

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

APPLICATION RESPONSE

Application response of: Glencore International AG, Glencore AG and Glencore Canada Corporation (the "**Glencore Group**")

THIS IS A RESPONSE TO the Notice of Application of Trevali Mining Corporation ("**Trevali Corp.**") filed the 17th day of July, 2022 (the "**Notice of Application**").

PART 1: ORDER CONSENTED TO

The Glencore Group consents 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 Glencore Group 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 Glencore Group 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

1. Trevali Corp. seeks an order, *inter alia*, interpreting the Settlement Agreement (defined below) such that payments made pursuant to paragraph 5 (the “**Settlement Payments**”) are:

- (a) not additional obligations of Trevali Corp. or Trevali Mining (New Brunswick) Ltd., or any other entity of the Trevali Group (defined below); and
- (b) have been and shall only be paid in accordance with the amounts outstanding under the Glencore Canada Facility (defined below), and shall not exceed the amounts owing under the Glencore Canada Facility.

2. In other words, this application is for an interpretation of the Settlement Agreement that renders the Settlement Payments merely a payment against the Glencore Canada Facility. This is both contrary to the Settlement Agreement’s terms and the factual matrix surrounding it being entered into. The purpose of the Settlement Agreement is clear:

- (a) In 2020, the Agent, Trevali Corp., Glencore Canada and others had negotiated a comprehensive Intercreditor Agreement, which expressly preserved the rights of the Glencore Group under various off-take agreements and included the right to assert set-off against counter-parties;¹
- (b) At the time the Settlement Agreement was negotiated in 2022, the Petitioners in this proceeding had filed for creditor protection and the Glencore Group was facing large liabilities under some of those off-take agreements;
- (c) The Lenders (defined below) did not want to advance interim financing without confirmation that a member of the Glencore Group would not assert its right to setoff any obligations of that Glencore Group entity to any particular mine owner, or in respect of any mine, on one hand, against any obligations owed to another Glencore Group entity of any other mine owner, or in respect of any other mine, on the other hand (“**Multilateral Setoff**”); and

¹ Affidavit #1 of Yiota Petrakis dated July 17, 2023 [*First Petrakis Affidavit*] at 7, Exhibit “A”, Intercreditor Agreement, s 1.1(a).

- (d) The Trevali Group (defined below) needed the interim financing to fund its restructuring.

3. In exchange for agreeing not to asset Multilateral Setoff, the parties agreed that that Glencore Group would receive the Settlement Payments (defined below). Now, having received the entire benefit of the Settlement Agreement, including facilitating a sale that repaid the Lenders in full, Trevali Corp. seeks to strip the Glencore Group of its rights under the Settlement Agreement.

Background

(a) Relationship Between the Parties

(i) Off-Take Agreements

4. Trevali Corp. is the ultimate parent company of several corporate entities incorporated in Canada, the United Kingdom, Namibia, Burkina Faso, and Bermuda (collectively, the “**Trevali Group**”)². The entities that make up the Glencore Group were separately the sole and exclusive purchaser of one hundred percent of the concentrates produced from the Trevali Group's mines through off-take agreements.

5. As of the date Trevali Corp. and Trevali Mining (New Brunswick) Ltd. filed for protection in these proceedings, Glencore International, Glencore AG, and Glencore Canada each had claims under the off-take agreements and otherwise. After the filing date, claims continued to arise under the off-take agreements.

(ii) Credit Facilities

6. Pursuant to a second amended and restated credit agreement dated August 6, 2020 among the Bank of Nova Scotia (the “**Agent**”) and Trevali Corp., the Agent, on behalf of a group of lenders (the “**Lenders**”) made available to Trevali Corp. a revolving credit facility up to a maximum amount of US\$150,000,000 (the “**Revolving Credit Facility**”). The Lenders were owed approximately US\$84,500,000 as of August 18, 2022.³

7. Pursuant to a facility agreement dated August 6, 2020 among Glencore Canada and Trevali Corp., Glencore Canada made available to Trevali Corp. a non-revolving credit facility in

² Affidavit #1 of Brendan Creaney dated August 19, 2022 at paras 3 and 32.

³ *Ibid* at para 13.

the amount of US\$20,000,000 (the “**Glencore Canada Facility**”). Glencore Canada was owed approximately US\$13,000,000 by Trevali Corp. as of August 18, 2022.⁴

8. The Agent, Glencore Canada, the Trevali Group, and others are parties to an intercreditor agreement dated September 30, 2020 (the “**Intercreditor Agreement**”) which, among other things, confirms the relative priority of the Agent’s and Glencore Canada’s security.⁵ In addition, the Intercreditor Agreement expressly confirms the independent and separate nature of the off-take agreements from the Glencore Canada Facility, and preserves the right under those off-take agreements, including the right of set-off against a counter-party.⁶

(b) **The Settlement Agreement**

9. The Settlement Agreement contains a number of defined terms which are important to its interpretation. This includes defining each of the Glencore Group individually and collectively:

Glencore International AG (“Glencore International”), Glencore AG (“Glencore AG”) and Glencore Canada Corporation (“Glencore Canada”) (collectively, “Glencore”)

10. The recitals to the Settlement Agreement set out the parties to whom the credit facilities were owed and secured,⁷ and acknowledge which parties that form the Glencore Group are parties to the specific off-take agreements.⁸ The recitals were incorporated into the Settlement Agreement.⁹

11. Under the Settlement Agreement, the Glencore Group agreed to waive its right to Multilateral Setoff in exchange for the Settlement Payments. Paragraph 5 of the Settlement Agreement, in its entirety, states as follows:

At such time as Trevali Corp., or such other party on Trevali Corp.’s behalf, is authorized to pay the Net Proceeds Available for Distribution to the Agent, the Agent and Glencore hereby irrevocably authorize and direct Trevali Corp., or such other party on Trevali Corp.’s behalf, to immediately pay out the Net Proceeds Available for Distribution to the Agent, for the Agent to immediately apply the Net Proceeds Available for Distribution to pay the Outstanding

⁴ *Ibid* at para 12.

⁵ *First Petrakis Affidavit, supra* note 1 at 8, Exhibit “A”, Intercreditor Agreement, s 2.1(a).

⁶ *Ibid* at 7, Exhibit “A”, Intercreditor Agreement, s 1.1(b).

⁷ Confidential Supplemental Report to the Fourth Report of the Monitor dated October 11, 2022, Settlement Agreement, Recital F.

⁸ *Ibid* at Recitals G-I.

⁹ *Ibid* at para 2.

Interim Financing Balance to the Lenders, and to thereafter apply the Net Proceeds on the following terms:

(a) up to the first USD \$1,000,000 shall be paid to Glencore, or to such other entity as may be directed by Glencore in writing;

(b) up to the next USD \$28,000,000 shall be paid to the Agent;

(c) up to the next USD \$1,000,000 shall be paid to Glencore, or to such other entity as may be directed by Glencore in writing; and

(d) Net Proceeds in excess of USD \$30,000,000 shall be paid 98% to the Lenders and 2% to Glencore, or to such other entity as may be directed by Glencore in writing, provided that Glencore's total share of the Net Proceeds shall not exceed USD \$3,000,000 until the RCF Indebtedness is repaid in full, and thereafter any remaining Net Proceeds shall be applied in accordance with the priorities in relation thereto in accordance with the Security and the ICA.

[Emphasis added]

12. Paragraph 7 of the Settlement Agreement sets out the consideration that the Glencore Group gave in exchange for the Settlement Payments contemplated in paragraph 5:

Glencore hereby formally and irrevocably waives any right or claim to apply set off in respect of: (i) any obligations of Glencore Canada, Glencore AG or Glencore International to any particular Mine Owner, or in respect of any particular Mine, on the one hand; against (ii) any obligations to Glencore of any other Mine Owner, or in respect of any other Mine, on the other hand (such setoff is herein referred to as "Multilateral Setoff"). ...

[Emphasis added]

13. The Settlement Agreement only modifies the Intercreditor Agreement to the extent expressly contemplated in the Settlement Agreement.¹⁰ The parties also agreed that they read and understood the terms of the Settlement Agreement, with the assistance of counsel.¹¹

(c) **The Parties' Position on the Application**

14. Trevali Corp. argues that the Settlement Payments should be interpreted, notwithstanding the Settlement Agreement saying they are to the Glencore Group, as partial

¹⁰ *Ibid* at para 14.

¹¹ *Ibid* at para 19.

repayment to Glencore Canada of the Glencore Canada Facility (“**Trevali Corp.’s Interpretation**”).

15. The Glencore Group submits that the Settlement Agreement should be interpreted exactly in accordance with its terms: a negotiated settlement providing the Settlement Payments to the Glencore Group in consideration of waving any entitlement to assert Multilateral Setoff. It does not amend Glencore Canada’s right to be paid under the Glencore Canada Facility in accordance with the Security and the Intercreditor Agreement (“**Glencore’s Interpretation**”).

PART 5: LEGAL BASIS

(a) Contractual Interpretation Supports Glencore’s Interpretation

1. The goal of contractual interpretation is to ascertain the objective intentions of the parties at the time of formation.¹² Contractual interpretation is grounded in the words of the contract. A legitimate interpretation will be consistent with the language that the parties employed.¹³

2. Contracts must also be examined as a whole.¹⁴ Meanwhile, courts are not free to read in implied terms unless there is clear intention by the parties to be bound by the terms.¹⁵ When parties use defined terms, they must be understood to mean what they say. The choice of one defined term over another, or lack of use of a defined term, has significance.¹⁶

3. Moreover, in the commercial context, an accurate interpretation of a contract is one that accords with sound business sense.¹⁷ Where one possible interpretation will allow the contract to meet the commercial objective, and the other will not, then the former must be chosen.¹⁸

4. Applying these principles supports Glencore’s Interpretation:

¹² *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at paras 47-48 and 55 [*Sattva*].

¹³ *Resolute FP Canada Inc. v. Ontario (Attorney General)*, 2019 SCC 60 at para 76 [*Resolute FP*] citing Geoff R. Hall, *Canadian Contractual Interpretation Law* 3rd ed. (Toronto: LexisNexis, 2016) at 9-11 [*Contractual Interpretation, 3rd Ed*].

¹⁴ Geoff R. Hall, *Canadian Contractual Interpretation Law* 4th ed (Toronto, LexisNexis Canada, 2020) at 16 [*Contractual Interpretation, 4th Ed*] citing *Hnatiuk et al. v. Court et al.*, 2010 MBCA 20 at para 43.

¹⁵ *JEKE Enterprises Ltd. v. Northmont Resort Properties Ltd.*, 2016 BCSC 401 at para 230, aff’d 2017 BCCA 38.

¹⁶ *Levesque v Edmonton Regional Airports Authority*, 2022 ABQB 411 at para 39.

¹⁷ *Contractual Interpretation, 4th Ed*, supra note 14 at 65; *Kentucky Fried Chicken Canada v. Scott’s Food Services Inc.*, 1998 CanLII 4427 (ON CA) at para 27; *Resolute FP*, supra note 13 at para 79.

¹⁸ *Contractual Interpretation, 4th Ed*, supra note 14 at 65.

- (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 Setoff in exchange for the Settlement Payments.
 - (b) Paragraph 5 of the Settlement Agreement deals with the payments to the Glencore Group. These payments are in exchange for the Glencore Group waiving its rights regarding Multilateral Setoff in paragraph 7 of the Settlement Agreement. When the two provisions are read together, the meaning of paragraph 5 becomes even clearer—namely, that the Glencore Group (the three parties to the off-take agreements) were seeking meaningful compensation from the Trevali Group for waiving its right to assert Multilateral Setoff.
 - (c) Paragraph 5 of the Settlement Agreement refers to Settlement Payments being made to Glencore. It is relevant that the defined term used is “Glencore”, and not “Glencore Canada”. Effect must be given to the term used.
 - (d) Glencore’s Interpretation applies all of the words in the Settlement Agreement using their normal and usual meanings. It accords with the commercial context, and does not require that any terms be implied.
5. Instead, to find in favour of Trevali Corp.’s Interpretation, this Court would need to:
- (a) imply a provision that the Settlement Payments were payments to reduce the Glencore Canada 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 the Glencore Group;
 - (b) find that the parties intended to implicitly amend the Intercreditor Agreement with early payments to Glencore Canada on the Glencore Canada Facility despite the fact that there is no explicit provision or suggestion of such an amendment;
 - (c) read the Settlement Agreement as a whole, and find that, despite the parties not mentioning the Glencore Canada Facility beyond the preamble and in reference to the Security, the Settlement Agreement was meant to address the repayment of the Glencore Canada Facility;

- (d) find that, despite defining the Glencore Canada Facility and Glencore Canada specifically in the Settlement Agreement, the drafters chose to use none of those defined terms in paragraph 5 of the Settlement Agreement, but still intended to import their application;
- (e) find that the commercial intention was, in exchange for all of the Glencore Group entities waiving Multilateral Setoff, the consideration was that Glencore Canada would be paid on account of the Glencore Canada Facility earlier than under the existing agreements. Commercially, it is unconvincing to assume the Glencore Group would agree to waive its right to Multilateral Setoff without meaningful compensation, which in this case, was the Settlement Payments; and
- (f) assume that when the parties used the defined term “Glencore” to describe the Settlement Payments, they meant Glencore Canada.

(i) *The Factual Matrix Supports Glencore’s Interpretation*

6. The exercise of contractual interpretation is an effort to give meaning to the words in their proper context, including the surrounding circumstances in which the contract has arisen. This is usually referred to as the “factual matrix”.¹⁹ The relevant information is what the authors of the contract knew when they wrote the contract.²⁰ The factual matrix must never be allowed to overwhelm the words of the agreement or make an otherwise unambiguous text, ambiguous.²¹ Trevali Corp. seeks here to use subjective evidence prepared by it after the agreement terms were settled as evidence to construe the Settlement Agreement contrary to its express terms.

7. In September and October 2022, the Agent and Trevali Corp. were negotiating an interim financing facility to fund a sales and investment solicitation process. The Lenders’ willingness to fund the facility was conditional on the resolution of the issue between the Glencore Group and the Trevali Group as to the potential exercise of Multilateral Setoff.²²

¹⁹ *Ibid* at 25.

²⁰ *Gainers Inc. v. Pocklington Financial Corporation*, 2000 ABCA 151 at para 21 [*Gainers Inc.*]; *Sattva*, *supra* note 12 at paras 47-48.

²¹ *Ibid*; *Athwal v. Black Top Cabs Ltd.*, 2012 BCCA 107 at para 46; *Mann v. Grewal*, 2023 BCCA 88 at paras 45 and 46.

²² Third Report of the Monitor filed October 4, 2022 at para 26(c).

8. It is undisputed that, at the time, the Trevali Group required interim financing on an urgent basis.²³ Pursuant to the Intercreditor Agreement, the Lenders were entitled to provide interim financing and Glencore Canada was required to consent to it.²⁴ Moreover, Trevali Corp. and the Monitor were concerned that the looming possibility of the Glencore Group asserting that it had the right under the off-takes and the Intercreditor Agreement to assert Multilateral Setoff, which could also jeopardize the sale of the Rosh Pinah Mine.²⁵ To resolve these concerns, the Trevali Group, the Agent, and the Glencore Group entered the Settlement Agreement.²⁶

(ii) *Evidence of Negotiations Supports Glencore's Interpretation*

9. The traditional rule is to not consider evidence of prior negotiations to assist in contractual interpretation, however, this has been distinguished in a number of cases where general evidence of negotiations has been admitted to show the factual matrix.²⁷ More specifically, the deletions from an agreement during the course of negotiations may assist in resolving an ambiguity.²⁸

10. In this case, the back and forth email correspondence between the parties assists by showing that counsel to Trevali Corp. was not only notified about language directly related to the question at issue in this dispute but was involved and actively participated in the negotiation of terms into the final form of the Settlement Agreement.

11. On October 2, 2022, counsel to the Agent emailed counsel to Trevali Corp., copying in counsel to the Glencore Group. Counsel to the Agent provided a high level summary of the status of the negotiations and forwarded an email chain. In the chain was the set of financial terms sent from counsel to the Agent to counsel for the Glencore Group. The terms were described in an attached summary as follows:²⁹

The first \$1 million of Net Proceeds are to be paid to Glencore
The next \$29 million of Net Proceeds are to be paid to the RCF Lenders
the next \$1 million (i.e. Net Proceeds of \$29 million to \$30 million) will be paid to

²³ Fourth Report of the Monitor filed October 11, 2022 at para 15; Notice of Application filed October 11, 2022 at para 6.

²⁴ *First Petrakis Affidavit*, *supra* note 1 at 28, Exhibit "A", Intercreditor Agreement, s 5.1

²⁵ Fourth Report of the Monitor filed October 11, 2022 at para 15.

²⁶ *Ibid* at para 20.

²⁷ *Contractual Interpretation*, 4th Ed, *supra* note 14 at 426; *Langley Lo-Cost Builders Ltd. v. 474835 Ltd.*, 2000 BCCA 365 at para 29; *IFP Technologies (Canada) Inc. v EnCana Midstream and Marketing*, 2017 ABCA 157 at para 85.

²⁸ *1079268 Ontario Inc. v. Goodlife Fitness Centres Inc.*, 2017 ONCA 12 at paras 28-33, leave to appeal denied 2017 CanLII 35124 (SCC). See also *Filkow Estate v. D'Arvy & Deacon LLP*, 2019 MBCA 61 at para 41; *Twogee Developments Ltd. v. Felger Farming Co.*, 2017 ABCA 138; *Emtwo Properties Inc. v. Cineplex (Western Canada) Inc.*, 2011 BCSC 1072 at para 84 [*Emtwo Properties*].

²⁹ Affidavit #1 of Susan Danielisz dated July 24, 2023 [*First Danielisz Affidavit*] at Exhibit A.

Glencore Net Proceeds in excess of \$30 million [sic] will be shared 98% to the RCF Lenders and 2% to Glencore, provided that Glencore's share of Net Proceeds shall not exceed \$3 million until the RCF Lenders are repaid in full.

Net Proceeds	Paid to Glencore	Paid to the Agent
\$1.0	\$1.0	\$-
10.0	1.0	9.0
29.0	1.0	28.0
30.0	2.0	28.0
40.0	2.2	37.8
50.0	2.4	47.6
60.0	2.6	57.4
70.0	2.8	67.2
80.0	3.0	77.0
91.8	3.0	88.8
100.0	11.2	88.8

Once amounts owing [sic] to the RCF Lenders are repaid in full, any excess would then go to Glencore up to the balance of Glencore's subordinated debt (less whatever Glencore previous received out of the Net Proceeds – i.e. Glencore's total recovery could not exceed the balance of their subordinated debt).

[Emphasis added]

12. The language below the illustrative chart (the “**Subordinated Debt Language**”) was proposed by counsel to the Agent and was the only correspondence among any of the Agent, the Glencore Group, and Trevali Corp. to tie the recovery by the Glencore Group to the Glencore Canada Facility. It was the first and only time this concept was raised.

13. The email from counsel for the Agent specifically stated that “Glencore needs to confirm the description of the financial terms is consistent with its understanding of the proposed deal”.³⁰

14. On October 2, 2022, counsel to the Glencore Group emailed counsel to the Agent and counsel to Trevali Corp. a revised version of the settlement terms. Counsel to the Glencore Group removed the Subordinated Debt Language.³¹

15. There were further discussions among the parties, and on October 3, 2022, counsel for the Glencore Group sent an email to counsel to the Agent and counsel to Trevali Corp. that:³²

³⁰ *Ibid.*

³¹ *Ibid* at Exhibit B.

³² *Ibid* at Exhibit C.

- (a) included a combined settlement terms document for review, including making revisions requested by Trevali Corp.; and
- (b) specifically requested that everyone seek client instructions on these terms.

The terms also did not include the Subordinated Debt Language.

16. Later that day, counsel to the Agent responded to counsel to the Glencore Group's email—on which Trevali Corp.'s counsel remained copied—and stated the following regarding the Subordinated Debt Language:³³

Given that you have proposed to take out the language after the Illustrative Chart [the Subordinated Debt Language], it seems to me we should cut that chart off after full recovery by the Lenders – the rest does not concern them [the RCF Lenders], as we discussed. Agreed?

17. There was further back and forth among the parties, including counsel to Trevali Corp. who confirmed "I have a call late this morning with our clients and will send this latest draft to them but we will not be able to get our comments back to you until later today."³⁴ Counsel for Trevali Corp. sought confirmation that the parties agreed that the settlement terms addressed Multilateral Setoff, and proposed language on various points. There was no discussion of the Glencore Canada Facility or the Subordinated Debt Language.³⁵

18. The drafting of the Settlement Agreement was coordinated by counsel to the Agent, with active input from counsel to all stakeholders:

- (a) On October 7, 2022, counsel for the Glencore Group sent counsel for the Agent a markup on the draft Settlement Agreement. Included in those comments was an amendment to paragraph 5 of the Settlement Agreement.³⁶
- (b) On October 7, 2022, counsel for the Agent sent counsel for the Glencore Group a copy of the draft Settlement Agreement, including a redline from a prior version, and noted "See amended draft, which incorporates all comments from all

³³ *Ibid* at Exhibit D.

³⁴ *Ibid* at Exhibit D.

³⁵ *Ibid* at Exhibit D.

³⁶ *Ibid* at Exhibit F.

stakeholders and the Monitor, along with a comparison to the draft you sent over".³⁷ There are amendments to the entire document, including paragraph 5 and the revised provisions.³⁸

- (c) On October 10, 2022, counsel for the Agent confirmed that counsel for Trevali Corp. had confirmed the amount outstanding under the Glencore Canada Facility, and the Settlement Agreement was nearly final.³⁹
- (d) Later that day, the Glencore Group confirmed its agreement to the form of the Settlement Agreement (which is the form subsequently signed by the parties).⁴⁰

19. Accordingly, the following can be deduced from the factual matrix. First, while the Agent proposed that the Settlement Payments would pay down Glencore Canada on the Glencore Canada Facility, the Glencore Group disagreed, and took the appropriate steps to change the terms. All parties were privy to this change. Second, Trevali Corp. was actively involved in negotiations. They were represented by counsel, and had active input in the terms of the Settlement Agreement, including the provision that gives rise to the Settlement Payments.

(iii) *Hearing and Materials to Approve the Settlement Agreement*

20. Trevali Corp. argues that the hearing to approve and authorise Trevali Corp. and Trevali Mining (New Brunswick) Ltd. to execute the Settlement Agreement, and the materials filed in support thereof, is somehow relevant to interpretation of the Settlement Agreement.

21. The relevant information is what the authors of the contract knew when they wrote the contract;⁴¹ however, at the hearing, the Settlement Agreement was settled. Accordingly, the submissions and materials at that hearing are not matters that were known to the parties nor ones that they had in mind when they composed the written text, and are at best, inadmissible evidence of the subjective views of Trevali Corp. after the terms were settled..

A. Materials

³⁷ *Ibid* at Exhibit G.

³⁸ *Ibid* at Exhibit G.

³⁹ *Ibid* at Exhibit H.

⁴⁰ *Ibid* at Exhibit I.

⁴¹ *Gainers Inc.*, *supra* note 20 at para 21; *Sattva*, *supra* note 12 at paras 47-48.

22. October 11, 2022, Trevali Corp. filed an application seeking authorisation for Trevali Corp. and Trevali Mining (New Brunswick) Ltd. to enter into the Settlement Agreement and approval to obtain and borrow an interim financing tranche from the Lenders. Trevali Corp. opted not to share advance copies of the materials with the Glencore Group, including the materials relating to the Settlement Agreement. Counsel to the Glencore Group flagged this to the Court, following submissions by Trevali Corp.⁴²

23. As such, these materials should not be reviewed to interpret the Settlement Agreement, as they are subjective views prepared without input from the Glencore Group after the Settlement Agreement was settled. In the alternative, even a review of the materials and submissions does not detract from Glencore's Interpretation. The materials and submissions are consistent that Multilateral Setoff needed to be waived, and the Glencore Group, as a key stakeholder, had agreed to waive it for certain payments. There is *no* mention of the Glencore Canada Facility, Glencore Canada's security, or the Glencore Canada Facility being paid down by the Settlement Payments. Further, the term "Glencore" in the materials is defined as the Glencore Group, not Glencore Canada.

B. Hearing

24. At the hearing to approve the Settlement Agreement, counsel to Trevali Corp. described the terms of the Settlement Agreement and sought this Court's approval to execute the Settlement Agreement to facilitate the interim financing. This was approved.

25. Counsel to Trevali Corp. did the following at the hearing:

- (a) set out the parties to the Settlement Agreement, including the Glencore Group's specific entities and interests under the off-takes;⁴³
- (b) repeatedly referred to "Glencore" as a collective term and in discussing their relationship to the Trevali Group, counsel to Trevali Corp. even specifies that the Glencore Group is not just the secured creditor, but also the sole purchaser of off-takes;⁴⁴

⁴² *First Petrakis Affidavit*, *supra* note 1 at 134, lines 7-17.

⁴³ *Ibid* at 111, lines 26-35.

⁴⁴ *Ibid* at 124, lines 6-19.

- (c) described, in detail for the Court, the Settlement Payments that will be made to the Glencore Group, by stating: "What it does is paragraph 5 sets out the method in which net proceeds will be divided amongst the parties... ".⁴⁵
- (d) confirmed that the benefit of the exchange is the Glencore Group waiving its right to Multilateral Setoff.⁴⁶

26. From the hearing, an objective party is left with the following:

- A. The submissions at the hearing are irrelevant and inadmissible to the determination of the meaning of the Settlement Agreement, as they are only evidence of subjective interpretations and arise after the words used by the parties to the Settlement Agreement were settled.
- B. In the alternative, the submissions of Trevali Corp.'s counsel are ambiguous at best, and are not inconsistent with the Glencore's Interpretation.
- C. In the further alternative, an objective party at the hearing would have concluded that the parties were concerned about Multilateral Setoff, that the matter was settled, and it was settled by certain payments being made to the Glencore Group. This is consistent with the Court's reasons that paragraph 5 of the Settlement Agreement refers to various sharing arrangements between the various parties.⁴⁷ Notably, there is no discussion of the Glencore Canada Facility being reduced.

(b) **Ambiguity**

27. In the alternative, if this Court finds there is ambiguity in the Settlement Agreement, the Court can consider external evidence. Where a court finds ambiguity, certain extrinsic evidence which is usually barred, such as evidence of negotiations, becomes relevant and admissible for contractual interpretation.⁴⁸

⁴⁵ *Ibid* at 112, lines 15-18, 36-47 and 113, lines 1-6.

⁴⁶ *Ibid* at 113, lines 30-36.

⁴⁷ *Trevali Mining Corporation (Re)*, 2022 BCSC 2442 at para 8.

⁴⁸ *Contractual Interpretation*, 4th Ed, *supra* note 14 at 30-31.

28. Even if the Court disagrees that evidence of the negotiations is not properly considered in the factual matrix, it should be admitted to resolve ambiguity.⁴⁹

(c) **Specific Responses**

29. Trevali Corp. suggests that the Glencore Group's position changed after the Court approved the Settlement Agreement, or that the Glencore Group was required to disclose or confirm its interpretation of the Settlement Agreement. This is not supported by evidence or law. In fact, the evidence suggests the opposite.

30. While neither parties' subjective knowledge is relevant to the interpretation of the Settlement Agreement, the representative of the Glencore Group who was the primary contact became aware of the contrary interpretation of Trevali Corp. on February 8, 2023, when the Monitor presented a chart of estimated net recoveries.⁵⁰

PART 6: RELIEF REQUESTED

1. The Glencore Group seeks an order:
 - (a) dismissing the application of Trevali Corp., with costs; and
 - (b) declaring that the amount owing under the Glencore Canada Facility shall not be computed with regard to or adjustment for, the Settlement Payments.

PART 7: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Brendan Creaney dated August 19, 2022;
2. Third Report of the Monitor filed October 4, 2022;
3. Fourth Report of the Monitor filed October 11, 2022;
4. Notice of Application filed October 11, 2022;
5. Confidential Supplemental Report to the Fourth Report of the Monitor dated October 11, 2022;
6. Ninth Report of the Monitor filed March 27, 2023;

⁴⁹ *Emtwo Properties*, *supra* note 28 at para 82.

⁵⁰ Affidavit #1 of Peter Wright dated July 24, 2023.

7. Affidavit #1 of Yiota Petrakis dated July 17, 2023;
8. Affidavit #1 of Susan Danielisz dated July 24, 2023;
9. Affidavit #1 of Peter Wright dated July 24, 2023; and
10. Such further and other material as counsel may advise and this Honourable Court may permit.

The Application Respondent estimates that the application will take one day.

The Application Respondent has not filed in this proceeding a document that contains an address for service. The application respondent's ADDRESS FOR SERVICE is:

Application Respondent's address for service:

McCarthy Tétrault LLP
Barristers & Solicitors
Suite 2400, 745 Thurlow Street
Vancouver, BC V6E 0C5

Attention: H. Lance Williams and Ashley Bowron

Email address for service:

lwilliams@mccarthy.ca
abowron@mccarthy.ca
sdanielisz@mccarthy.ca

DATED: July 24, 2023



Counsel for the Applicant Respondent
McCarthy Tétrault LLP
(H. Lance Williams)