



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

NOTICE OF APPLICATION

Name of applicant: Alvarez & Marsal Canada Inc. (the "Monitor") in its capacity as
Court-appointed Monitor of North American Tungsten Corporation
Ltd. ("NATC" or the "Petitioner")

To: The Service List

TAKE NOTICE that an application will be made by the Applicant to the Honourable Mr. Justice Butler at the courthouse at 800 Smithe Street, Vancouver, B.C. on January 4³, 2017 at 9:00 a.m. for the orders set out in Part 1 below.

Part 1: ORDERS SOUGHT

1. An order substantially in the form attached hereto as **Schedule "A"**:
 - (a) approving the Allocation Methodology, as defined and described in the Monitor's fourteenth report to court dated December 16, 2016 (the "**Fourteenth Report**");
 - (b) authorizing and directing the Monitor to pay to the Government of the Northwest Territories ("GNWT") from the Allocation Amounts (as defined below) such amounts as are identified as payable in the Allocation Methodology plus interest thereon (the "**Final Allocation Amounts**");

- (c) authorizing and directing the Monitor to repay each Equipment Financier (as defined below) the Allocation Amount paid by them less their Final Allocation Amount;
- (d) ordering Caterpillar Financial Services Ltd. (“CFS”) to pay to GNWT the sum of \$11,064 plus interest thereon at the rate of 6.85% per annum from December 10, 2015 until the date of payment;
- (e) authorizing the Monitor to retain the insurance premiums paid by certain Equipment Financiers to the Monitor;
- (f) discharging the Administration Charge (as defined in the Amended and Restated Initial Order of this Court made herein on July 9, 2015 (the “ARIO”)) and the Allocation Charge (as defined in the November 17, 2015 Order of this Court); and
- (g) authorizing the Monitor to pay the Pre-Transition Funds, as that term is defined in the Fourteenth Report, to or at the direction of Callidus.

Part 2: FACTUAL BASIS

Background

1. Capitalized terms used herein and not otherwise defined shall have the meanings ascribed to them in the ARIO.
2. On June 9, 2015, Mr. Justice Butler granted the Initial Order providing for, among other things, a stay of proceedings to July 8, 2015.
3. On July 9, 2015, Mr. Justice Butler granted the ARIO, pursuant to which, among other things: (i) the Stay Period was extended to 11:59 p.m. on July 17, 2015; (ii) the Petitioner was authorized to borrow up to \$2,500,000 from Callidus under the Interim Facility; and (iii) the Court created the Interim Lender’s Charge to secure repayment of the Interim Facility.
4. The Stay Period has since been extended on a number of occasions, most recently to October 27, 2017 pursuant to the September 12, 2016 Order of Mr. Justice Butler made herein.
5. On November 16, 2015, Mr. Justice Butler granted an order (the “**Expanded Powers Order**”) pursuant to which, among other things, the Monitor’s powers were modified and

expanded such that the Monitor was thereafter empowered and authorized, though not obligated, to act in respect of the Property and Business.

6. Also on November 16, 2015, Mr. Justice Butler granted an order (the “**Redundant Equipment Order**”) authorizing the Equipment Financiers (as defined in the Redundant Equipment Order) to take possession of the Redundant Equipment (as defined in the Redundant Equipment Order) subject to the Monitor determining that there was no equity in such equipment, and provided each Equipment Financier paid to the Monitor, in trust, the amount (the “**Allocation Amount**”) estimated by the Monitor as necessary to satisfy such Equipment Financier’s *pro rata* portion of the charges against the Property created pursuant to various orders of the court made in these proceedings (collectively, the “**CCAA Charges**”).
7. On November 17, 2015, the Court granted an order (the “**Mactung Sale Approval Order**”) which, among other things, the following:
 - (a) approved the sale of the Company’s Mactung property to the Government of the Northwest Territories (“**GNWT**”) pursuant to an asset purchase agreement (the “**Mactung APA**”);
 - (b) ordered GNWT to pay in full at closing any CCAA Charges then outstanding (the “**Charges Payment**”);
 - (c) created a charge (the “**Allocation Charge**”) over the Company’s property other than the Mactung property (the “**Cantung Property**”) as security for payment to GNWT of any part of the CCAA Charges ultimately allocated against the Cantung Property;
 - (d) ordered that GNWT is entitled to charge interest in respect of the Charges Payment at the rate of 6.85% per annum from the date the Charges Payment is made until GNWT is paid in full the amount of the Charges Payment allocated against the Cantung Property; and
 - (e) directed the Monitor to prepare the Allocation Methodology, which concerned the allocation of the CCAA Charges among the assets of NATC.

Allocation of CCAA Charges

8. The sale of the Mactung property to GNWT closed on December 10, 2015. At the closing, the only CCAA Charge that remained unsatisfied was the Interim Lender’s Charge. At closing, GNWT issued a payment to Callidus in the amount of \$2.5 million

plus \$58,000 of accrued interest and fees to satisfy the Interim Lender's Charge in full. Accordingly, the Allocation Methodology concerns only the allocation of that amount (i.e. \$2.558 million) against the Property.

9. The only stakeholders with a financial interest in the Allocation Methodology (collectively, the "**Financial Stakeholders**") are:
 - (a) GNWT, which had a first-ranking security interest in the Mactung assets and, by virtue of the Allocation Charge, has a first-ranking security interest in the Cantung Property;
 - (b) Callidus, which has a security interest in the Cantung mine and the majority of the related assets and equipment which ranks in priority behind only the CCAA Charges and the Allocation Charge; and
 - (c) Equipment Lenders that hold security interests in equipment that comprises part of the Cantung Property.
10. To assist the Monitor in preparing the Allocation Methodology, both GNWT and Callidus provided written submissions setting out their respective positions, which the Monitor agreed to keep confidential. In preparing the Allocation Methodology, the Monitor considered the submissions of both Callidus and GNWT as well as alternative methodologies for allocating the Interim Lender's Charge, including by allocating the charge based on the net realization values of the charged assets.
11. The Monitor ultimately determined that it was appropriate to allocate the Interim Lender's Charge against the Financial Stakeholders' assets based on the nature of the net costs giving rise to the charge. Specifically, the Allocation Methodology is premised on the source and uses of the funding secured by the Interim Lender's Charge, and allocates both cash inflows and outflows among the Financial Stakeholders.
12. The principles underlying the Allocation Methodology include the following:
 - (a) The methodology concerns only the Company's cash receipts and disbursements for the period from the commencement of these proceedings on June 9, 2015 and ending on December 31, 2015 (the "**Restructuring Period**"), by which time the Mactung Credit Bid had closed and the Company had fully transitioned the Cantung mine to care and maintenance.

- (b) The amounts which were secured by the Interim Lender's Charge have been allocated among the Financial Stakeholders based on which stakeholder(s) benefited from various costs incurred during the Restructuring Period, and which contributed so as to fund those costs during that period.
 - (c) Because certain of the costs incurred by the Company, including administrative expenses, corporate overhead and certain restructuring costs, are general in nature, it is only possible to estimate the portion of such costs that should be allocated to each Financial Stakeholder.
 - (d) The amount allocated to each of the Equipment Financiers is based on the relative appraised forced liquidation values of each of the Equipment Financiers' collateral using the values contained in an appraisal prepared by Hilco Global for Callidus in May 2015 (the "**Appraisal**"). As alluded to in paragraph 8.5 of the Monitor's Thirteenth Report to the Court dated September 1, 2016, in preparing the Allocation Methodology, the liquidation value attributed to the Finning R1700G Scoop Tram (the "**Scoop Tram**") was reduced by USD \$220,000, being the estimated damage to that equipment caused by a cave-in that occurred in July 2015, which was not taken into account when the original Allocation Amounts were calculated by the Monitor.
13. The Monitor has confirmed that it believes the Allocation Methodology is fair and appropriate for a number of reasons, including:
- (a) consideration is given to which Financial Stakeholder contributed to any receipts or benefited from any disbursements, including the impact of various financing transactions, including the "gap advance" and "roll-up" of pre-filing debt under the Interim Facility;
 - (b) consideration is given to the contributions of pre-filing accounts receivable, inventory stockpiles and other working capital assets that resulted in net receipts used to fund the proceedings;
 - (c) all Financial Stakeholders are allocated a portion of general and corporate costs consistent with their respective standing and involvement in these proceedings;
 - (d) the issue of uncertainty concerning the realization value of Callidus' collateral (which will not likely be known for a considerable amount of time) is avoided; and
 - (e) costs that were for the sole benefit of one Financial Stakeholder are not borne by the other Financial Stakeholders.
14. Under the Allocation Methodology, the Interim Financing Charge is allocated among the Financial Stakeholders as follows:
- (a) Callidus: 45.7%, or approximately \$1.169 million;

- (b) GNWT: 46%, or approximately \$1.178 million; and
 - (c) Equipment Financiers: 8.3%, or approximately \$211,000.
15. The Final Allocation Amount for each of the Equipment Financiers was calculated based on the relative forced liquidation value of each of the Equipment Financiers' collateral using the values contained in the Appraisal (with an adjustment to the value of the Scoop Tram due to the cave-in). The Final Allocation Amount for each Equipment Financier and the corresponding net payment or refund owing are as follows:

Equipment Financier	Percentage of Appraised Value	Final Allocation Amount (exclusive of interest)	Net Refund/ (Payment) (after including interest to January 4, 2017)
Amalgamated Mining Inc.	40%	\$84,655	\$72,766
Finning International Inc.	52%	\$109,198	\$195,318
Kubota Canada Ltd.	2%	\$3,897	\$3,348
RCAP Leasing Inc.	1%	\$2,532	\$2,177
Caterpillar Financial Services Ltd. ("CFS")	5%	\$11,064	(\$11,876)

16. Equipment Financiers whose Final Allocation Amounts are less than the Allocation Amounts they paid will receive refunds totaling approximately \$275,000 from the Allocation Amounts held in trust by the Monitor. The Monitor proposes to distribute the remainder of the Allocation Amounts to GNWT in partial satisfaction of the Allocation Charge.
17. CFS did not pay an Allocation Amount to the Monitor as their equipment has continued to be used by the Company for care and maintenance activities. Accordingly, in order to satisfy its share of the Allocation Charge in accordance with the Allocation Methodology, CFS would have to pay to GNWT its Final Allocation Amount of \$11,064.

18. The Monitor provided a copy of the Allocation Methodology to each of the Financial Stakeholders on December 2, 2016. Callidus and GNWT subsequently advised the Monitor that they had reached an agreement regarding the allocation of the Interim Lender's Charge as between themselves. The details of that agreement are not known to the Monitor, however it is the Monitor's understanding that a payment will be made by Callidus to GNWT which, together with the payment of the Final Allocation Amounts as provided for in the Allocation Methodology, will satisfy the Allocation Charge.
19. The Equipment Financiers have either advised the Monitor that they accept the Allocation Methodology or have not advised that they have any concerns with it.

Distribution of Pre-Transition Funds

20. As at December 9, 2016, the Company has approximately \$573,000 of Pre-Transition Funds on hand, consisting of cash receipts of the Company from June 9 through to December 9, 2015 (the date on which the transition of the Cantung mine to care and maintenance was substantially complete) after payment of all expenses incurred during the same period.
21. In addition to the foregoing, the Monitor: (i) has received \$21,000 paid by certain Equipment Financiers to the Monitor on account of insurance premiums paid by the Company in insuring the equipment remaining at the Cantung mine site, of which, after taking into applying available rebates, the Monitor proposes to retain \$18,000; and (ii) anticipates receiving \$16,000 from Global Tungsten & Powders Corp. on account of costs awards made against it. The Monitor is of the view that the foregoing funds should be included as part of the Pre-Transition Funds, which would then total \$607,000.
22. The Monitor does not expect that the Company will incur further operating expenses or financing costs with the exception of disbursements in respect of the Company's care and maintenance activities and the administration of these proceedings, all of which is currently being funded by the Department of Indian Affairs and Northern Development. In addition, the Monitor does not expect that there will be any further claims for amount secured by the Administration Charge (as distinct from the Second Administration Charge created as part of the Expanded Powers Order).

23. Presuming the arrangements between Callidus and GNWT are satisfactory to GNWT such that it consents to the discharge of the Allocation Charge, and if the orders sought by the Monitor are granted, the Monitor proposes to disburse the Pre-Transition Funds as follows:

- (a) payment of \$25,000, being the portion of the professional fees incurred in relation to the Monitor's preparation of the Allocation Methodology that Callidus agreed to fund;
- (b) payment of approximately \$236,000 for insurance premiums in respect of the equipment comprising Callidus' collateral for the policy term from December 1, 2016 to November 30, 2017;
- (c) a holdback for payment of outstanding pre-transition claims, if any should arise, of \$25,000; and
- (d) a distribution to Callidus of the remaining approximately \$321,000.

Part 3: LEGAL BASIS

- 1. Section 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, (the "CCAA") and the inherent jurisdiction and statutory discretion of this Honourable Court.
- 2. In circumstances where a court-created charge attaches to property or collateral of more than one stakeholder, it is necessary to allocate that charge among the stakeholders' assets. In most such cases, it is the court's officer that recommends such allocation to the court. The stakeholders are, at the same time, afforded an opportunity if they wish to make submissions as to why the allocation should be different. Pursuant to the terms of the Expanded Powers Order, that is what has happened in this case.
- 3. The principals governing an allocation exercise such as the one at bar are summarized in the decision of Brown J. in *Royal Bank of Canada v. Atlas Block Co. Limited*, 2014 ONSC 1531 at paragraph 43:
 - (i) The allocation of such costs must be done on a case-by-case basis and involves an exercise of discretion by a receiver or trustee;

- (ii) Costs should be allocated in a fair and equitable manner, one which does not readjust the priorities between creditors, and one which does not ignore the benefit or detriment to any creditor;
 - (iii) A strict accounting is neither necessary nor desirable in all cases. To require a receiver to calculate and determine an absolutely fair value for its services for one group of assets vis-à-vis another likely would not be cost-effective and would drive up the overall cost of the receivership;
 - (iv) A creditor need not benefit “directly” before costs of an insolvency proceeding can be allocated against that creditor’s recovery;
 - (v) An allocation does not require a strict cost/benefit analysis or that the costs be borne equally or on a *pro rata* basis;
 - (vi) Where an allocation appears *prima facie* as fair, the onus falls on an opposing creditor to satisfy the court that the proposed allocation is unfair or prejudicial.
4. In this case, the Monitor considered submissions by each of the two most significant Financial Stakeholders as to how they believed the Interim Lender’s Charge should be allocated, and also considered alternative methodologies. Ultimately, the Monitor settled on a methodology that allocated the Interim Lender’s Charge among the Financial Stakeholders’ assets based, in essence, on the costs contributed by each of them and the benefit obtained by each of them to and from the restructuring proceedings, including the sale and investment solicitation process.
5. The Monitor’s proposed Allocation Methodology is well thought-out, and undoubtedly *prima facie* reasonable. Not only does the methodology take into account each of the Financial Stakeholders’ circumstances, it also reflects the outcome of the restructuring process, including how it impacted each Financial Stakeholder.
6. For the foregoing reasons, it is submitted that the Allocation Methodology should be approved and the related relief sought by the Monitor granted.

Part 4: MATERIAL TO BE RELIED ON

- 1. Redundant Equipment Order made November 16, 2016;
- 2. Mactung Sale Approval Order made November 17, 2016;

3. Monitor's Thirteenth Report to the Court dated September 1, 2016;
4. Monitor's Fourteenth Report to the Court dated December 16, 2016; and
5. Such further and other materials as counsel may advise and as this Court deems admissible.

The applicant(s) estimate(s) that the application will take 1 hour.

- ☐ This matter is within the jurisdiction of a master.
- ☒ This matter is not within the jurisdiction of a master. Mr. Justice Butler is seized of these proceedings and this application has been scheduled to be heard before Mr. Justice Butler by Trial Scheduling.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this Notice of Application, you must, within 5 business days after service of this Notice of Application or, if this application is brought under Rule 9-7, within 8 business days of service of this Notice of Application,

- (a) file an Application Response in Form 33,
- (b) file the original of every affidavit, and of every other document, that
 - (i) you intend to refer to at the hearing of this application, and
 - (ii) has not already been filed in the proceeding, and
- (c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
 - (i) a copy of the filed Application Response;
 - (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
 - (iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Date: 16/December/2016



Signature of lawyer for filing party
Kibben Jackson

To be completed by the court only:	
Order made	
<input type="checkbox"/>	in the terms requested in paragraphs _____ of Part 1 of this Notice of Application
<input type="checkbox"/>	with the following variations and additional terms:
Date:	
Signature of <input type="checkbox"/> Judge <input type="checkbox"/> Master	

APPENDIX

THIS APPLICATION INVOLVES THE FOLLOWING:

- ☐ discovery: comply with demand for documents
- ☐ discovery: production of additional documents
- ☐ other matters concerning document discovery
- ☐ extend oral discovery
- ☐ other matter concerning oral discovery
- ☐ amend pleadings
- ☐ add/change parties
- ☐ summary judgment
- ☐ summary trial
- ☐ service
- ☐ mediation
- ☐ adjournments

- ☐ proceedings at trial
- ☐ case plan orders: amend
- ☐ case plan orders: other
- ☐ experts

SCHEDULE "A"

No. -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*,
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AND

IN THE MATTER OF NORTH AMERICAN TUNGSTEN CORPORATION LTD.

PETITIONER

ORDER MADE AFTER APPLICATION

BEFORE THE HONOURABLE

MR. JUSTICE BUTLER

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JANUARY 4, 2017

THE APPLICATION of Alvarez & Marsal Canada Inc. in its capacity as court-appointed monitor of the Petitioner (the "**Monitor**") coming on for hearing at Vancouver, British Columbia on this day, and ON HEARING Kibben Jackson, counsel for the Monitor, and those other counsel listed on Schedule "A" hereto; AND UPON READING the material filed, including the Monitor's Fourteenth Report to Court dated December 16, 2016 (the "**Fourteenth Report**");

THIS COURT ORDERS AND DECLARES THAT:

1. The allocation methodology prepared by the Monitor concerning the allocation of the CCAA Charges (as defined in the Order of this Court made herein on November 17, 2015 (the "**Sale Approval Order**")) among the assets comprising the Property (as defined in

the Amended and Restated Initial Order of this Court made herein on July 9, 2015), a copy of which is attached as Appendix "A" to the Fourteenth Report (the "**Allocation Methodology**"), is hereby approved.

2. The Monitor is hereby authorized and directed to pay to the Government of the Northwest Territories ("**GNWT**") from the Allocation Amounts (as defined in the Order of this Court made herein on November 16, 2015) paid to the Monitor by the Equipment Financiers (as defined in the Order of this Court made herein on November 16, 2015) such amounts as are identified in the Allocation Methodology as payable by each Equipment Financier plus interest thereon at the rate of 6.85% per annum on such amounts from December 10, 2015 up to and including the date of payment (the amounts so payable by the Equipment Financiers are hereby referred to as the "**Final Allocation Amounts**").
3. The Monitor is hereby authorized and directed to repay to each Equipment Financier that paid their Allocation Amount to the Monitor their Allocation Amount less their Final Allocation Amount.
4. Caterpillar Financial Services Ltd. is hereby ordered to pay to GNWT the sum of \$11,064 plus interest thereon at the rate of 6.85% per annum from December 10, 2015 up to the date of payment in partial satisfaction of the Allocation Charge (as defined in the Sale Approval Order).
5. The Monitor is hereby authorized to retain for the benefit of the Company all funds paid to it by the Equipment Financier in respect of their share of the premiums paid by the Company to insure the equipment remaining in its possession pending its retrieval by the applicable Equipment Financiers, which funds shall form part of the Pre-Transition Funds (as defined in the Fourteenth Report).
6. The Administration Charge (as defined in the Amended and Restated Initial Order of this Court made herein on July 9, 2015) and the Allocation Charge (as defined in the Sale Approval Order) are hereby discharged and of no further force and effect.

7. The Monitor is hereby authorized and directed to pay to or as directed by Callidus Capital Corporation ("**Callidus**") the Pre-Transition Funds (as defined in the Fourteenth Report) less \$25,000, which funds shall be retained in order to pay outstanding claims in respect of post-filing obligations of the Company incurred prior to November 16, 2015, if any.
8. The need for endorsement of this Order by counsel appearing on this application, other than counsel for the Monitor, is hereby dispensed with.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:

Signature of Kibben Jackson
Lawyer for the Monitor, Alvarez & Marsal Canada Inc.

BY THE COURT

REGISTRAR

Schedule "A"

(List of Counsel)

COUNSEL	APPEARING FOR