Order and the limit on the amount authorised to be distributed were without prejudice to the parties’ positions on the Settlement Agreement and preserved the *status quo* with respect to the dispute discussed in more detail below.
7. On June 23, 2023, the Appian Transaction was successfully completed and the net proceeds were distributed in accordance with the Distribution Order.
8. On June 28, 2023, this Honourable Court granted an order expanding the powers of the Monitor with respect to Trevali Corp. and its property.
9. On July 17, 2023, Trevali Corp. filed a Notice of Application (the “**Trevali Application**”) for a declaration (the “**Settlement Agreement Declaration Order**”) that any payments made, or that may potentially be made, to or on behalf of Glencore pursuant to section 5 of the Settlement Agreement:
  - a. are not new or additional post-filing liabilities of Trevali Corp., Trevali NB or any entity in the Trevali Group (as defined in the Settlement Agreement);

- b. have been, and shall only be, paid as a reduction of the amounts outstanding under the Glencore Facility; and
  - c. shall not exceed the amounts owing under the Glencore Facility (as set out in the Distribution Order).
10. On July 24, 2023, Glencore served an unfiled Application Response (the “**Glencore Response**”) to the Trevali Application and supporting affidavits on Trevali Corp., the RCF Administrative Agent and the Monitor. The Glencore Response and supporting affidavits were unfiled due to a number of references to information subject to the Sealing Order granted by this Honourable Court on October 11, 2022 (the “**Sealing Order**”).

#### **PURPOSE**

11. The purpose of this Thirteenth Report is to provide this Honourable Court and the Applicants’ stakeholders with information with respect to the Trevali Application and the Glencore Response.

#### **TERMS OF REFERENCE**

12. In preparing this report, the Monitor has relied upon certain information (the “**Information**”) including the Applicants’ unaudited financial information, books and records and discussions with previous senior management of Trevali Corp. (“**Management**”).
13. Except as described in this report, the Monitor has not audited, reviewed or otherwise attempted to verify the accuracy or completeness of the Information in a manner that would comply with Generally Accepted Assurance Standards pursuant to the Chartered Professional Accountants of Canada Handbook.

14. The Monitor has not examined or reviewed financial forecasts and projections referred to in this report in a manner that would comply with the procedures described in the Chartered Professional Accountants of Canada Handbook.
15. Future-oriented financial information reported to be relied on in preparing this report is based on Management's assumptions regarding future events. Actual results may vary from forecast and such variations may be material.
16. Unless otherwise stated, all monetary amounts contained herein are expressed in United States dollars to be consistent with the Applicants' primary reporting currency.
17. Capitalized terms not otherwise defined herein are as defined in the First Report.

#### **SETTLEMENT AGREEMENT**

18. The Monitor reported on the Settlement Agreement in the Fourth Report and the Confidential Supplemental Report to the Fourth Report of the Monitor dated October 11, 2022 (the "**Fourth Confidential Supplemental Report**"), which was filed pursuant to the Sealing Order.
19. On September 29, 2022, Trevali filed a Notice of Application for an order (the "**Non-Applicant Stay Order**") with respect to Trevali Corp.'s non-applicant subsidiary Rosh Pinah Zinc Corporation (Proprietary) Limited ("**RPZC**"). Trevali's application for the Non-Applicant Stay Order arose in response to Glencore declining to advise whether they would assert a right of set-off against amounts owing by them for delivery under the Off-Take Agreements with the Applicants and certain affiliated entities ("**Multilateral Set-Off**").
20. As stated in the Notice of Application filed September 29, 2022, the Non-Applicant Stay Order was sought to provide certainty for Trevali to (a) determine their liquidity requirements, (b) source necessary interim financing and (c) advance the SISP. The

Notice of Application was scheduled to be heard on October 11, 2022, but not argued given the settlement as described below.

21. As noted in the Fourth Report, on or about October 11, 2022, the Applicants, the RCF Lenders and Glencore reached the Settlement Agreement, which avoided the need to argue the application for the Non-Applicant Stay Order. Among other things, the Settlement Agreement resolved the possibility of Glencore asserting entitlement to Multilateral Set-Off and the preservation of the Off-Take Agreements and facilitated the funding of the Interim Financing Tranche (as defined in the Fourth Report).
22. The Settlement Agreement was subject to approval by this Honourable Court.
23. On October 11, 2022, Trevali brought an application to, among other things, approve the Settlement Agreement. The materials filed in support of the order approving of the Settlement Agreement included:
  - a. Notice of Application, filed October 11, 2022;
  - b. Affidavit #7 of Brendan Creaney, dated and filed October 11, 2022;
  - c. Fourth Report; and
  - d. Fourth Confidential Supplemental Report.
24. The Settlement Agreement was approved by this Honourable Court on October 11, 2022.

#### **DISPUTE REGARDING SETTLEMENT AGREEMENT**

25. The Monitor first reported on the current dispute between Glencore and Trevali Corp. with respect to the Settlement Agreement in the Ninth Report of the Monitor dated March 27, 2023 (the “**Ninth Report**”).

26. As stated in the Ninth Report, in early February 2023, the Monitor became aware of Glencore's view that certain net proceeds to be distributed to Glencore under the Settlement Agreement are not intended to reduce secured amounts owing under the lending facility due to Glencore Canada. In March 2023, Glencore subsequently advised the Monitor that it is of the view that the \$3 million payment to Glencore provided for in the Settlement Agreement is an additional payment to be made by Trevali Corp., constitutes a post-filing obligation of Trevali Corp. and does not reduce any liabilities owing to Glencore.
27. As further stated in the Ninth Report, the Monitor was not privy to the negotiations of the Settlement Agreement. To expand on the statement in the Ninth Report, once an agreement in principle was reached among the parties, the Monitor was provided with copies of certain emails between the parties.
28. As further stated in the Ninth Report, at the time of the Settlement Agreement, no party advised the Monitor that the Settlement Agreement was intended to pay, or had the effect of paying, Glencore amounts beyond reducing the secured amounts due to Glencore Canada under the Glencore Facility. Had the Monitor been advised of this purported intention, the Monitor would have reported it to the stakeholders and commented on whether such a payment was fair, reasonable and necessary in the circumstances.
29. Since the Ninth Report, the Monitor has:
- a. received and reviewed additional email communications between counsel for the RCF Administrative Agent and counsel for Glencore with respect to the negotiation of the Settlement Agreement, and also subsequent communications that included counsel for Trevali Corp., which were not provided to the Monitor at the time the parties were negotiating the Settlement Agreement or in advance of the Fourth Report;
  - b. held discussions with Glencore, counsel for the RCF Administrative Agent and Trevali Corp. in relation to their respective positions; and



- c. reviewed the transcript of the hearing held on October 11, 2022 (the “**Approval Hearing**”).

30. As noted in the Ninth Report and stated in the Trevali Application, Trevali Corp. is of the view that the net proceeds distributed to Glencore under the Settlement Agreement are to reduce the secured amounts due to Glencore Canada. With respect to Glencore’s position that the \$3 million payment to Glencore provided for in the Settlement Agreement constitutes a post-filing obligation of Trevali Corp. and does not reduce any liabilities owing to Glencore, Trevali Corp. argues that position:

- a. is inconsistent with the terms of the Settlement Agreement;
- b. is not set out, disclosed or referred to in any of the materials filed with this Court in support of approval of the Settlement Agreement, and is inconsistent with those materials;
- c. was not disclosed to this Court by Glencore during the application before this Court to approve the Settlement Agreement;
- d. is at odds with statements made to this Court during the Approval Hearing;
- e. is inconsistent with the nature and timing of the notice provided to stakeholders with respect to the Approval Hearing;
- f. was not disclosed by Glencore to, and was not known by, Trevali, the Monitor, the RCF Lenders, and the various creditors and stakeholders who would be negatively impacted by an additional \$3 million payment to Glencore in addition to its secured debt at the time the Settlement Agreement was entered or at the Approval Hearing; and

- g. is contrary to the circumstances of the negotiations leading to the Settlement Agreement and statements made by counsel to Glencore in advancing the Settlement Agreement.

31. As stated in the Glencore Response, Glencore is of the view that the interpretation of the Settlement Agreement advanced by Trevali Corp. is both contrary to the terms of the Settlement Agreement and the factual matrix surrounding it being entered into. Among other things, Glencore argues:

- a. on its face and read as a whole, the purpose of the Settlement Agreement is clear and it is inherent in the title of the agreement itself: the parties negotiated a settlement whereby Glencore agreed not to assert Multilateral Set-Off in exchange for a \$3 million payment;
- b. paragraph 5 of the Settlement Agreement deals with payments to Glencore in exchange for Glencore waiving its rights regarding Multilateral Set-Off in paragraph 7 of the Settlement Agreement, when these two provisions are read together the meaning of paragraph 5 becomes even clearer – namely, Glencore (the three parties to the Off-Take Agreements) were seeking meaningful compensation from the Trevali Group for waiving its right to assert Multilateral Set-Off;
- c. paragraph 5 of the Settlement Agreement refers to payments being made to Glencore, not Glencore Canada, and effect must be given to the term used;
- d. Glencore’s interpretation of the Settlement Agreement applies all of the words in the agreement using their normal and usual meanings, which accords with the commercial context and does not require that any terms be implied; and
- e. Trevali Corp.’s interpretation of the Settlement Agreement requires this Court to imply a provision that payments under the Settlement Agreement were payments to reduce the Glencore Facility, notwithstanding there is no such term in the

Settlement Agreement, and such an inference would materially improve the bargain for Trevali Corp. to the detriment of Glencore.

32. As stated in the Ninth Report, the Monitor confirms that:

- a. the Monitor was not privy to the negotiations of the Settlement Agreement;
- b. prior to the Approval Hearing, no party advised the Monitor that the Settlement Agreement was intended to pay, or had the effect of paying, Glencore amounts beyond reducing the secured amounts due to Glencore Canada under the Glencore Facility (the Monitor first became aware of Glencore's position to the contrary in early February 2023); and
- c. had the Monitor been advised of a purported intention of the Settlement Agreement was a \$3 million post-filing obligation of Trevali Corp. to Glencore, the Monitor would have reported it to all stakeholders and commented on whether such a payment was fair, reasonable and necessary in the circumstances.


## **CONCLUSIONS**

33. Based on the foregoing, the Monitor respectfully seeks the assistance of this Honourable Court to determine the proper interpretation of the Settlement Agreement.

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All of which is respectfully submitted this July 25, 2023.

FTI Consulting Canada Inc.  
in its capacity as Monitor of Trevali

  
Tom Powell  
Senior Managing Director

  
Mike Clark  
Senior Director