



No. S-226670
Vancouver Registry
Estate No. 51-126392

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: XL Specialty Insurance Company ("**XL**" or the "**Application Respondent**")

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 (in that capacity, the "**Monitor**") and 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 on July 8, 2024 (the "**Notice of Application**")

The Application Respondent estimates that the application will take 2 hours.

Part 1: ORDERS CONSENTED TO

The Application Respondent consents to the granting of none of the orders set out in Part 1 of the Notice of Application.

Part 2: ORDERS OPPOSED

The Application Respondent opposes the granting of the orders set out in none of the paragraphs of Part 1 of the Notice of Application provided that these orders include the Reservation of Rights Language (as defined below).

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 1, 2, and 3 of Part 1 of the Notice of Application provided that these orders include the Reservation of Rights Language.

Part 4: FACTUAL BASIS

1. Capitalized terms used and not otherwise defined in this Application Response have the meanings given to them in the Notice of Application.
2. XL, as surety, issued in favour Trevali Mining (New Brunswick) Ltd. ("**Trevali NB**"), as principal, and His Majesty the King in Right of the Province of New Brunswick (the "**Province**"), as obligee, the surety bonds described below:
 - (a) Bond No. CA00011181SU20A dated June 4, 2020, in the amount of \$365,000 related to the Restigouche Mine operated by Trevali NB (the "**Restigouche Bond**"); and
 - (b) Bond No. CA00011180SU20A dated June 4, 2020, in the amount of \$6,256,000 related to the Caribou Mine operated by Trevali NB (the "**Caribou Bond**" and, together with the Restigouche Bond, the "**Bonds**").
3. The Restigouche Bond secures certain obligations of Trevali NB related to the Restigouche Mine.
4. The Caribou Bond secures certain obligations of Trevali NB related to the Caribou Mine.
5. On April 13, 2023, the Province made a claim pursuant to the Caribou Bond.
6. There are disputes between XL and the Province about the Bonds, including about:
 - (a) the nature and scope of obligations of Trevali NB that the Bonds secure; and
 - (b) the quantum and propriety of expenses that the Province incurred and if these expenses fall within the scope of the Bonds.
7. To this date, these disputes remain unresolved. It is unclear to XL if the Province intends to pursue any claim(s) pursuant to the Bonds. If the Province pursues such claims, XL intends to raise defences available to it at law, including defences based on the law of surety.
8. The transactions contemplated by the Sale Agreements are conditional upon the Court approving the Settlement Agreement, the Limited Environmental Liability Agreements, and the Funding Agreement between the Purchaser, the Province, and the Applicants, as applicable (collectively, the "**Additional Agreements**").
9. XL has not been privy to the negotiations leading to the Additional Agreements or the Sale Agreements (collectively, the "**Agreements**").

10. The Settlement Agreement provides, among other things, that:
- (a) the Receiver, as receiver of certain assets of Trevali NB, will make a payment to the Province for \$4,000,000;
 - (b) the Monitor, on behalf of Trevali Mining (Maritimes) Ltd., will make a payment to the Province for \$750,000; and
 - (c) the Province will waive and release any claim that it may have against the proceeds of the transactions contemplated by the Sale Agreements.
11. The Settlement Agreement does not provide for any allocation of the Settlement Amount to any particular liability of Trevali NB to the Province, including any liability that is secured by the Bonds.

Part 5: LEGAL BASIS

12. If the Agreements are approved, XL wants to preserve its rights to rely on any defences related to the Bonds that are based on or arising out of the Agreements.
13. Without limiting the generality of the above, XL wants to be able to later make the argument, if necessary, that: (i) the Settlement Amount represents a credit against the amounts secured pursuant to the Bonds, and (ii) as a result, any liability that XL might have pursuant to the Bonds is reduced accordingly.
14. Further, XL may raise surety defences, including that:
- (a) the conduct of Trevali NB and the Province has materially affected the risk assumed under the Bonds;
 - (b) the conduct of the Province (including by entering into those Agreements to which it is a party) is prejudicial to the interests of XL and thereby discharges XL's liability;
 - (c) the Agreements otherwise release the liability of Trevali NB which, in turn, releases XL from liability under the Bonds.
- Kevin McGuinness, *The Law of Guarantee* 3rd ed. (Markham: LexisNexis Canada Inc., 2013) at §11.4, 11.202, 12.13, 12.18, and 12.50.
15. Given all of this, XL is prepared not to oppose the Sale Approval and Vesting Orders and the Settlement Approval Order if these orders include language pursuant to which XL reserves its rights to raise defences to any claims that the Province may pursue, or continue to pursue, against XL in respect of the Bonds (the "**Reservation of Rights Language**").
16. After the filing of the Notice of Application, XL, the Province, and the Monitor and Receiver have agreed to revise the proposed forms of orders to include certain Reservation of Rights Language in each order. XL does not otherwise take a position on these revised orders.

Part 6: MATERIALS TO BE RELIED ON

1. Seventeenth Report of the Monitor dated July 5, 2024.
2. Third Report of the Receiver dated July 5, 2024 and filed July 8, 2024.
3. Such further and other material as counsel may advise.

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:

Cassels Brock & Blackwell LLP
Suite 2200, RBC Place
885 West Georgia Street
Vancouver, BC V6C 3E8

Attention: John Birch / Mihai Tomos

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Dated: July 11, 2024



**Signature of the lawyer for the Application
Respondent
John Birch / Mihai Tomos**