



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 and Trevali Mining (New Brunswick Ltd. (in that capacity, the "Monitor")  
FTI Consulting Canada Inc., in its capacity as court-appointed receiver of certain assets of Trevali Mining (New Brunswick) Ltd. (in that capacity, the "Receiver", and collectively with the Monitor, the "Applicants")

To: THE SERVICE LIST

TAKE NOTICE that an application will be made by the Applicants to the Honourable Madam Justice Fitzpatrick at the courthouse at 800 Smithe Street, Vancouver, British Columbia on October 18, 2024, at 10:00 a.m., for the orders set out in Part 1 below.

The Applicants estimate that the application will take a full day.

- 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 Applicants seek an Order that Glencore Canada Corporation ("**Glencore**") remit to the Applicants the amount of CA\$1,544,875.11 plus applicable interest and penalties.
2. Such further orders as counsel for the Applicants may advise and this Court may deem appropriate in the circumstances.

## Part 2: FACTUAL BASIS

3. The Monitor currently has expanded powers with respect to Trevali Mining Corporation ("**TMC**") and is administering a claims process with respect to claims against TMC and Trevali Mining (New Brunswick) Ltd. ("**TNB**", together with TMC, "**Trevali**" or the "**Petitioners**").
4. The Applicants seek remittance of unpaid harmonized sales tax ("**HST**") plus interest and penalties by Glencore to progress the on-going claims process and maximize recoveries related to TMC's and TNB's assets.

## Parties to Dispute

5. TMC was created on December 31, 1993, by an amalgamation of two other corporations, under the laws of British Columbia and its registration number for HST under the *Excise Tax Act*, R.S.C. 1985, c. E-15, as amended (the "**ETA**") is 13896 8664 RT001.
6. TNB, a wholly-owned subsidiary of TMC, was incorporated on November 2, 2012, under the laws of New Brunswick and its HST registration number is 84468 0652 RT0001.
7. Glencore was originally called Xstrata Canada Corporation, a corporation created on July 18, 2011, by an amalgamation of two other corporations under the laws of Ontario, which changed its name to Glencore on July 30, 2013.
8. Pursuant to certain agreements (collectively, the "**Caribou Offtake Agreements**"), TMC agreed to sell to Glencore and Glencore agreed to buy from TMC certain amounts of zinc and lead concentrate from the Caribou mine owned and operated by TNB. All products sold to Glencore under the Caribou Offtake Agreements were sold by TNB.

## Insolvency Proceedings

9. 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, among other things, a stay of proceedings (the "**Stay of**

**Proceedings**") in favour of TMC and TNB, which was subsequently amended and restated by further order of this Court (the "**ARIO**") on August 29, 2022.

10. Among other things, the ARIO appointed the Monitor and extended the Stay of Proceedings until October 6, 2022. The Stay of Proceedings has since been extended in respect of TMC until and including October 31, 2024. The Stay of Proceedings in respect of TNB expired January 24, 2023 and was replaced with a stay of proceedings under the Receivership Order (defined below).
11. Since being granted protection under the CCAA, both TMC and TNB have worked to restructure their affairs for the benefit of their stakeholders and maximize recovery for creditors.
12. 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 TMC's primary asset of value, a 90% interest in the Rosh Pinah mine in Namibia which it owned through the shares of GLCR Limited (the "**RP Interest**") and TNB's interest in the Caribou mine in New Brunswick.
13. The SISP resulted in a sale (the "**Appian Transaction**") of the RP Interest 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.
14. On December 21, 2022, this Court approved the Appian Transaction.
15. On April 24, 2023, this Court approved a distribution order (the "**Distribution Order**") authorizing TMC's distribution of available funds, including the Immediately Available Sale Proceeds (as defined in the Distribution Order) arising from the Appian Transaction. The Distribution Order authorized 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.
16. On June 23, 2023, the Appian Transaction closed. The Outstanding Interim Financing Balance, the Revolving Credit Facility and the Glencore Facility have been repaid in full.

17. The SISP did not generate any bids for TNB's assets prior to the LOI Deadline (as defined in the SISP) of October 7, 2022.
18. On January 9, 2023, this Court approved a receivership order (the "**Receivership Order**") by which among other things, effective from January 24, 2023 at 11:59 pm, appointed the Receiver as receiver of all the assets, undertakings and property of TNB, including all proceeds thereof, other than any real property, mineral claims, mining leases or real property leases owned or held by TNB. The Receivership Order established a stay of proceedings against TNB and its property. Since its appointment, the Receiver has been working to maximize value for the TNB assets covered by the Receivership Order.
19. On March 28, 2023, this Court approved a Claims Process Order (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).
20. 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.
21. Given the status of TMC's restructuring efforts, the nature of its remaining assets and the reduction of its employees and management, TMC brought an application to expand the Monitor's powers regarding TMC.
22. On June 28, 2023, this Court granted an order (the "**EMP Order**") expanding the powers of the Monitor with respect to TMC and its property.

### **Caribou Offtake Agreements**

23. The Caribou Offtake Agreements are comprised specifically of:
  - (a) for zinc concentrates: Contract No. 062-17-30418-P, dated effective on or about January 11, 2021, as amended by Amendment No. 1 dated effective on August 10, 2022, pursuant to which, inter alia, TMC agreed to sell to Glencore and Glencore agreed to buy from TMC zinc concentrates in accordance with the terms and conditions thereof (as further amended, supplemented, amended and restated, replaced, or otherwise modified, the "**Zinc Offtake Agreement**"); and
  - (b) for lead concentrates: Contract No. 180-20-30432-P, dated effective on January 1, 2020, pursuant to which, inter alia, TMC agreed to sell to Glencore and Glencore agreed to buy from TMC lead concentrates in accordance with the terms and conditions thereof (as amended, supplemented, amended and restated, replaced, or otherwise modified from time to time, the "**Lead Offtake Agreement**").

24. TMC either entered into the Caribou Offtake Agreements on behalf of TNB, which adopted them on being incorporated or TMC assigned the Caribou Offtake Agreements to TNB after it was incorporated. In any event, all products sold to Glencore were sold by TNB and all invoicing to Glencore resulting from those sales were issued by TNB.
25. The lead and zinc concentrates to be sold under the Caribou Offtake Agreements were mined, and sold to Glencore, by TNB in New Brunswick.

### **Settlement Agreement**

26. On October 11, 2022, this Court granted an order approving a Settlement Agreement effective as of October 12, 2022 (the "**Settlement Agreement**") among TMC, TNB, Glencore International AG ("**Glencore International**"), Glencore AG and Glencore (collectively, Glencore International, Glencore AG and Glencore are referred to as "**Glencore Group**"), among other parties.
27. The Settlement Agreement addressed issues that arose in response to Glencore Group declining to advise whether they would assert a right of set-off against amounts owing by them for delivery under various off-take agreements with TMC and TNB and certain affiliated entities, referred to as "**Multilateral Setoff**" in the Settlement Agreement.
28. The Settlement Agreement concerned, among other things, the Caribou Offtake Agreements.
29. The Settlement Agreement resolved the possibility of Glencore asserting entitlement to Multilateral Setoff and confirmed that Glencore Group continued to have rights of set-off under the off-take agreements, included the Caribou Offtake Agreements, in accordance with the terms of those Agreements and such rights are not stayed.

### **Invoices and Total Net HST**

30. The invoicing process with respect to the sale of lead and zinc concentrate under the Caribou Offtake Agreements involved TNB issuing a provisional invoice to Glencore upon shipment of concentrate to Glencore, which would be adjusted upon final calculation of the actual mineral content, resulting in a final invoice.
31. In or about March 2023, TNB issued:
  - (a) ten (10) final invoices (collectively, the "**Final Zinc Invoices**") with respect to the Zinc Offtake Agreement; and
  - (b) four (4) final invoices (collectively, the "**Final Lead Invoices**") with respect to the Lead Offtake Agreement.

32. With respect to some of the concentrate delivered to Glencore, TNB received certain payments from Glencore, which included payment of some, but not all, HST that was paid to TNB based on provisional invoices. The payments made by Glencore based on provisional amounts were reconciled once the Final Zinc Invoices and the Final Lead Invoices were issued. The total amounts outstanding (the “**Total Net Final Invoice Amount**”) with respect to the Final Zinc Invoices and Final Lead Invoices are as follows:

<b>Concentrate</b>	<b>Total Net Final Invoice Amount (USD)</b>	<b>Total Net HST (USD)</b>
Final Zinc Invoices:	\$4,805,417.51	\$626,793.46
Final Lead Invoices:	\$3,851,243.73	\$502,336.14
<b>TOTAL:</b>	<b>\$8,656,660.24</b>	<b>\$1,129,129.60</b>

#### **Glencore's Set-off Claim**

33. As purported payment for the Total Net Final Invoice Amounts (US\$8,656,660.24) owing pursuant to the Final Zinc Invoices and the Final Lead Invoices, including HST (US\$1,129,129.60) (the “**Total Net HST**”) payable by Glencore and collectible by TNB in respect thereof, Glencore claimed a set-off against amounts owing from TMC and/or TNB to Glencore as damages in respect of the Zinc Offtake Agreement and Lead Offtake Agreement.
34. The Zinc Offtake Agreement and Lead Offtake Agreement both contain contractual set-off rights.

#### **Canada Revenue Agency Assessment and Claim**

35. The Canada Revenue Agency (the “**CRA**”) has assessed TNB for an amount equal to the Total Net HST, plus interest and penalties, for failing to collect that HST from Glencore.
36. Pursuant to the CPO, CRA submitted a Proof of Claim dated April 18, 2023, against TNB with respect to a pre-filing claim (the “**CRA Claim**”).
37. The Monitor did not dispute the CRA Claim and did not send a Notice of Revision or Disallowance to CRA. In accordance with the CPO, the CRA Claim was deemed a Proven Claim (as defined in the CPO).

## Glencore Claim

38. Pursuant to the CPO, Glencore submitted a Proof of Claim dated April 21, 2023, against TMC or TNB (the “**Glencore Claim**”).
39. The Monitor did not dispute the Glencore Claim and did not send a Notice of Revision or Disallowance to Glencore. In accordance with the CPO, the Glencore Claim was deemed a Proven Claim.

## Request to Remit the Total Net HST

40. By letter dated September 13, 2023 (the “**Remittance Letter**”), the Receiver requested that Glencore remit US\$1,129,129.60 (being the US dollar equivalent of the Total Net HST of CA\$1,544,875.11) to the Receiver. The letter did not demand an amount equal to the interest and penalties assessed to TNB.
41. Glencore has not remitted the Total Net HST to the Applicants.
42. As set out in the Remittance Letter, as TNB has made a taxable supply to Glencore, TNB is required under s. 221(1) of the *ETA* to collect the tax payable by Glencore in respect of that supply. As the Total Net HST is an obligation of Glencore to the CRA, not an obligation to either TNB or TMC (rather TNB acts as an agent and trustee for the CRA), the Total Net HST owing to the CRA is not subject to set-off.

## Part 3: LEGAL BASIS

43. The Monitor relies on:
  - (a) CCAA, in particular, section 11;
  - (b) *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, in particular, section 243.
  - (c) *ETA*, in particular, sections 165, 169, 221, 222, 225, 228, 296 and 313;
  - (d) *Supreme Court Civil Rules*, in particular Rules 8–1 and 13–1;
  - (e) the inherent and equitable jurisdiction of this Court; and
  - (f) such further and other legal bases and authorities as counsel may advise and this Court may permit.
44. The Monitor is in receipt of the CRA Claim and the Glencore Claim in accordance with the CPO and seeks the Court’s direction in this regard.

45. Pursuant to the Claims Process:
- (a) “the Monitor may apply to this Court from time to time for directions from this Court with respect to this Claims Process Order and the Claims Process” (paragraph 41); and
  - (b) the “terms of this Claims Process Order shall be binding on the Monitor in its capacity as Court appointed Receiver of Trevali NB” (paragraph 42).
46. Further, pursuant to the EMP Order, the Monitor is authorized and empowered to:
- (a) “administer the [CPO]” (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(c)).
47. Pursuant to the Receivership Order:
- (a) the Receiver is empowered and authorized to:
    - (i) “take possession of and exercise control over the Property and any and all receipts and disbursements arising out of or from the Property” (paragraph 3(a)); and
    - (ii) “to receive and collect all monies and accounts now owed or hereafter owing to [TNB]” (paragraph 3(d)); and
  - (b) the “Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder” (paragraph 36).

**Glencore is not permitted to set-off the Total Net HST**

48. The Caribou Offtake Agreements contain identical set-off clauses:

Either party may at any time without notice to the other party set off any of its liabilities to the other party against any liabilities of the other party to itself (in either case howsoever arising and whether any such liability is present or future, liquidated or unliquidated and irrespective of the currency of its denomination) and may for such purpose convert or exchange any currency.

49. Under *ETA* subsection 165(1), Glencore owes the Total Net HST to CRA, not TNB and under *ETA* subsections 221(1) and 222(1), TNB is required to collect the Total Net HST



from Glencore as agent and trustee for CRA rather than in TNB's personal capacity. Hence, HST is not within the set-off clause.

***ETA, ss. 165(1), 221(1), 222(1).***

50. The same principle applies to legal and equitable set-off.

***Holt v. Telford, [1987] S.C.R. 193.***  
***Kelly R. Palmer, The Law of Set-Off in Canada (Aurora, ON: Canada Law Book, 1993).***  
***Philip R. Wood, English and International Set-Off (London, UK: Sweet & Maxwell Ltd., 1989).***

51. Under *ETA* subsections 169(1), 225(1) and 228(1), Glencore already has or will be entitled to deduct as an input tax credit the Total HST Liability in calculating its own net HST owing to CRA, so there is no prejudice to Glencore.

***ETA, ss. 169(1), 225(1), 228(1).***

52. As Glencore owes the HST to the CRA, the Total Net HST should be remitted by Glencore. Further, ordering Glencore to remit the Total Net HST will benefit the stakeholders of TNB and TMC as it will substantially reduce the CRA Claim and maximize value for all other creditors.
53. The Monitor respectfully requests that this Court order Glencore to remit the Total Net HST plus interest and penalties.

**Part 4: MATERIAL TO BE RELIED ON**

1. Affidavit #1 of Mike Clark, made September 16, 2024;
2. Affidavit #17 of Brendan Creaney, made September 17, 2024; and
3. 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: 17/SEPT/2024



Signature of lawyer for the Applicants  
Eamonn Watson

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To be completed by the court only:

Order made

- in the terms requested in paragraphs \_\_\_\_\_ of Part 1 of this Notice of Application
- with the following variations and additional terms:

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Date:

Signature of  Judge  Associate Judge

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**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