SCC File No. 41063

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

TRAVELERS CAPITAL CORP.

APPLICANT
(Appellant)

AND:

MANTLE MATERIALS GROUP, LTD.

RESPONDENT
(Respondent)

RESPONSE TO APPLICATION FOR LEAVE TO APPEAL
(Mantle Materials Group, Ltd., Respondent)
(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Procedural and Factual Background

1. This memorandum is in response to an application by Travelers Capital Corp. ("**Travelers**") for leave to appeal two decisions of the Honourable Justice W.T. de Wit of the Alberta Court of Appeal released on October 18, 2023[1] and November 27, 2023.[2] Those decisions were in respect of a decision of the Honourable Justice C.C.J. Feasby of the Alberta Court of King's Bench issued August 28, 2023[3] in the proposal proceedings commenced by Mantle Materials Group, Ltd. ("**Mantle**") under Part IV of the *Bankruptcy and Insolvency Act*[4] ("**Proposal Proceedings**").

2. Mantle operated and continues to have interests in gravel pits located in Alberta on public lands pursuant to surface material leases with the government of Alberta and on private lands pursuant to royalty agreements with the landowners. The surface material leases and royalty agreements grant Mantle access to the lands to extract, process and sell gravel. Mantle acquired the business in 2021 pursuant to a restructuring of two affiliates under the C*ompanies' Creditors Arrangement Act*,[5] and as part of the transaction, inherited significant obligations, including environmental reclamation obligations associated with the pits that were no longer being operated.

3. The pits that were no longer economically viable were subject to environmental protection orders ("**EPOs**") issued by Alberta Environment and Public Areas ("**AEPA**") requiring their reclamation under Alberta's environmental regulatory legislation ("**Environmental**

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[1] *Mantle Materials Group, Ltd. v Travelers Capital Corporation*, 2023 ABCA 302 [***de Wit Decision***].

[2] *Mantle Materials Group, Ltd. v Travelers Capital Corp*, 2023 ABCA 339 [***Second de Wit Decision***, and with the *de Wit Decision, the* ***Appeal Decisions***].

[3] *Re Mantle Materials Group, Ltd*, 2023 ABKB 488 [***Feasby Decision***].

[4] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended [***BIA***].

[5] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended [***CCAA***].

Legislation").[6] The Environmental Legislation requires operators such as Mantle to fully reclaim and remediate sites following the termination of operations in order to restore them to the state they were in before operations commenced ("**Environmental Obligations**"). The AEPA has not carried out any reclamation work on any of Mantle's gravel pits.

4. In late 2021, Mantle acquired equipment for its gravel extraction and processing operations ("**Equipment**")[7] and financed this acquisition with a loan from Travelers. Mantle granted to Travelers a purchase-money security interest in the Equipment ("**Travelers Security**").[8] The availability of the loan was conditional upon Travelers being satisfied with its environmental due diligence. Accordingly, prior to the advance, Mantle provided Travelers with information disclosing the Environmental Obligations and Travelers confirmed that this condition precedent was satisfied.[9]

5. Because of financial difficulties arising from a significant debt burden, the legacy Environmental Obligations and insufficient sales, Mantle commenced the Proposal Proceedings by filing a notice of intention to make a proposal on July 14, 2023. Mantle required the relief available under Part IV of the *BIA* in order to liquidate its assets in a commercially reasonable manner, fully address its Environmental Obligations, and distribute any remaining net proceeds to creditors. This involved selling its gravel inventory and the Equipment, collecting its accounts receivable, selling gravel pits that were still economically viable to purchasers that would assume the Environmental Obligations and be acceptable to the AEPA, and satisfying the Environmental Obligations affecting all other gravel pits in accordance with the Environmental Legislation.

[6] *Feasby Decision* at paras 4-9.

[7] As noted in the *Feasby Decision* at para 39, the Equipment included a jaw crushing plant, cone crushing plant, screen plant, aggregate feeder, aggregate surge bin, material washer, conveyor, truck scale, articulated dump truck, tracked excavator and similar equipment.

[8] *Feasby Decision* at para 12.

[9] *Feasby Decision* at para 42; *de Wit Decision* at para 5.

6. Mantle applied for an Order, *inter alia*, to: (a) approve an interim financing facility provided by an affiliate of Mantle's parent to fund its activities during the Proposal Proceedings; (b) grant a charge to secure the interim financing facility; (c) grant an administration charge to secure the fees and expenses of the proposal trustee, its counsel and Mantle's counsel; (d) grant a charge to secure Mantle's obligation to indemnify its officers and directors for certain liabilities that could arise during the proceedings; and (e) grant these charges ("**Charges**") priority over any other security. On August 15, 2023, Justice Feasby granted the relief sought by Mantle, but reserved on whether the Charges would take priority over Travelers' Security. On August 28, 2023, Justice Feasby decided that the Charges should have priority to Travelers' Security.[10]

7. Travelers applied to the Alberta Court of Appeal for: (a) a declaration under section 193(c) of the *BIA* that it was entitled as of right to appeal the *Feasby Decision*; or (b) leave to appeal the *Feasby Decision* under section 193(e) of the *BIA*. This application was dismissed on October 18, 2023.[11] Travelers then applied for leave to bring the question of whether Travelers had an appeal as of right before a full panel of the Court of Appeal. The second application was dismissed by Justice de Wit on November 27, 2023.[12]

8. Travelers now seeks leave of this Court to appeal the two *Appeal Decisions* in a "leave on leave" application on the purported basis that the questions it raises are of national and public importance.

9. On January 10, 2024, the Honourable Associate Chief Justice D.B. Nixon of the Alberta Court of King's Bench released reasons taking up the Proposal Proceedings and converting them into proceedings under the *CCAA*.[13]

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[10] *Feasby Decision* at para 43.

[11] *de Wit Decision* at para 23.

[12] *Second de Wit Decision* at para 14.

[13] *Mantle Materials Group, Ltd. (Re)*, 2024 ABKB 19.

B. Overview of Mantle's Submissions

10. While this Court has jurisdiction to grant "leave on leave" applications, such discretion is exercised only in exceptionally rare cases, and for the reasons summarized below, this is not such a case.

(a) In this Court's decision in *Orphan Well Association v Grant Thornton Ltd.*,[14] the majority repeatedly emphasized that the estate of a bankrupt debtor, which encompasses all of the debtor's assets, is responsible for meeting its Environmental Obligations. If the Environmental Obligations are not provable claims under the test articulated in *Newfoundland and Labrador v AbitibiBowater Inc*.[15] and *Redwater*, those Environmental Obligations must be satisfied <u>before</u> the *BIA's* priority distribution regime comes into play and distributions are made to the debtor's secured or unsecured creditors.

(b) In *Redwater*, the majority's comment that the regulator was not seeking in that case to have Environmental Obligations satisfied from assets unrelated to those obligations was intended to illustrate that the *BIA*, in section 14.06(7), contemplates that a regulator would have priority over creditors.[16] The decision does not state that unrelated assets can be realized upon by secured creditors prior to Environmental Obligations that are not provable claims being satisfied, nor provide any guidance as to how unrelated assets could be identified and separated from the debtor's estate for the purposes of satisfying those Environmental Obligations.

(c) The Courts below found that the Equipment was in fact used in and formed part of the business activities of Mantle that gave rise to its Environmental Obligations, and therefore did not constitute Unrelated Assets. This finding is consistent with

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[14] *Orphan Well Association v Grant Thornton Ltd.*, 2019 SCC 5 [***Redwater***] at para 159.

[15] *Newfoundland and Labrador v AbitibiBowater Inc*, 2012 SCC 67 [***Abitibi***] at para 26.

[16] *Redwater* at para 159.

Manitok Energy Inc. (Re)[17] and *Orphan Well Association v Trident Exploration Corp.*[18]

(d) While different courts have said the interpretative approach to section 193(c) of the *BIA* should be "narrow" or neither narrow nor expansive but in accordance with its terms and context, there is a consensus in the case law about how to answer the question of whether the property involved in the appeal exceeds $10,000.[19] Accordingly, there is no substantive uncertainty for litigants as to the test for establishing whether an appeal exists as of right under that section. In any event, Travelers has failed to establish that under either approach, it would have an appeal as of right under section 193(c).

PART II – QUESTION IN ISSUE

11. The question in issue on this application is whether Travelers' proposed issues are of national and public importance. Mantle asserts that they are not, as the legal theories advanced by Travelers are not supported by decisions of this Court or Courts of Appeal, and in any event, the Equipment secured by Travelers' Security is not unrelated to Mantle's Environmental Obligations. Further, under either judicially sanctioned approach to section 193(c) of the *BIA*, Travelers has not established that it has satisfied the test for having an appeal as of right.

PART III – STATEMENT OF ARGUMENT

A. *Redwater* Decision

12. Despite the assertions made by Travelers, *Redwater* does not in essence create a priority interest in the bankrupt's assets that are related to Environmental Obligations. The majority held that the estate remains responsible for the bankrupt's Environmental Obligations notwithstanding the bankruptcy. The question of whether the estate is required to utilize its assets to comply with

[17] *Manitok Energy Inc (Re)*, 2022 ABCA 117 [***Manitok***] at paras 28-31.

[18] *Orphan Well Association v Trident Exploration Corp.*, 2022 ABKB 839 [***Trident***] at para 67.

[19] *Hillmount Capital Inc. v Pizale*, 2021 ONCA 364 [***Hillmount***] at paras 34 and 45.

Environmental Obligations, and whether those obligations have "priority", depends upon whether or not, under the *Abitibi* test, the Environmental Obligations are claims provable in bankruptcy. If the Environmental Obligations are not provable claims under the *Abitibi* test, then the bankrupt estate is required to meet the Environmental Obligations to the extent of the estate's assets prior to any distribution being made to any creditors, whether secured or unsecured.[20]

13. The majority also noted that Environmental Obligations that are not provable decrease the value of the estate, but that this effect does not conflict with the *BIA's* priority scheme, as those Environmental Obligations must be satisfied before that priority scheme comes into play.[21] In other words, the value of the property in the estate, or the estate's contours, available for distribution to creditors under the *BIA* is reduced or defined by the amount required to meet Environmental Obligations that are not provable claims, notwithstanding the consequences this may have for the bankrupt's secured creditors.[22] The majority decision emphasizes that <u>all</u> Environmental Obligations remain binding on the bankrupt estate.[23]

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[20] *Redwater* at paras 99, 118. See also the reasons of McLachlin C.J. in *Abitibi* at paras 72-74, with which the majority agreed (at paras 2, 59), where McLachlin C.J. wrote that it is a fundamental plank of Canadian corporate law that Environmental Obligations, which are owed to the public and are ongoing notwithstanding proceedings under the *BIA*, are unlike monetary claims that are provable under the *BIA*. They are not subject to the priority distribution scheme and remedies set out in the *BIA*. The *BIA*'s priority scheme for provable claims, whether secured or unsecured, and whether attaching to specific assets or all of a bankrupt's assets, only comes into play once Environmental Obligations that are not provable claims are satisfied.

[21] *Redwater* at paras 158-159.

[22] *Redwater* at para 159.

[23] *Redwater* at paras 7, 74-79, 81-84, 86, 88, 93, 96-100, 102-104, 113, 114, 118, 135, 155-157, and 160-162, where the majority discusses or refers to the estate as continuing to be liable for environmental obligations approximately 78 times. While the term "estate" is not defined in the

14. Travelers asserts that there is uncertainty as to whether *Redwater* requires that assets of a bankrupt estate that are unrelated to the Environmental Obligations must be utilized to satisfy those obligations before distributions are made to creditors. Travelers argues that the Equipment subject to Travelers' Security was not affected by the Environmental Obligations, and therefore it should not be required to wait to enforce against the Equipment until the Environmental Obligations have been satisfied. This argument is based on an isolated comment in paragraph 159 of *Redwater*, in which the majority stated:

> Accordingly, the end-of-life obligations binding on GTL are not claims provable in the Redwater bankruptcy, so they do not conflict with the general priority scheme in the *BIA*. This is not a mere matter of form, but of substance. Requiring Redwater to pay for abandonment before distributing value to creditors does not disrupt the priority scheme of the BIA. In crafting the priority scheme set out in the *BIA*, Parliament intended to permit regulators to place a first charge on real property of a bankrupt affected by an environmental condition or damage in order to fund remediation (see s. 14.06(7)). Thus, the *BIA* explicitly contemplates that environmental regulators will extract value from the bankrupt's real property if that property is affected by an environmental condition or damage. Although the nature of property ownership in the Alberta oil and gas industry meant that s. 14.06(7) was unavailable to the Regulator, the Abandonment Orders and the LMR replicate s. 14.06(7)'s effect in this case. Furthermore, it is important to note that Redwater's only substantial assets were affected by an environmental condition or damage. *Accordingly, the Abandonment Orders and LMR requirements did not seek to force Redwater to fulfill end-of-life obligations with assets unrelated to the environmental condition or damage.* In other words, recognizing that the Abandonment Orders and LMR requirements are not provable claims in this case does not interfere with the aims of the *BIA* — rather, it facilitates them. [emphasis added][24]

15. It is notable that this was the only place in the 164-paragraph decision where a distinction was made between assets that were related to the Environmental Obligations and assets that were not. Elsewhere, this Court repeatedly indicated that the bankrupt estate remains responsible for performing the Environmental Obligations notwithstanding the bankruptcy, and that a trustee is

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BIA, section 71 vests all of the bankrupt's property and assets in the trustee, which makes up the estate.

[24] *Redwater* at para 159.

responsible for performing those Environmental Obligations, if they are not provable claims, to the extent that assets remain in the estate.[25] Those obligations require the estate to take actions rather than make payments,[26] and reduce both the value, and determine the contours, of the estate available for distribution.[27] This is a type of super-priority whose effect, the majority observed, is also contemplated by section 14.06(7) and therefore facilitates the aims of the *BIA*. The observation that the regulator did not seek to fulfill the Environmental Obligations with assets unrelated to those obligations is very different from a determination that Environmental Obligations can only be fulfilled from assets related to such obligations. Such a restriction appears neither in paragraph 159 nor anywhere else in the majority's reasons.

16. If the distinction between monetary claims provable in insolvency proceedings and Environmental Obligations that are not provable claims is indeed a fundamental plank of corporate law, and such Environmental Obligations must be performed from the assets in the estate before the creditor priority regime contemplated by the *BIA* comes into play, then by necessary implication such Environmental Obligations are fundamentally different than secured creditor claims that are secured by security interests in assets. The former, as a public duty binding the corporate persona of the debtor, continues to operate notwithstanding insolvency. The latter are *in rem* interests in debtors' assets that, like unsecured claims, are governed by the priorities contemplated by the *BIA* and only receive recoveries or distributions once those Environmental Obligations are satisfied. Travelers' argument that a secured creditor with a purchase-money security interest ("**PMSI**") in unrelated assets it should recover before those Environmental Obligations are satisfied assumes that the majority was creating charge in assets affected by such Environmental Obligations that is similar to the charge in real property created by section 14.06(7), but that is not consistent with the majority repeatedly affirming that the duty to satisfy these obligations bound the bankrupt estate.

17. Other courts have examined the argument raised by Travelers and have not endorsed it.

[25] *Redwater* at paras 99, 114.

[26] *Redwater* at para 139.

[27] *Redwater* at paras 156-159.

For example, *Manitok* provides no support for Travelers' argument. Discussing the reference to "unrelated" assets in *Redwater*, the Court wrote:

> One could read para. 159 of *Redwater* as excluding resort to "unrelated" non-oil and gas assets to cover abandonment and reclamation costs. However, as was pointed out by the Orphan Well Association, the reasons in *Redwater* refer repeatedly to the "assets of the estate", without drawing any such distinction: see for example *Redwater* at paras. 76, 102, 107, 114. *Further, there is no clear boundary between licensed assets and other assets.* For example, the sale to Persist (like many similar sales) included not only licensed assets but oil and gas rights, royalty rights, intellectual property, seismic data, vehicles and other chattels. *Redwater* gives no support to the municipalities' argument.
>
> In the final analysis, the assets sold to Persist appear to be indistinguishable from the type of assets that the trustee in *Redwater* sold. *Redwater* confirms that the proceeds of the sale of those assets must be applied first towards the satisfaction of abandonment and reclamation obligations. To the extent that there is any issue about it, the status of assets completely unrelated to the oil and gas business can be left for another day. [emphasis added][28]

18. Similarly, in *Trident*, the Court rejected the validity of the distinction:

> There are those who might characterize the outcome of *Redwater* as shifting liability for environmental remediation in the oil and gas industry from "polluter-pay" to "lender-pay." I disagree.
>
> In my view, *Redwater* shifts liability from "polluter-pay" to "everyone pays," starting with all of those who have suffered financial losses in dealing with the insolvent company, and ending with the OWA, which spreads remaining losses between the Province of Alberta and industry. This includes secured creditors who have lent money to the insolvent entity in good faith, trade creditors who have provided goods or services and remain unpaid, landowners who have hosted the wells, pipelines and production facilities, and municipal governments who are owed taxes dating back to pre-insolvency, among many others. The essence of the AER super priority is that it is not subject to prioritization because the obligation must be met before a distribution can be made to anyone else. It defines the contours of the funds that may be available for distribution.
>
> I also find that the assets subject to the AER super priority are not limited to licenced oil and gas wells, pipelines and production facilities. Trident had

[28] *Manitok* at paras 35-36.

> certain real estate assets that were used for office or equipment storage and the like. However, Trident had only one business: exploration and production of oil and gas. It makes no sense to differentiate real estate assets from other assets used in that business, just as it made no sense in *Manitok* to carve out economic licensed assets from uneconomic ones. In either case, the result would be to undermine the policy purposes upon which the super priority principle is based. [emphasis added][29]

19. While the Courts in *Manitok* and *Trident* did not endorse the distinction between assets that are related to Environmental Obligations and assets that are not, they did observe that to the extent that such a distinction was possible, assets utilized in the business creating Environmental Obligations that are not provable claims had to be applied to the satisfaction of such obligations. Justice Feasby in the *Feasby Decision* and Justice de Wit in the *de Wit Decision* both determined that: (a) the Equipment was utilized in Mantle's gravel production business; (b) no sensible distinction could be made between the Equipment and the equipment and real estate in *Trident*; and (c) Mantle has no assets unrelated to its gravel production operations.[30] Hence, even if the distinction asserted by Travelers exists, on the facts of this case it is not relevant.

20. Travelers has provided no evidence to support its argument that applying the *Redwater* principles to assets subject to a PMSI would place a significant chill on financial lending against personal property. Travelers' assertion that well-established priority rules are being thrown into disarray is also incorrect, as those priority rules do not come into effect until the Environmental Obligations that are not provable claims have been satisfied from the assets in the estate.

21. Travelers also has adduced no evidence to support its claim that it is unrealistic to expect lenders financing specific assets to carry out effective due diligence in respect of Environmental Obligations. Moreover, any creditor with a provable claim against an estate faces this same risk as a result of *Redwater*, whether those claims are secured or unsecured. Travelers and other lenders holding PMSIs are not uniquely burdened by this risk.

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[29] *Trident* at paras 65-67.

[30] *Feasby Decision* at paras 39-40; *de Wit Decision* at paras 19-20.

22. In summary, the majority decision is clear in requiring that all of the assets in a bankrupt estate be utilized to satisfy Environmental Obligations that are not provable claims. If a distinction can be drawn between unrelated and related assets, it does not arise in this case, as the Equipment was found to be intimately related to Mantle's Environmental Obligations.

B. Section 193(c) of the *BIA*

23. Under section 193(c) of the *BIA*, an appeal lies to a Court of Appeal from any order or decision of a judge if the property involved in the appeal exceeds the value of $10,000.[31] Travelers asserts that there are two approaches to the interpretation of this section. However, as the Ontario Court of Appeal in *Hillmount* recently observed, there is substantive consensus in the decided cases as to how to determine if the property involved in the appeal exceeds $10,000,[32] and the perceived dichotomy in interpretative approaches is more illusory and semantic than real and substantive.[33]

24. In decisions such as *2403177 Ontario Inc. v Bending Lake Iron Group Limited*,[34] the Court indicated that the legislative history of section 193(c) militated against an expansive reading, that that referred to the jurisprudence of other courts holding that section 193(c) must be narrowly interpreted, because if an appeal as of right is available whenever the property subject to an order exceeds $10,000 in value, then this would apply to most proceedings under the *BIA* and render the leave requirement in section 193(e) almost meaningless. The Court also held it would run contrary to the *BIA*'s more general purpose of providing for the efficient, expeditious and final resolution of issues to allow the debtor's property to be disposed of and the proceeds distributed as efficiently

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[31] *BIA*, s. 193(c).

[32] *Hillmount* at para 34.

[33] *Hillmount* at para 47-51.

[34] *2403177 Ontario Inc. v Bending Lake Iron Group Limited*, 2016 ONCA 225 [***Bending Lake***] at paras 47-53.

as possible.[35] The Court identified three types of orders that do not fall within the ambit of section 193(c): (a) first, orders that do not result in a loss, (b) second, orders that do not bring into play the value of the debtor's property or would not result in a loss, or put property value in jeopardy, and (c) third, orders that are procedural in nature, which is a subset of orders that do not result in a loss or put property value in jeopardy.[36] For section 193(c) to apply, the order in question must contain some element of a final determination of the economic interests of a claimant in the debtor in order for there to be a gain or loss resulting from it.[37] The court is to conduct a fact-specific and evidence based enquiry into the economic effect of an order with the aim of determining whether a loss or risk of loss in excess of $10,000 has been proven. This involves examining the grounds of appeal advanced, the reasons of the lower court and the record before the appeal court, and requires actual evidence rather than bald assertions.[38]

25. In *MNP Ltd v Wilkes*,[39] the Saskatchewan Court of Appeal took a slightly different approach. The Court indicated that sections 193(c) and 193(e) of the *BIA* should neither be read narrowly nor expansively, but rather interpreted according to their terms and within their context. In interpreting section 193(c) of the *BIA*, the question is whether the property involved exceeds $10,000. However, this determination focuses on the question of what loss is entailed from the granting or refusing of a right claimed, or what property is in jeopardy, and must be grounded in the evidence.[40]

26. The Court in *Hillmount* agreed that the characterization of an order as procedural is not determinative. Rather, it is the economic effect of the order, which is a fact-specific and evidence-

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[35] *Bending Lake* at paras 35, 51, 53. See also *Athabasca Workforce Solutions Inc. v Greenfire Oil & Gas Ltd.*, 2021 ABCA 66 [***Athabasca***] at para 12, and *Manitok Energy Inc (Re)*, 2022 ABCA 260 [***Manitok 2***] at para 26.

[36] *Bending Lake* at para 53; *Athabasca* at para 13; *Manitok 2* at para 27.

[37] *Bending Lake* at paras 61-62.

[38] *Bending Lake* at para 64; *Hillmount* at para 42.

[39] *MNP Ltd v Wilkes*, 2020 SKCA 66 [***Wilkes***].

[40] *Wilkes* at paras 61, 64.

based enquiry.[41] Similarly, in *Manitok 2*, the Court applied the decisions in *Bending Lake* and *Athabasca* to hold that a sale approval and vesting order, which would generally be characterized as procedural in nature, had an element of a final determination of the economic interests of a claimant of the debtor because under the order the claimant lost its interest in certain proceeds in an amount exceeding $10,000. Therefore, section 193(c) applied to that order.[42]

27. At the core of these decisions, despite differing language, the courts are attempting to discern the operative or economic effect of the order. That is, whether it results in a loss or gain, or puts in jeopardy value of property, in excess of $10,000.[43] Hence, whether a court characterizes an approach as "narrow", or neither "narrow" nor "expansive", its approach to interpreting and applying the section is the same. The existence of these semantic differences in how courts describe their approaches, rather that the approach itself, which does not require this Court's intervention.

28. In any event, Travelers does not qualify for an appeal as of right under section 193(c) of the *BIA*. Noting that Travelers has not filed any evidence of the value of the Equipment, Justice de Wit determined that there was no evidential basis for calculating loss or jeopardy, and therefore Travelers' allegations of loss are speculative.[44] This finding is consistent with the principles applied by the courts in *Wilkes* and *Bending Lake*, which mandate an enquiry grounded in the evidence, rather than in bare allegations.[45]

29. Further, *Redwater* requires that Environmental Obligations that are not provable claims be addressed before distributions are made to creditors. The priority Charges provided for in the *Feasby Decision* enable Mantle to perform and pay for the work required to address its Environmental Obligations. As the amounts are advanced under the interim facility to pay for that work, the quantum of the Environmental Obligations is reduced. The economic position of

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[41] *Hillmount* at para 42; *Wilkes* at paras 61, 64.

[42] *Manitok 2* at paras 27-32; *Bending Lake* at para 60; *Athabasca* at para 14 and 15.

[43] *Hillmount* at paras 41-42, 45.

[44] *Second de Wit Decision* at paras 7-9.

[45] *Bending Lake* at para 64; *Wilkes* at paras 63-64.

Travelers, which is behind the Environmental Obligations, does not change because the Environmental Obligations decrease as advances funding the expenses incurred in addressing those obligations are made. In other words, one priority obligation decreases as the other increases.

30. In *Second de Wit Decision*, the Court held that section 193(c) of the *BIA* is <u>not</u> satisfied simply because the value of the property exceeds $10,000, the order is procedural, or any loss is speculative and not crystalized. The Court noted that the *Feasby Decision* was not a final determination of Travelers' economic interests, but merely created the Charges to fund the realization of Mantle's assets and reclamation work to address the Environmental Obligations, and once the Environmental Obligations have been addressed, to allow distributions to be made to creditors.[46] Justice Feasby made a finding of fact that the realizations and reclamation that would ultimately allow distributions could not occur without the Charges.[47] Therefore, the *Feasby Decision* permits this process and is not a final determination of the value of Travelers Security. This finding is consistent with the principles applied by the Court in *Manitok*, *Athabasca* and *Bending Lake*.[48]

C. Conclusion

31. For all the reasons set out above, Mantle submits that:

(a) *Redwater* clearly requires that the entire estate of a bankrupt debtor be utilized to satisfy Environmental Obligations that are not provable claims;

(b) Even if there was a basis to distinguish between related and unrelated assets in relation to Environmental Obligations that are not provable claims, that is not an issue in this case, as the Courts below determined that all of Mantle's assets, including the Equipment, are closely related to Mantle's Environmental Obligations;

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[46] *Second de Wit Decision* at paras 6, 7.

[47] *Feasby Decision* at para 43.

[48] *Manitok 2* at para 28; *Athabasca* at para 14; *Bending Lake* at paras 60-62.

(c) The interpretation and application of section 193(c) of the *BIA* is substantively consistent; and

(d) There is no evidence in this case to substantiate that Travelers is able to meet the test under the either purported formulation.

PART IV – SUBMISSIONS CONCERNING COSTS

32. Mantle submits that the costs of this application be in the cause.

PART V – ORDER SOUGHT

33. Mantle requests that leave to appeal to the Supreme Court of Canada be denied with costs in the cause.

DATED at Ottawa this 2nd day of February, 2024.

Jeff Beedell

GOWLING WLG (CANADA) LLP
Ottawa Agent for Counsel for the Respondent, Mantle Materials Group, Ltd.

PART VI – TABLE OF AUTHORITIES & STATUTORY PROVISIONS

Case Law:			**Paragraph References (to Memorandum)**
2403177 Ontario Inc. v Bending Lake Iron Group Limited, 2016 ONCA 225			24, 26, 30
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a) s. 14.06 (7)	English	Français	
b) s. 193	English	Français	
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