

No. S-154746
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 *CANADA BUSINESS CORPORATIONS ACT*,
R.S.C. 1985 c. C-44, as amended**

AND

IN THE MATTER OF NORTH AMERICAN TUNGSTEN CORPORATION LTD.

PETITIONER

APPLICATION RESPONSE

Application response of: Callidus Capital Corporation (the "**Application Respondent**")

THIS IS A RESPONSE TO the Notice of Application of the Government of the Northwest Territories ("GNWT"), to be filed.

Part 1: ORDERS CONSENTED TO

The Application Respondent consents to the granting of the orders set out in the following paragraphs of the draft order attached as Schedule B to the notice of application on the following terms: none

Part 2: ORDERS OPPOSED

The Application Respondent opposes the granting of the orders set out in the following paragraphs of the draft order attached as Schedule B to the notice of application: 8 and 9.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The Application Respondent takes no position on the granting of the orders set out in the following paragraphs of the draft order attached as Schedule B to the notice of application: 1 to 7 (inclusive).

Part 4: FACTUAL BASIS

1. Callidus typically lends to companies that cannot access traditional lending sources. It lends on the basis of the assets offered as security, typically on a fairly high percentage of the liquidation value. This form of lending allows greater capital to be made available to borrowers, but requires that Callidus monitor its loans closely and that its customers be fully transparent with Callidus regarding issues impacting their

business. Confidence in management is a critical component of Callidus's lending practice.

Callidus Loans to NATC

2. In May 2014, Callidus and the North American Tungsten Corporation Ltd. ("NATC") entered into a loan agreement, pursuant to which Callidus would advance \$11 million to NATC, and pursuant to which NATC would make monthly interest payments (at a rate of 18% per annum) and monthly principal payments of \$150,000.
3. In December 2014, NATC required additional funding. Callidus agreed to loan an additional \$3.65 million, and the term of the May 2014 financing was extended to May 31, 2016. During this time, NATC was to continue making monthly interest payments (at a rate of 18% per annum) and monthly principal payments of \$150,000. Callidus would also receive a deferred fee of \$154,000.
4. As of November 11, 2015, NATC owes Callidus approximately \$16 million, including principal, accrued interest and fees (not including accrued costs or legal fees).

NATC files for CCAA Protection

5. On June 9, 2015, NATC sought and obtained creditor protection in these proceedings. The Initial Order granted an Administration Charge in the amount of \$500,000 to secure the professional fees incurred in connection with the restructuring. The Administration Charge did not have priority over the Callidus security for the May Loan and the December Loan (the "**Callidus Pre-Filing Security**"). On June 12, 2015, NATC obtained an order granting the Administration Charge priority over the Callidus Pre-Filing Security.

NATC Requests Interim Financing

6. On or about June 15, 2015, NATC requested that Callidus consider providing interim financing to NATC. Callidus and NATC entered into discussions with respect to this potential financing. However, the financing was not concluded at that time because NATC did not provide Callidus with the information requested and required in order for Callidus to commit to interim financing.

The June 26 Application and Comsup Term Sheet

7. On June 24, 2015, NATC filed an Application, scheduled for June 26, 2015 (the “**June 26 Application**”).
8. At Court, shortly before the hearing of the Set-off Application was to begin, counsel for NATC provided counsel for Callidus with a copy of a term sheet for interim financing from Comsup Commodities Inc. (“**Comsup**”). The term sheet contemplated Comsup providing interim financing of up to \$3 million, and that this financing would have priority over the Callidus security. The super-priority charge in favour of Comsup was a condition to Comsup advancing funds.
9. NATC did not advise Callidus directly of the Comsup term sheet.

The Gap Advance

10. Despite concerns leading up to the Initial Order, the super-priority of the Administration Charge and the manner Callidus learned about the Comsup term sheet, Callidus and NATC began discussions and negotiations with respect to Callidus providing NATC with interim financing.
11. On June 29, 2015, Callidus advanced \$500,000 to NATC (the “**Gap Advance**”) to allow NATC sufficient funds to continue its operations until arrangements could be made for interim financing.

The Forbearance Agreement

12. On July 6, 2015, Callidus, NATC and others agreed to the terms of a forbearance agreement (the “**Forbearance Agreement**”). On July 9, 2015, this Court made an order authorizing NATC to enter into the Forbearance Agreement and perform all obligations set out in it. The material terms of the Forbearance Agreement included that NATC would comply with cash flow statements provided to Callidus, subject to small permitted variances or obtaining Callidus’s written consent to the variance.

The Interim Facility

13. On July 9, 2015, this Court authorized NATC to borrow under a credit facility offered by Callidus (the “**Interim Facility**”), provided the total borrowings did not exceed \$2,500,000. This Court granted a priority charge over all of NATC’s assets (including the Mactung Property) to secure repayment of the Interim Facility (the “**Priority Charge**”).

Priority of the Gap Advance

14. Pursuant to the terms of the Forbearance Agreement, the Gap Advance was to be deemed the first advance under the Interim Facility. At the request of NATC, and in light of opposition from GNWT, Callidus agreed that the Gap Advance would not form part of the Priority Charge and that it would form part of the debt owed under the May Loan and the December Loan and, accordingly, be secured by the Callidus Pre-Filing Security.

The AR Interim Facility

15. On July 21, 2015, Callidus and NATC entered into a term sheet pursuant to which Callidus would provide a revolving credit facility, up to a maximum of \$2,500,000 (the “**AR Facility**”). On August 13, 2015, this Court authorized and empowered NATC to borrow under the AR Facility.
16. The AR Facility was intended to relieve pressure on NATC’s cash flows caused by the payment terms of NATC’s agreement with one of its customers.

NATC misses payments to Callidus

17. The Forbearance Agreement provided that NATC would make various payments to Callidus and that Callidus could terminate the Forbearance Agreement and enforce its rights under the May Loan, the December Loan and related security if the payments were missed.
18. On September 30, 2015, NATC missed a payment of \$3,000,000 owed to Callidus under the Forbearance Agreement.

19. As a result of this default, Callidus discussed next steps with the Monitor and the Company. At that time, the Monitor and the Company encouraged Callidus to “stay the course” because the SISP was ongoing, and they were encouraged by the interest expressed by potential bidders in both the Cantung property and the Mactung property. The Monitor and the Company also suggested that the cost of appointing a receiver at that time would likely be the same as or greater than the cost of the CCAA Proceedings.
20. Despite the missed payment, and Callidus being entitled to enforce the Callidus Pre-Filing Security, Callidus permitted the CCAA Proceedings to continue so that the SISP could be completed.
21. On October 31, 2015, NATC missed a payment of \$381,419 owed to Callidus under the May Loan and the December Loan (and the cash flows provided in accordance with the Forbearance Agreement).
22. Despite the missed payment, and Callidus being entitled to enforce under the Callidus Pre-Filing Security, Callidus permitted the CCAA Proceedings to continue so that NATC could bring its application to enhance the Monitor’s powers and arrange for the orderly transition of the Cantung mine to care and maintenance.
23. Callidus expected that in transitioning the Cantung mine to care and maintenance, that NATC would comply with the cash flows and information provided. Unfortunately, the costs of the transition have been higher than initially forecast. These costs are to be borne by Callidus alone.

Callidus does not benefit from Care and Maintenance

24. The mine is being transitioned into care and maintenance at the request of GNWT. The Cantung mine being on care and maintenance will not increase the potential sale value for the mine. Accordingly, any costs incurred in connection with this transition and effort provide no benefit to Callidus. The sole benefit of the care and maintenance cost is to minimize the environmental risks and costs, to the benefit of GNWT.

GNWT Prevented a Sale of Mactung

25. In the course of the sales process, NATC received various offers for the purchase of Mactung. One of the offers was subject to conditions, but was for proceeds that would fully repay the Interim Facility and the Administration Charge.
26. Callidus was supportive of this offer, and was prepared to explore the offer and allow the offer to close. GNWT opposed the offer. As a result of the GNWT opposition, the Monitor concluded that the offers on Mactung were not likely to result in a transaction being completed, and the Monitor terminated the SISP.
27. Based on the disappointing outcome of the sales process, Callidus again mentioned the possibility of appointing a receiver over the assets, properties and undertakings of NATC.
28. Again, the Monitor and the Company advised that the cost of doing so would not be significantly less than the cost of the CCAA Proceedings, particularly as the Company was beginning to explore an expansion of the Monitor's powers that would have the same practical effect.

Jeopardy to Callidus

29. Callidus has one of the greatest financial stakes in this proposed restructuring.
30. Earlier this year, Callidus obtained an appraisal of the machinery and equipment that it had financed. This appraisal showed the equipment had liquidation value of approximately USD\$13.75 million (approximately \$16.9 million in Canadian dollars).
31. Industry and market conditions may have weakened since the time of the appraisal, such that the value of the equipment and its potential liquidation is speculative at this time.
32. Callidus has cooperated throughout these proceedings, and allowed the proceedings to continue in the hope that this would generate benefits for all stakeholders. Unfortunately, despite this cooperation and accommodation, Callidus has not benefited

from its cooperation and may bear the brunt of the disappointing outcome of the sales process.

Part 5: LEGAL BASIS

GNWT Acquisition of the Interim Facility

33. GNWT proposes to pay out the charges granted by Court order in this proceeding, and to become subrogated to the positions of the beneficiaries. With respect to the Interim Facility, and the Priority Charge, the GNWT proposal is effectively a second interim financing facility to be used to pay out the Interim Facility.
34. Where a party seeks a second interim facility to pay out an existing interim facility, and a priority charge for the second facility, the Court assesses whether the interim facility is appropriate and justified.

Tuan Development Inc. (Re) (2007), 38 C.B.R. (5th) 71 (“*Tuan Development*”)

35. While the Court is clearly empowered to authorize interim financing, and to grant a super-priority charge as security for the facility, it remains an extraordinary remedy that should only be used sparingly and in clear cases. The charge represents a significant re-ordering of priorities that should not be entered into lightly.

Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36 (“CCAA”) s. 11.2.

Royal Oak Mines Inc. (Re) (1999), 6 C.B.R. (4th) 314.

36. Before receiving interim financing or a priority charge, the Court must be satisfied, on proper and cogent evidence, that the benefits to all stakeholders clearly outweigh the prejudice to the creditors whose security will be primed. It isn’t enough that the financing would benefit the business – it must be critical for the business to continue or for the debtor to successfully restructure its affairs. This requires both the prospect of a successful restructuring, and evidence that a restructuring would likely yield a better outcome for the majority of stakeholders compared to the alternative.

United Used Auto & Truck Parts Ltd. (Re) (1999), 12 C.B.R. (4th) 144.

Tuan Development.

Timminco Limited (Re) (2012), 86 C.B.R. (5th) 171.

League Assets Corp. (Re), 2013 BCSC 2043

37. At this point in the proceedings, it is clear that NATC is no longer working towards a plan for approval by its creditors. The restructuring has failed, and the goal now is to maximize recovery.
38. Allowing GNWT to become the new interim financing lender by taking an assignment of or becoming subrogated to the Callidus position, and to continue to charge interest, would erode the potential recovery.
39. There is no evidence that allowing GNWT to become the new interim financing lender will generate a benefit NATC's stakeholders, let alone that this benefit will exceed the prejudice to Callidus. Callidus submits that the evidence available shows that the prejudice to Callidus will significantly exceed the potential benefits. Accordingly, GNWT has failed to satisfy the requirements for interim financing.
40. Further, the Interim Facility was capable of being repaid in full on conclusion of a sale of the Mactung property to one of the bidders from the sales process. GNWT opposed that transaction concluding, and frustrated NATC's ability to repay the Interim Facility (and end the facility incurring interest). Callidus submits that it would be inequitable to allow GNWT to profit, at the expense of Callidus's recovery, as a result of its actions in preventing a transaction that would have repaid the Interim Facility and discharged the Priority Charge.
41. In the alternative, the doctrine of subrogation is an equitable doctrine that requires a balancing of all interests. GNWT has prevented a transaction that would have fully repaid the Callidus interim facility and terminated the ongoing interest charges. In the circumstances, it would be inequitable to allow an assignment or subrogation of the Callidus interim facility position, particularly where doing so would erode the recovery for subsequent creditors.

Allocation of Costs

42. Equity informs all decisions made under the CCAA, including the allocation of restructuring costs. Each case must be judged on its particular facts, with a view to effecting an equitable allocation of costs, in a manner that does not readjust the priorities between and among creditors.

Hunters Trailers & Marine Ltd., 2001 ABQB 1094.

Hunjan International Inc. (Re) (2006), 21 C.B.R. 5th 156.

43. Although an allocation *may* be done at an early stage on the basis of appraised value or estimated recovery, particularly where it would be cumbersome to wait for a full liquidation, there is no requirement that the allocation take place at this time. The timing of the allocation is considered on a case-by-case basis, centred on what will do justice among the parties in that case.
44. Callidus submits that based on the information currently available, and in particular the limited information regarding the value of Cantung and the equipment, it would be time consuming and expensive for the Monitor to attempt to allocate costs to those assets at this time. This would further erode the recovery. Further, this exercise would necessarily be arbitrary and speculative.
45. Callidus submits that in this case, it would be pragmatic and cost-effective to pay the Court-ordered priority charges out of the Mactung proceeds now, with a future adjustment and allocation as the assets are sold.
46. This deferred allocation will minimize the expense and ensure that the costs are allocated fairly, and with sufficient information for the Monitor to undertake the allocation analysis. Callidus further submits that this approach will cause no prejudice to GNWT, while ensuring that all creditors bear an equitable portion of the expenses.

Part 6: MATERIAL TO BE RELIED ON

47. The Tenth Report of the Monitor dated October 23, 2015;
48. The Affidavit #2 of Craig Boyer, sworn November 16, 2015 (to be filed);

49. The Eleventh Report of the Monitor dated November 12, 2015; and,
50. Such further and other material as counsel may advise and this Honourable Court may permit.

The Application Respondent estimates that the application will take 2.5 hours.

Date: November 14, 2015



Signature of William E.J. Skelly
Lawyer for the Application Respondent

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