

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 applicants: 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 Mr. Justice Butler at the courthouse at 800 Smithe Street, Vancouver, B.C. on 27/July/2015 at 9:00 a.m. for the orders set out in Part 1 below.

Part 1: ORDERS SOUGHT

1. An order and declaration that, by refusing to pay its post-filing obligations to NATC on the basis of an alleged claim of set-off, Global Tungsten & Powders Corp. ("**GTP**") is in violation of paragraphs 15 and 16 of the Amended and Restated Initial Order, made July 9, 2015, as amended (the "**ARIO**");
2. An order that GTP make immediate payment of all due or past due invoices issued by NATC after June 9, 2015;
3. An injunction permanently restraining GTP from exercising any right of set-off it may have in respect of any invoices issued by NATC;

4. An order compelling and directing GTP to make payment for all shipments made after June 9, 2015, in accordance with the terms of the Supply Agreement dated December 19, 2013 between NATC and GTP.
5. Costs on a solicitor and own client basis; and
6. Such other relief as this Honourable Court may deem just.

Part 2: FACTUAL BASIS

1. The Petitioner, North American Tungsten Corporation Inc. ("**NATC**"), is engaged in the acquisition, exploration, development, mining and milling of minerals, principally tungsten.
2. NATC has two properties:
 - (a) the "**Cantung Mine**" and associated mine facilities, which is an operating mine located in the south-west corner of the Northwest Territories; and
 - (b) the "**Mactung Property**", which is an undeveloped exploration property located on the border of the Yukon Territory and the Northwest Territories.
3. At or around the commencement of these proceedings, most of NATC's secured creditors held security over the assets of either the Cantung Mine or the Mactung Property. The secured creditors with an interest in the Cantung Mine assets include:
 - (a) Callidus Capital Corporation;
 - (b) Various parties (the "**Debentureholders**"), who also hold security over the Mactung Property assets; and
 - (c) Queenwood Capital Partners II LLC ("**Queenwood II**"), who also hold security over the Mactung Property assets.
4. The secured creditors with an interest in the Mactung Property assets include:
 - (a) The Government of the Northwest Territories;
 - (b) Global Tungsten & Powders Corp. ("**GTP**") and Wolfram Bergbau and Hutten AG ("**WBH**"); and
 - (c) the Debentureholders and Queenwood II, as noted above.

5. In the case of GTP, NATC's pre-filing debt to GTP (the "**NATC Pre-filing Debt**"), arose pursuant to a Loan Agreement between GTP and NATC dated December 19, 2013 (the "**Loan Agreement**"). GTP claims that the NATC Pre-filing Debt is approximately \$4.4 million.
6. As a result of various factors, primarily a recent and significant drop in APT market prices, NATC became insolvent in or around mid-2015. It therefore sought protection under the *Companies' Creditors Arrangement Act* in these proceedings.

Status of Restructuring Proceedings

7. On June 9, 2015, Mr. Justice Butler granted the Initial Order providing for a stay of proceedings, which was amended by an Orders made July 9 and 17, 2015 to, among other things, extend the stay of proceedings to October 31, 2015.
8. The Petitioner has two customers: GTP and WBH. As noted above, both customers are also secured creditors, with second ranking security on the Mactung Property.
9. NATC has separate supply agreements with both customers which initially provided for payment within 30 days of shipments being made from NATC's Cantung Mine site. In the case of GTP, NATC is party to a Supply Agreement dated December 19, 2013 (the "**Supply Agreement**").
10. However, to manage cashflow, NATC had entered into arrangements with both customers to allow for payment within approximately 5 days of shipment. In the case of GTP, early payment was achieved through a factoring agreement between the Petitioner and Royal Bank of Scotland plc ("**RBS**").
11. In late June, 2015, the Petitioner learned that RBS was discontinuing payments under the factoring arrangement, and that GTP would not accelerate their existing payment terms to allow for continued early payment to the Petitioner for ongoing shipments.
12. This created an urgent need for further liquidity in order for NATC to continue operations through these proceedings. To address the urgent cashflow situation, NATC sought approval of an interim financing facility in the amount of \$2.5 million (the "**Interim Financing**") from its main equipment lender, Callidus.

13. On July 8, 2015, the Petitioner brought an application to approve the Interim Financing and extend the stay of proceedings herein. As part of that application, the Petitioner presented:
 - (a) its operating plan, under which Petitioner would, among other things, continue operations (including management of environmental care) at the Cantung Mine until at least the end of October, 2015, and position the Mine for a transition to care and maintenance (the “**Operating Plan**”); and
 - (b) its plan to develop a sale and investment solicitation process (the “**SISP**”), under which the Petitioner would seek a long term investor in its business, or purchaser of some or all of its assets or business, with an aim of presenting a transaction for approval by the end of October, 2015, and closing a transaction in late 2015. The SISP was later presented in more detail and approved by Order made July 17, 2015.
14. Given the above timelines, the Petitioner sought an extension of the stay to October 31, 2015.
15. On July 9 and 17, 2015, the Court approved the Interim Financing and the SISP, and extended the stay of proceedings to October 31, 2015.

NATC Dependence on Receivables

16. NATC has filed cashflow projections to October 23, 2015 (the “**Cashflow**”). These projections show that, with the Interim Financing, and based on anticipated receivables, NATC has sufficient liquidity to continue operations through to the end of October, 2015, consistent with the Operating Plan and the SISP.
17. As noted above, following the Initial Order, and up until late June, 2015, NATC had been receiving payment on all post-filing shipments made to GTP through its factoring agreement with RBS.
18. After RBS discontinued the factoring agreement, GTP continued to make payments on certain post-filing shipments it received, although on 30 day terms (as noted above). GTP paid approximately US \$750,000 in respect of these post-filing shipments.
19. However, on July 22, 2015, without any prior notice, GTP asserted a right of legal, equitable and contractual set-off between the NATC Pre-Filing Debt, and GTP’s post filing debt to NATC of approximately US \$1,682,826.71 (the “**GTP**

Post-Filing Debt”), arising from various invoices issued in respect of shipments of tungsten ore made in accordance with the Supply Agreement.

20. Had GTP raised its claim of set-off in a timely way, it could have been negotiated and, if necessary, argued before the Court in conjunction with NATC’s earlier applications, at which time the proposed cashflow and the Operating Plan were front and center, and in conjunction with the application to approve the SISP, the Interim Financing and the extension of the stay of proceedings.
21. If GTP is permitted to set-off the NATC Pre-Filing Debt against the GTP Post-Filing Debt, NATC will not have sufficient liquidity to meet its post-filing obligations.
22. I note that Callidus, the existing Interim Lender and proposed AR Facility Lender, has indicated through its counsel it will not approve additional financing if GTP invoices are not being paid in the ordinary course, and NATC does not have any other commitments for additional financing at this time.
23. As a result, notwithstanding that the Court has already approved the various processes outlined above, GTP’s set-off claim could effectively terminate NATC’s restructuring efforts.

Part 3: LEGAL BASIS

1. NATC submits that GTP is not entitled to set-off the NATC Pre-Filing Debt against the GTP Post-Filing Debt for a number of reasons, including the following set forth below.

Policy Objects of the CCAA

2. As recognized in many cases, some of the key purposes of the CCAA include “maintain[ing] the *status quo* for a period to provide a structured environment in which an insolvent company can continue to carry on business and retain control over its assets while the company attempts to gain the approval of its creditors for a proposed arrangement that will enable the company to remain in operation for the future benefit of the company and its creditors” and “assist[ing] insolvent companies in developing and seeking approval of compromises and arrangements with their creditors”.

Dr. Janis Sarra, *Rescue! The Companies’ Creditors Arrangement Act*, 2nd ed. (Toronto: Thomson Reuters Canada Limited, 2013 at p. 15

3. If GTP is permitted to set off the NATC Pre-Filing Debt against the GTP Post-Filing Debt, both of these key policy objectives would be frustrated as GTP would

- essentially elevate its pre-filing claim to receive full and immediate payment for the NATC Pre-Filing Debt in improper preference to other creditors, while sabotaging the viability of a restructuring for NATC pursuant to the CCAA.
4. GTP will not be prejudiced by being required to abide by the terms of its Supply Agreement with NATC.
 5. In contrast, if GTP is permitted to set off the NATC Pre-filing Debt, the viability of NATC's restructuring will be threatened. In the event of a forced liquidation, the mine would be abandoned and the company, creditors, employees and other stakeholders, which the CCAA aims to protect, would be greatly prejudiced.
 6. While section 21 of the CCAA states that "the law of set-off... applies to all claims made against a debtor company and to all actions instituted by it for the recovery of debts due to the company...", the language of that section must be read and interpreted bearing in mind the objectives of the CCAA.
 7. Section 21 of the CCAA appears to contemplate the set-off of pre-filing claims against pre-filing claims and post-filing claims against post-filing claims. Bearing in mind the objects of the CCAA, NATC submits that section 21 cannot be properly interpreted to permit the set-off of pre-filing claims against post-filing claims as that would frustrate the purposes of the Act to maintain the *status quo* and facilitate restructuring.
 8. Accordingly, NATC submits that GTP's purported set-off should not be permitted or condoned by this Court as being contrary to the objects of the CCAA.

Conduct and Implicit Representations of GTP

9. In addition to the policy considerations under the CCAA, NATC submits that GTP should not be permitted, at this point, to resile from its obligation to pay for the concentrate in accordance with the Supply Agreement.
10. In particular, NATC incurred costs for production and transport of concentrate in reliance on the expectation that it would receive payment under the Supply Agreement. GTP's post-filing conduct evidenced at the very least an implication that GTP would make payment in consideration for NATC supplying the concentrate.
11. As GTP is aware, throughout these proceedings, NATC has been transparent to its creditors regarding its cash flow issues, which have only been exacerbated by the termination of the factoring arrangement between NATC and RBS and the cashflows filed with this Court have all been clearly premised on NATC including timely payment from its only two customers, one of which is GTP.

12. Representatives of NATC had numerous discussions and communications with GTC over the course of these proceedings regarding post-filing deliveries of concentrate and payment for the same under the Supply Agreement.
13. As a secured creditor and one of only two customers of NATC, the Petitioner consulted extensively throughout these proceedings with GTC while developing the Operating Plan.
14. GTP declined NATC's post-filing requests to accelerate the payment terms for the concentrate supplied post-filing by NATC and insisted that it required, for business reasons, the entire 30 day payment term provided by the Supply Agreement.
15. To be clear, throughout these proceedings and the foregoing discussions and other communications, GTP gave no indication to NATC whatsoever that it intended to assert a right to set off the NATC Pre-filing Debt against the present GTP Post-Filing Debt. To the contrary, GTP has paid for other post-filing deliveries of concentrate from NATC without raising such an issue.
16. GTP was aware that NATC had predicated its continued operation on GTP's timely payment of concentrate to be supplied post-filing and, by its conduct, led or at the very least permitted NATC to expect, to its detriment, that payment would be made as required under the Supply Agreement.
17. Accordingly, it would be both inappropriate and inequitable for GTP to be permitted to now claim set-off of the NATC Pre-Filing Debt and receive an undue preference above other creditors who have gone unpaid.

No Basis for Set-Off

18. Moreover, in addition to the above, NATC further submits that GTP has not met the burden of showing that it is entitled to contractual, legal or equitable set off in any event.

Contractual Set Off

19. With respect to contractual set off, neither the Supply Agreement (being the basis for the GTP Post-Filing Debt) nor the Loan Agreement (being the basis for NATC Pre-Filing Debt) set forth a contractual right for GTP to set off the NATC Pre-Filing Debt against the GTP Post-Filing Debt.
20. There are no provisions in the Supply Agreement which purport to confer a right of set-off. The only provision of the Loan Agreement which purports to confer a right of set-off in favour of GTP is found at section 10.10 and relates only to the

set off of “deposits held for the Borrower”, which NAT submits is not applicable in the circumstances.

21. Accordingly, NATC submits that GTP fails to make out the requirements to assert any right to contractual set-off.

Legal Set Off and Equitable Set Off

22. There are two requirements for legal set-off. Namely, both obligations must be debts and both debts must be mutual cross obligations:”

Coffey Estate v. Coffey, 2014 BCSC 110 at para. 37

23. As for equitable set-off, the following principles apply:

- a. The party relying on the set off must show some equitable ground for being protected against its adversary’s demands;
- b. The equitable ground must go to the very root of the plaintiff’s claim;
- c. A cross claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the claim;
- d. The plaintiff’s claim and cross claim need not arise out of the same contract;
- e. Unliquidated claims are on the same footing as liquidated claims.

Telford v. Holt, [1987] 2 S.C.R. 193 at para. 35

24. NATC notes that the Supply Agreement and the Loan Agreement are different agreements, with their own terms and conditions, governing different issues and made for different purposes. Bearing this separation in mind, the Petitioner further submits that GTP’s obligation to pay the GTP Post-Filing Debt is not so clearly connected to NATC’s obligation to pay the NATC Pre-Filing Debt that the obligation to pay the NATC Pre-Filing Debt goes to the root of the obligation to pay the GTP Post-Filing Debt.

25. In this case, NATC submits that GTP fails to make out the requirements for legal set-off and equitable set-off in any event.

Stay of Set-Off Rights

26. Further and in the alternative, even if GTP does have any right to set-off the NATC Pre-Filing Debt against the GTP Post-Filing Debt notwithstanding the stay of all remedies of creditors pursuant to the ARIO, NATC submits that any such right should be temporarily stayed by this Court.

27. To the extent that GTP relies upon the decision of Mr. Justice Farley in *Air Canada, Re*, NATC submits that *Air Canada* simply stands that proposition that the provisions of the Initial Order in CCAA proceedings should be consistent with section 18.1 (now section 21) of the CCAA such that the Initial Order should not specifically prohibit, at that point, pre-filing claims from being set off against post-filing claims.

Air Canada, Re, [2003] O.J. No. 6058

28. However, Mr. Justice Farley's decision did not address whether a set off of this nature would necessarily be protected by section 18.1 (now section 21). Instead, that issue was left to be determined at a future time and does not appear to have been determined in a reported decision.

29. As discussed above, NATC submits that the set-off of a pre-filing debt against a post-filing debt is not a set-off which is protected by section 21 and the *Air Canada* decision does not provide any clear authority on this issue.

30. To the extent that GTP has any right to assert set-off of the NATC Pre-Filing Debt against the GTP Post-Filing Debt, which is expressly denied, then such right should be at least temporarily stayed by this Court pending a more fulsome determination, at a later date, of GTP's entitlement to any right of set-off as it was in *Aero*.

Tucker v. Aero Inventory (UK) Ltd., 2009 CarswellOnt 7007 (Ont. S.C.J.)

Prejudice

31. As noted above, in balancing the prejudices, NATC emphasizes that staying any potential right to set-off the NATC Pre-Filing Debt against the GTP Post-Filing Debt would not prejudice GTP as it would be receiving value (in concentrate) in exchange for payment pursuant to the Supply Agreement. The converse, however, would result in great prejudice to the Petitioner's stakeholders as discussed above.

32. Accordingly, in balancing the prejudice in this case and considering the other factors discussed above, it is appropriate for this Court, in NATC's submission, to grant the relief sought.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Dennis Lindahl, sworn June 8, 2015;
2. Affidavit #4 of Dennis Lindahl, sworn July 2, 2015;

3. Affidavit #9 of Dennis Lindahl, sworn July 21, 2015;
4. Affidavit #10 of Dennis Lindahl, to be sworn;
5. The Fourth Report of Monitor, dated July 7, 2015;
6. The Sixth Report of the Monitor, to be filed;
7. The Amended and Restated Initial Order, made July 9, 2015;
8. Order made July 17, 2015; and
9. Such further and other material as counsel may advise and this Honourable Court may permit.

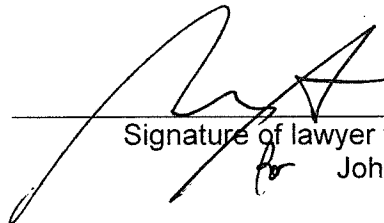
The applicant(s) estimate(s) that the application will take 2 hours.

- ☐ This matter is within the jurisdiction of a master.
- ☒ This matter is not within the jurisdiction of a master.

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: 23 / July / 2015



Signature of lawyer for filing party
John R. Sandrelli

To be completed by the court only:

Order made

☐ in the terms requested in paragraphs _____ of Part 1 of this Notice of Application

☐ with the following variations and additional terms:

Date:

Signature of ☐ Judge ☐ 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