

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:** Global Tungsten & Powders Corp. (the "application respondent" or "GTP")

THIS IS A RESPONSE TO the notice of application of the Government of the Northwest Territories ("GNWT") filed 10/Nov/2015.

#### **Part 1: ORDER 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: NIL.

#### **Part 2: ORDERS OPPOSED**

The application respondent oppose the granting of the orders set out in the following paragraphs of Part 1 of the notice of application: ALL.

#### **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 Part 1 of the notice of application: NIL.

#### **Part 4: FACTUAL BASIS**

##### Background

1. GTP owns and operates a tungsten processing plant in Towanda, Pennsylvania, which processes tungsten concentrates and tungsten containing secondary raw materials into

tungsten containing powders. An affiliate of GTP also owns and operates a tungsten plant in Bruntal, Czech Republic.

2. On December 19, 2013, GTP entered into a long term supply agreement with NATC (the "Supply Agreement").
3. Pursuant to the Supply Agreement, GTP purchased tungsten concentrates from NATC that are produced at the Cantung Mine owned and operated by NATC located in the Northwest Territories.
4. On the same day as entering into the Supply Agreement, GTP agreed to lend NATC the amount of US\$4,700,000 (the "GTP Loan") pursuant to the terms of the Loan Agreement.
5. Pursuant to the terms of the Loan Agreement, GTP provided NATC with a non-revolving US\$2.5 million loan. \$2.2 million of the proceeds of the GTP Loan was used to repay to GTP a pre-payment advance of \$2.2 million made by GTP to NATC under a prior supply agreement.
6. NATC's indebtedness to GTP is secured by a Security Agreement dated December 19, 2013 (the "Security Agreement") and the collateral of all of NATC's present and after acquired property relating to or connected with the Mactung Mine, an undeveloped exploration property located on the border of the Yukon Territory and the Northwest Territories owned by NATC.
7. As of July 22, 2015, the outstanding indebtedness of NATC to GTP for the GTP Loan was \$4,406,250.00.
8. The reason that GTP agreed to lend money to NATC in late 2013 was to provide financial assistance to the operating tungsten mine to help stabilize and continue operations so as to continue the sale of concentrates to GTP in the ordinary course of business.
9. GTP's indebtedness and security against the Mactung Mine ranks *pari passu* with the indebtedness and security of Wolfram Bergbau und Hütten ("WBH").
10. The security held by GTP and WBH against the Mactung Mine ranks in priority, up to US\$5.0 million plus interest and costs (*pari passu*), behind the security held by the Government of the Northwest Territories ("GNWT") in connection with NATC's reclamation obligations for the Cantung Mine (the "Reclamation Obligations").
11. Certain charges granted in these proceedings (the "CCAA Charges") rank in priority to all charges against the Cantung Mine and the Mactung Mine. The CCAA Charges have yet to be allocated between the Cantung Mine and the Mactung Mine.
12. GNWT has brought the within application for, *inter alia*, an order approving a sale transaction (the "Proposed Sale") for the purchase by GNWT of the Mactung Mine for \$4.5 million, to be paid in part by a cash payment to the holders of the CCAA Charges in an amount apportioned to the Mactung Mine, and the balance by "credit bidding" a portion of the amounts payable by NATC to GNWT to secure the performance of the Reclamation Obligations (the "Reclamation Security").

### The Reclamation Obligations

13. As a condition of the water licence issued to NATC for the operations at the Cantung Mine (as amended, the "Water Licence"), NATC was required to post the Reclamation Security to ensure payment for the costs of projected reclamation obligations at the Cantung Mine (the "Reclamation Obligations").

14. The Reclamation Obligations are secured under the Water Licence, a land use permit, and a Reclamation Security Agreement dated August 24, 2010 (the "RSA") between NATC and the Ministry of Indian Affairs and Northern Development ("DIAND").

Affidavit #1 of Dennis M. Lindahl sworn June 8, 2015 ("Lindahl #1"), para. 37.

15. The rights, benefits, obligations, covenants and liabilities of DIAND in relation to the RSA were subsequently assigned to GNWT.

Lindahl #1, para. 39.

16. The payment of the Reclamation Security and performance of NATC's obligations under the RSA and the Water Licence are secured by a continuing security interest in favour of GNWT against all present and after-acquired property, assets and undertakings relating to the Mactung Mine.

Lindahl #1, para. 40.

17. As of March 31, 2015, NATC had posted \$6.2 million in cash (the "Existing Cash") and \$5.5 million in promissory notes (the "Promissory Notes") as part of the Reclamation Security, pursuant to the RSA and the Water Licence.

Lindahl #1, para. 41.

18. In March 2014, NATC submitted an application to GNWT and the Mackenzie Valley Land and Water Board (the "Water Board") to amend the Water Licence to implement a dry stack tailings management system, as part of NATC's mine operations plan.

Lindahl #1, para. 43.

19. On March 2, 2015, the Water Board recommended that GNWT approve the amendment to the Water Licence, and determined that NATC was required to increase the Reclamation Security to \$27.95 million. NATC has sought a reduction of this amount.

Lindahl #1, paras. 45-48;

Affidavit #1 of Mark Warren, sworn July 7, 2015 ("Warren #1"), para. 3.

20. The Water Licence is set to expire on January 29, 2016.

Lindahl #1, para. 42.

### Nature of the Reclamation Security

21. The Federal Government's has published a "Mine Site Reclamation Policy for the Northwest Territories" (the "Policy") setting out the operation and principles regarding reclamation security. As the Policy explains:
- (a) estimates of reclamation costs, for the purposes of financial security should be based on the cost of having the necessary reclamation work done by a third party contractor if the operator defaults;
  - (b) when ongoing reclamation work reduces the outstanding environmental liability, it will result in a reduction in the level of financial security required to be maintained; and
  - (c) as reclamation work is successfully completed and environmental liability is reduced, the amount of financial assurance required will be proportionately reduced and the surplus refunded.

Warren #1, Ex. B, pp. 123.

22. The Water Licence includes the following relevant terms:
- (a) The Reclamation Security shall be maintained until such time as it is fully or in part refunded by the Minister of Environment and Natural Resources (the "Minister") pursuant to s. 35 of the *Waters Act*, S.N.W.T. 2014, c. 18 (the "Waters Act") (C.2);
  - (b) The Reclamation Security shall be sufficient to address the full current liability on the site. If there is a reduction in the total liability, due to progressive reclamation or alteration of the mine development plans, the Licencee may apply to the Water Board for a reduction in the amount of security held or required (C.3); and
  - (c) A failure to provide the required security as set out will be cause for the Water Board to initiate proceedings to suspend the Water Licence (C.4).

Warren #1, Ex. C.

23. The Water Licence was issued under and is governed by the Waters Act.

Warren #1, para. 3.

24. Under the Waters Act, no one shall use waters in a water management area except in accordance with the conditions of a licence, which may be issued by the Water Board.

Waters Act, s. 26.

25. The Water Board may require an applicant to furnish and maintain security with the Minister in an amount determined in accordance with the *Waters Regulations*, N.W.T. Reg 019-2014 (the "Regulations"), and in a form prescribed by the Regulations or

satisfactory to the Minister. The Reclamation Security is the security referenced in this provision.

Waters Act, s. 35(1).

26. Section 11 of the Regulations states that the Water Board may fix the amount of the Reclamation Security in an amount not exceeding the aggregate of the costs of abandonment of an undertaking (i.e. the operation of the Cantung mine), the restoration of the site of the undertaking, and any ongoing measures that may remain to be taken after the abandonment of the undertaking.
27. The Reclamation Security may be applied by the Minister to, among other things, reimburse GNWT either fully or partially, for reasonable costs incurred under s. 67(3) or 69(1)(b)(i) of the Waters Act.

Waters Act, s. 35(2).

28. Section 67(3) of the Waters Act states that if a person fails to comply with a direction from an inspector under s. 67(1), the inspector may take the measures referred to in that direction.
29. Section 69(1) of the Waters Act states that if the Minister believes on reasonable grounds that a person has closed or abandoned a work related to the use of waters or deposit of waste and the person has failed to comply with a condition of a licence, the Minister may take reasonable measures to remedy a resulting adverse effect.
30. Where the Minister is satisfied that an appurtenant undertaking (which is defined as "the work described in a licence") has been permanently closed or permanently abandoned, or a licence has been assigned, a portion of the security that, in the Minister's opinion, will not be required under 35(2) shall without delay be refunded to the licensee or assignor.

Waters Act, s. 35(5).

31. As the above summary demonstrates, the Waters Act sets out the specific circumstances in which GNWT is permitted to make use of the Reclamation Security. It also requires GNWT to refund, in whole or in part, the Reclamation Security if it is no longer necessary to secure the Reclamation Obligations.
32. GNWT would not, therefore, need to resort to the Mactung Mine in order to reimburse itself for costs incurred with respect to reclamation activities at the Cantung Mine if, for example:
  - (a) NATC performs progressive reclamation activities, and/or alters its mine development plans at Cantung Mine such that the Water Board determines that the environmental liability is reduced to below \$6.2 million;

- (b) a party purchases the Cantung Mine, takes assignment of the Water Licence, and posts its own reclamation security to the satisfaction of the Minister and the Water Board, as anticipated by s. 35(5)(b) of the Waters Act; or
- (c) a party purchases the Cantung Mine and the Mactung Mine, and GNWT replaces its secured charge against the Mactung Mine with a new charge, after the proceeds of sale of the Mactung Mine are paid out to the subsequent chargeholders (i.e. GTP and WBH).

## **Part 5: LEGAL BASIS**

### Section 36 of the CCAA

#### 1. Section 36 of the CCAA provides:

36. (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court...

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

2. The above factors are not exhaustive nor limitative, and the court has to look at the transaction as a whole to decide whether or not the sale is appropriate, fair and reasonable.

*White Birch Paper Holding Company (Arrangement relative á),*  
2010 QCCS 4915, paras. 48-49.

### Credit Bidding

3. Credit bidding is not dealt with extensively in Canadian jurisprudence, and appears to have entered into Canada without much inquiry from the courts as to its validity. Credit bidding has only recently been included as a feature in Canadian insolvency proceedings and as such there is very little guidance or rules as to its application in a Canadian context. In fact, it is still very much a controversial topic in the U.S. where the concept was introduced.

Jennifer Wriley, "The Evolutionary Progression of Credit Bidding – A Journey Through Time and a Glimpse of the Future", in Janis P. Serra, ed., *Annual Review of Insolvency Law* (Toronto: Carswell, 2013 ("Wriley")), pp. 503, 539-540.

4. In the U.S., unlike Canada, credit bidding is a statutory right set out at s. 363(k) of the Bankruptcy Code, which also limits the right to secured creditors with an "allowed claim". "Credit bid" is not itself a defined term in the Bankruptcy Code, but rather a colloquial term used to express a secured creditor's right to bid at the sale of its collateral, and then offset the purchase price by the value of its outstanding claim secured by the collateral being purchased.

*Re RML Development Inc.*, No. 13-29244, 2014 WL 3378578  
(Bankr. W.D. Tenn. July 10, 2014)).

5. The basis for credit bidding was described by the court in *M&I Bank, FSB v. Coughlin*, 805 F. Supp. 2d 858 (D. Ariz. 2011) in this way:

Like anyone else, a lender may bid for property at a trustee's sale. But the lender's position differs from that of other potential purchasers because a lender's cash, if treated the same as other bidders' cash, would run a pointless "round trip": the lender (as winning bidder) would write a check to the trustee, and the trustee would in turn write a check to the lender (as beneficiary) for the same amount. "[T]o avoid the inefficiency of requiring the lender to tender cash which would only be immediately returned to it," the lender is allowed to "make a credit bid up to the amount of the outstanding indebtedness." *Alliance Mortg. Co. v. Rothwell*... In other words, the lender may "bid" the money it already lent, to the extent that it has not been repaid.

6. The most-cited case to date on credit bidding in Canada is *White Birch Paper Holding Company (Arrangement relative á)*, 2010 QCCS 4915, a cross-border insolvency involving a stalking horse bid process in which the successful bidder for the debtor's assets incorporated a credit bid into its bid. The bidder was owed \$438 million (including

interest), which amount was secured by all of the debtors' fixed assets. The unsuccessful bidder had bid more in the form of cash, but \$500,000 less after factoring in the credit bid.

7. In concluding that the successful bid met the requirements of s. 36 of the CCAA, the court took into account that the possibility of credit bids was addressed in the bidding procedure sanctioned by an earlier Order.
8. There have been several credit bid cases in Canada since the *White Birch* decision, but these cases have done little to expand on the analysis set out in that case.

Wriley, *supra*, p. 16.

#### Application

9. GNWT cannot credit bid the Reclamation Security because GNWT does not have a beneficial interest in it at this time. As noted above, the concept of credit bidding is based on the idea that it would be inefficient for a creditor to pay money for an asset that is collateral for a debt that it is owed, because the money paid out would be simply paid back to that creditor on closing. This concept is premised on the foundation that the creditor at issue is entitled to a beneficial interest in the proceeds of the sale of the collateral.
10. Here, the circumstances in which GNWT can gain a beneficial interest in the Reclamation Security are set out in the Waters Act, and have not yet arisen. As discussed above, there are several outcomes whereby GNWT will have to refund the Reclamation Security to NATC in full or in part. GNWT's credit bid simply has no value at this point.
11. At best, the Reclamation Security constitutes a debt which GNWT must subsequently refund in full or in part if it does not incur the costs of the Reclamation Obligations with respect to the Cantung Mine.
12. With respect to the factors set out at s. 36(3) of the CCAA, GTP submits that:
  - (a) There is no evidence before the Court that the purchase price of \$4.5 million is a fair reflection of the mine's market value. GTP is aware that a court-ordered sales process was undertaken, but GTP was not consulted during the sales process nor has GTP been provided with any information regarding any offers received in the process. Further, no appraisal or other evidence of value has been presented by NATC, the Monitor, or any other stakeholder;
  - (b) GTP was not consulted with respect to the SISP, and still has no information regarding the offers made for the Mactung Mine in that process;

- (c) the Eleventh Report of the Monitor states that the Monitor considered the nature of GNWT's secured claim, but makes no comment on the issue of whether the Reclamation Security is properly subject to a credit bid;
  - (d) the effect of the Proposed Sale will be to vest off the interests of all other secured creditors (including GTP and WBH) from the Mactung Mine, effectively foreclosing all possibility of recovering any amounts from the assets of NATC; and
  - (e) the consideration offered by GNWT largely consists of its credit bid, which at the moment is not reasonable or fair, in that GNWT has no current need or ability to reimburse itself using the Mactung Mine for the costs of the Reclamation Obligations. GNWT may only reimburse itself if and until it incurs costs under s. 67(3) or 69(1)(b)(i) of the Waters Act over and above the amount of the Existing Cash.
13. GTP respectfully requests that the proposed sale be delayed at least until March 31, 2016. If tungsten prices rebound in the first quarter of 2016, it is not unreasonable to expect that a purchaser could be found for the Mactung Mine, for a price in excess of the proposed purchase price of \$4.5 million, or for the Cantung Mine in circumstances where the purchaser posts new security for the Reclamation Obligations.
  14. There is no prejudice to GNWT or other stakeholders if the Mactung Mine sale is not approved at this time. GNWT's security will remain on the mine, which is an undeveloped exploration property.
  15. The Monitor's care and maintenance cash flow statement included in its Eleventh Report dated November 12, 2015 forecasting expenditures for care and maintenance of approximately \$1.8 million for the period ending April 1, 2015. These care and maintenance costs, to the extent that they qualify as reclamation costs, can be satisfied from the \$6.2 million in cash posted as security.

#### **Part 6: MATERIAL TO BE RELIED ON**

1. Affidavit #1 of Karin Laursen sworn July 7, 2015;
2. Affidavit #2 of Karin Laursen sworn November 16, 2015;
3. Affidavit #1 of Dennis Lindahl, sworn June 8, 2015;
4. Affidavit #3 of Dennis Lindahl, sworn June 29, 2015;
5. Affidavit #1 of Mike Warren, sworn July 7, 2015;
6. Ninth Report of the Monitor, dated October 13, 2015;
7. Eleventh Report of the Monitor, dated November 12, 2015.
8. The pleadings and proceedings herein.

The application respondent estimates that the application will take half a day.

- ☒ The application respondent has filed in this proceeding a document that contains the application respondent's address for service.

Bull, Housser & Tupper LLP

per:



Date: 16/Nov/2015

\_\_\_\_\_  
Signature of lawyer for application  
respondent

Kieran E. Siddall

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**APPLICATION RESPONSE**

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Matter# 15-3341