



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 Canada Corporation, (the "**Application Respondent**" or "**Glencore**")

THIS IS A RESPONSE TO the Notice of Application of FTI Consulting Canada Inc., in its capacity as court-appointed monitor of Trevali Mining Corporation ("**TMC**") 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**") filed the 17th day of September, 2024.

The Application Respondent estimates that the application will take a full day.

PART 1: ORDERS CONSENTED TO

The application respondent consents to the granting of the orders set out in the following paragraphs of Part 1 of the Notice of Application on the following terms:

1. N.A.

PART 2: ORDERS OPPOSED

The application respondent opposes the granting of the orders set out in paragraph 1 of Part 1 of the Notice of Application.

PART 3: ORDERS ON WHICH NO POSITION IS TAKEN

The application respondent takes no position on the granting of the orders set out in paragraphs of Part 1 of the Notice of Application:

N.A.

PART 4: FACTUAL BASIS

The Offtake Agreements

1. Glencore and TMC entered into an amended agreement ("**Zinc Offtake Agreement**") effective January 11, 2021, pursuant to which TMC agreed to sell and Glencore agreed to buy zinc concentrates from TMC. The Zinc Offtake Agreement resulted from an assignment and transfer by Glencore AG to Glencore Canada.
2. Glencore and TMC also entered into an amended agreement ("**Lead Offtake Agreement**") effective January 1, 2020, pursuant to which TMC agreed to sell and Glencore agreed to buy lead concentrates from TMC. The Lead Offtake Agreement resulted from the assignment, transfer and novation of a contract between TMC and Glencore, as amended. (The Zinc Offtake Agreement and the Lead Offtake Agreement will be referred to collectively as the "**Offtake Agreements**".)
3. Pursuant to the Zinc Offtake Agreement, TMC was required to provide a minimum tonnage of zinc concentrate to Glencore every month at an agreed fixed price.

TMC Issues Provisional Invoices and Final Invoices

4. Before it filed for creditor protection under the *Companies' Creditors Arrangement Act*¹ ("**CCAA**") in August 2022, TMC provided Glencore with provisional invoices which estimated the amount of zinc and lead contained in each delivery made under the Offtake

¹ R.S.C. 1985, C. C-36, as amended.

Agreements. TMC charged HST on these provisional invoices. Glencore paid these provisional invoices, including the HST, in cash to TMC.

5. Once the actual amount of zinc and lead contained in each delivery was known, TMC provided Glencore with final invoices which reflected the actual amounts owing by Glencore under the Offtake Agreements. TMC also charged HST on these final invoices.
6. To the extent that the amounts owing under the final invoices were higher than the provisional invoices, Glencore was required to pay the additional amounts owing. To the extent that the amounts owing under the final invoices were lower than the provisional invoices, Glencore would deduct the amounts against any invoices due to Trevali.
7. TMC did not deliver the minimum amounts of zinc that it was required to deliver under the Zinc Offtake Agreement. Accordingly, under the Zinc Offtake Agreement, TMC owed amounts to Glencore to compensate Glencore for the losses that it incurred from TMC's failure to deliver the minimum amounts ("**Shortfall Amounts**"). In addition, freight and handling costs borne by Glencore pertaining to the Offtake Agreements and passed on to TMC were in arrears and remain outstanding to Glencore.
8. In August 2022, TMC filed for creditor protection under the CCAA. When the CCAA proceedings started, TMC ceased to provide invoices to Glencore on a regular basis.

The Set-Off

9. Section 21 of the Offtake Agreements provides that Glencore may set-off any of its liabilities to TMC against any liability owing by TMC to Glencore, and *vice versa*.
10. On August 18, 2022 and September 08, 2022, Glencore issued two Notices of Set-off to TMC, setting off amounts owing by Glencore under the Offtake Agreements with the Shortfall Amounts. The amounts that Glencore set-off included HST.
11. On September 9, 2022, Gordon Eng, VP, Tax & Treasury at TMC, sent an email to Glencore in which he stated that the HST described on TMC's invoices is an amount owing to the Canada Revenue Agency ("**CRA**"), not TMC. Mr. Eng asked Glencore to amend the Notice to exclude HST and to remit HST to the CRA directly on behalf of TMC.

12. After receiving this email, and in response to Mr. Eng, Glencore revised its Notices of Set-Off to exclude the HST. Those notices were sent on September 15, October 7, and November 4, 2022.
13. However, after consulting with Glencore's internal tax team, Glencore determined that TMC was required to include HST on their invoices and that Glencore was, in fact, entitled to set-off the HST on the amounts owing to TMC.
14. In February 2023, TMC issued final invoices dated December 31, 2022 and March 6, 2023. These invoices include amounts "due to Trevali", which include HST.
15. On April 14, 2023, in response to TMC's final invoices, Glencore provided an updated Set-off Notice stating that, in accordance with its rights pursuant to s. 21 of the Offtake Agreements, it elected to satisfy its net obligation to pay Trevali US\$8,656,660.24 (which includes HST).
16. In a letter dated September 13, 2023, FTI Consulting Canada ("FTI"), the Receiver of Trevali Mining (New Brunswick), FTI asked Glencore to remit US\$1,129,129.60 in HST to FTI.

PART 5: LEGAL BASIS

17. *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36;
18. *Excise Tax Act*, R.S.C., 1985, c. E-15 in its entirety, and in particular sections 169, 221, 222.1, 222, 223, 224, 228, 231, 278, and paragraph 296(1)(b);
19. *Supreme Court Civil Rules*, B.C. Reg. 168/2009;
20. The inherent and equitable jurisdiction of this Court; and
21. Such further and other legal bases and authorities as counsel may advise and this Court may permit.

Glencore is not required to remit HST.

22. Glencore is not required to remit HST, for several reasons:

23. **First**, under the *Excise Tax Act*, Glencore cannot, as a matter of law, remit the HST. The obligation to remit HST rests with TMC.
- Sections 169, 221, 222.1, 222, 223, 224, 228, 231, 278, and paragraph 296(1)(b)
24. **Second**, TMC has previously set-off HST owing under the Offtake Agreements. TMC is therefore estopped from arguing that Glencore cannot set-off the HST.
- *Ryan v Moore*, 2005 SCC 38
25. **Third**, the Offtake Agreements are governed by the laws of England and Wales. TMC has not provided any expert evidence as to the proper interpretation of the Offtake Agreements under the laws of England and Wales. TMC therefore cannot demonstrate that the set-off clauses do not apply in this case.
- *Friedl v Friedl*, 2009 BCCA 314
26. **Fourth**, even if this Court could interpret the Offtake Agreements, Glencore validly set off HST under the Offtake Agreements: The Offtake Agreements permit either party to set off any of its liabilities, howsoever arising.
- Kelly R. Palmer, *The Law of Set-Off in Canada* (Aurora, ON: Canada Law Book, 1993).
 - Phillip R. Wood, *English and International Set-Off* (London, UK: Sweet & Maxwell Ltd., 1989).

PART 6: MATERIALS TO BE RELIED ON

1. Affidavit #1 of Seung Hwoo Kim, made October 1, 2024;
2. Affidavit # 1 of Mike Clark, made September 16, 2024;
3. Affidavit #17 of Brendan Creaney, made September 17, 2024;
4. Proof of Claim Form (including Schedules and Exhibits) filed by Glencore Canada Corporation in this matter on April 21, 2023; and

5. Any other documents already in this Court file on which the respondent may rely.
- The application respondent has filed in this proceeding a document that contains the application respondent's address for service.
- 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:

Respondent's address for service:

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

**Attention: Anu Koshal and
Simon Douville**

Email address for service (if any):

lwilliams@mccarthy.ca;
akoshal@mccarthy.ca;
sdouville@mccarthy.ca;
amacdonald@mccarthy.ca

DATE: October 1, 2024



Almut MacDonald
Counsel for the Respondent