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Court of King's Bench of Alberta

Citation: Mantle Materials Group, Ltd (Re), 2024 ABKB 19

Date:
Docket: B201 965622**;** 2301 16114
Registry: Calgary

In the Matter of the Bankruptcy and Insolvency Act,
RSC 1985 c b-3, as Amended

and in the Matter of the Bankruptcy of
Mantle Materials Group Ltd.

In the Matter of the Companies' Creditors Arrangement Act,
R.S.C. 1985, c c-36, as Amended

and in the Matter of the Compromise or Arrangement
of Mantle Materials Group, Ltd. And RLF Canada Holdings Ltd.

Reasons for Decision
of the
Associate Chief Justice
D.B. Nixon

I. Introduction

[1] This is an application by Mantle Materials Group, Ltd. ("**Mantle**") to convert their action under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "***BIA***") to a proceeding under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (the "***CCAA***"). The conversion itself is not opposed, however, Travelers Capital Corp. ("**Travelers**") has made applications both to compel responses to certain undertakings and questions as well as an application to enhance the powers of the proposed monitor FTI Consulting Inc ("**FTI**").

[2] In the following reasons I will first address the conversion application by Mantle before turning to the applications brought by Travelers.

II. Background

[3] Mantle is a wholly owned subsidiary of RLF Canada Holdings Limited ("**RLF Canada**"). RLF Canada itself is a wholly owned subsidiary of Resource Land Fund V, LP ("**RLF V**"), a Delaware limited partnership. RLF V is private equity fund managed by RLH LLP.

[4] Mantle was incorporated in British Columbia on July 17, 2020, and was continued in Alberta under the *Business Corporations Act*, RSA 2000, c B-9, as amended on April 30, 2021. It was amalgamated on May 1, 2021, with JMB Crushing Systems Inc ("**JMB**") and its wholly owned subsidiary 2161889 Alberta Ltd ("**216Co**").

[5] RLF Canada is a Colorado corporation incorporated on July 8, 2020, under Title 7, Corporations and Associations of the *2022 Colorado Code*. The sole activity of RLF Canada is to hold all the shares in the capital of Mantle.

[6] Mantle's business involves the extraction, processing and selling of gravel and other aggregates ("**Aggregate**") from pits in Alberta ("**Aggregate Pits**"). It supplied Aggregate to service companies in the oil and gas sector, construction firms and municipalities. Mantle operates 14 Aggregate Pits on public land pursuant to surface material leases issued by Alberta Environment and Protected Areas ("**AEPA**").

[7] Following the acquisition of its business and property from the *CCAA* proceedings involving JMB and 216Co, Mantle was responsible for the environment protection orders ("**EPOs**") issued by the AEPA on the Aggregate Pits. These EPOs addressed the end-of-life reclamation steps to be taken.

[8] Mantle experienced operational problems and was burdened with excessive debt inherited from the JMB *CCAA* proceedings and incurred in the period following the acquisition of the gravel-producing properties. Mantle's difficulties were compounded by the significant reclamation obligations it was required to complete to satisfy the EPOs. On July 14, 2023, Mantle filed a notice of intention ("**NOI**") to make a proposal under s 50.4(1) of the *BIA* naming FTI as the proposal trustee.

[9] Mantle now seeks to convert the proposal proceedings under the *BIA* into a *CCAA* proceeding because the statutory time periods provided for under the *BIA* are not flexible enough to address its reclamation liabilities.

III. Issues

[10] In the present application I must decide the following:

A. Should Mantle's application to convert from the *BIA* to the *CCAA* be approved?

   i. Is Mantle a company under the definition of the *CCAA*?

   ii. Is a conversion allowable under section 11.6(a) of the *CCAA*?

B. Should the proposed extension to the stay of proceedings be granted?

C. Should the charges be approved?

D. Should the stay be extended to RLF Canada?

E. Should FTI be appointed as monitor?

F. Should the monitor's powers be enhanced?

G. Should Mantle be compelled to respond to certain undertakings and questions posed by Travelers?

IV. Analysis

A. Should Mantle's application to convert from the *BIA* to the *CCAA* be approved?

[11] Given the nature of this application, this question engages the following inquiries.

i. Is Mantle a debtor company under the definition of the *CCAA*?

[12] Under the *CCAA* section 2(1), a company is defined as:

> [...] any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies;

[13] Given this definition, it is clear that Mantle is a company for the purposes of the *CCAA*.

[14] Further, under section 3(1), the *CCAA* applies to a debtor company. A debtor company has a few definitions under section 2(1), including that it is "any company that (a) is bankrupt or insolvent".

[15] Although the *CCAA* does not define what is meant by insolvent, this can be derived from the definition of "insolvent person" under section 2(1) of the *BIA* which states:

> insolvent person means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and
>
> > (a) who is for any reason unable to meet his obligations as they generally become due,
> >
> > (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
> >
> > (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

[16] A more lenient definition of insolvent for the purposes of the *CCAA* has also been developed in ***Stelco Inc (Re)***, 2004 CanLII 24933 (ONSC) at para 26 wherein Justice Farley noted:

> [...] a proper interpretation is that the *BIA* definition of (a), (b) or (c) of insolvent person is acceptable with the caveat that as to (a), a financially troubled corporation is insolvent if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring.

[17] Mantle has acknowledged its insolvency because it filed the NOI to commence the proposal proceedings. Further, based on its books and records, as at June 20, 2023, Mantle's liabilities to its creditors amounted to approximately $16,046,272.21 whereas its aggregate book value of its assets amounted to approximately $7,452,838. Given that there is no evidence before the Court to suggest that the fair market value of the assets exceeds the book value, I accept the book value for purposes of the solvency test. I do so because I have no other facts on which to rely.

[18] Based on the evidence and my analysis of the law, I find that Mantle is a debtor company for the purposes of the *CCAA*.

ii. Is a conversion allowable under section 11.6(a) of the *CCAA*?

[19] Section 11.6 of the *CCAA* sets out the process by which a court may convert matters from the *BIA* to the *CCAA*:

> 11.6 Notwithstanding the *Bankruptcy and Insolvency Act*,
>
> (a) proceedings commenced under Part III of the *Bankruptcy and Insolvency Act* may be taken up and continued under this Act only if a proposal within the meaning of the *Bankruptcy and Insolvency Act* has not been filed under that Part;

[20] The factors that a court should consider in determining whether it is appropriate to continue a *BIA* matter are set out in ***Clothing for Modern Times***, 2011 ONSC 7522 ("***Modern***") at paragraph 9:

> (a) The company has satisfied the sole statutory condition set out in section 11.6(a) of the *CCAA* that it has not filed a proposal under the *BIA*;
>
> (b) The proposed continuation would be consistent with the purposes of the *CCAA*; and,
>
> (c) Evidence which serves as a reasonable surrogate for the information which section 10(2) of the *CCAA* requires accompany any initial application under the Act.

[21] I will address each of these three factors in sequence. I have restated the factors as questions.

a. Has Mantle filed a proposal under the *BIA* (the "First Factor")?

[22] Mantle has not filed a proposal under the *BIA*. Based on the evidence and my analysis of the law, I find that Mantle has satisfied the First Factor.

b. Is the proposed continuation consistent with the purposes of the *CCAA* (the "Second Factor")?

[23] An issue in the present case is whether the *CCAA* is an appropriate vehicle for Mantle. As acknowledged by its counsel, the goal in this instance is not restructuring. Rather, the underlying

goal in this case is a liquidation of Mantle's business with a focus on the reclamation of its liabilities.

[24] The notion of liquidation being permissible under the *CCAA* was considered by the Supreme Court in ***9354-9186 Québec inc v Callidus Capital Corp***, 2020 SCC 10 ["***Callidus***"]. The discussion by the Court in ***Callidus*** is a helpful guide to determining whether the continuation is consistent with the purposes of the *CCAA*. The Court highlights the following (footnotes excluded):

> [43] Liquidating CCAAs take diverse forms and may involve, among other things: the sale of the debtor company as a going concern; an "en bloc" sale of assets that are capable of being operationalized by a buyer; a partial liquidation or downsizing of business operations; or a piecemeal sale of assets (B. Kaplan, "Liquidating CCAAs: Discretion Gone Awry?", in J. P. Sarra, ed., *Annual Review of Insolvency Law* (2008), 79, at pp. 87-89). The ultimate commercial outcomes facilitated by liquidating CCAAs are similarly diverse. Some may result in the continued operation of the business of the debtor under a different going concern entity (e.g., the liquidations in *Indalex* and *Re Canadian Red Cross Society* (1998), 1998 CanLII 14907 (ON SC), 5 C.B.R. (4th) 299 (Ont. C.J. (Gen. Div.)), while others may result in a sale of assets and inventory with no such entity emerging (e.g., the proceedings in *Re Target Canada Co.*, 2015 ONSC 303, 22 C.B.R. (6th) 323, at paras. 7 and 31). Others still, like the case at bar, may involve a going concern sale of most of the assets of the debtor, leaving residual assets to be dealt with by the debtor and its stakeholders.
>
> [44] *CCAA* courts first began approving these forms of liquidation pursuant to the broad discretion conferred by the Act. The emergence of this practice was not without criticism, largely on the basis that it appeared to be inconsistent with the *CCAA* being a "restructuring statute" (see, e.g., *UTI Energy Corp. v. Fracmaster Ltd.*, 1999 ABCA 178, 244 A.R. 93, at paras. 15-16, aff'g 1999 ABQB 379, 11 C.B.R. (4th) 204, at paras. 40-43; A. Nocilla, "The History of the Companies' Creditors Arrangement Act and the Future of Re-Structuring Law in Canada" (2014), 56 *Can. Bus. L.J.* 73, at pp. 88-92).
>
> [45] However, since s. 36 of the *CCAA* came into force in 2009, courts have been using it to effect liquidating CCAAs. Section 36 empowers courts to authorize the sale or disposition of a debtor company's assets outside the ordinary course of business. Significantly, when the Standing Senate Committee on Banking, Trade and Commerce recommended the adoption of s. 36, it observed that liquidation is not necessarily inconsistent with the remedial objectives of the *CCAA*, and that it may be a means to "raise capital [to facilitate a restructuring], eliminate further loss for creditors or focus on the solvent operations of the business" (p. 147). Other commentators have observed that liquidation can be a "vehicle to restructure a business" by allowing the business to survive, albeit under a different corporate form or ownership (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 169; see also K. P. McElcheran, *Commercial Insolvency in Canada* (4th ed. 2019), at p. 311). Indeed, in *Indalex*, the company sold its assets under the *CCAA* in order to preserve the jobs of its employees, despite being unable to survive as their employer (see para. 51).

> [46] Ultimately, the relative weight that the different objectives of the *CCAA* take on in a particular case may vary based on the factual circumstances, the stage of the proceedings, or the proposed solutions that are presented to the court for approval. Here, a parallel may be drawn with the BIA context. In *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 150, at para. 67, this Court explained that, as a general matter, the *BIA* serves two purposes: (1) the bankrupt's financial rehabilitation and (2) the equitable distribution of the bankrupt's assets among creditors. However, in circumstances where a debtor corporation will never emerge from bankruptcy, only the latter purpose is relevant (see para. 67). Similarly, under the *CCAA*, when a reorganization of the pre-filing debtor company is not a possibility, a liquidation that preserves going-concern value and the ongoing business operations of the pre-filing company may become the predominant remedial focus. Moreover, where a reorganization or liquidation is complete and the court is dealing with residual assets, the objective of maximizing creditor recovery from those assets may take centre stage. As we will explain, the architecture of the *CCAA* leaves the case-specific assessment and balancing of these remedial objectives to the supervising judge.

[25] The above discussion is helpful particularly in relation to the reclamation obligations as set out in ***Orphan Well Association v Grant Thornton Ltd***, 2019 SCC 5 ["***Redwater***"]. These reclamation obligations are the remedial objectives of Mantle. Mantle has described its intentions if continued under the *CCAA* as follows:

> (a) complete the remaining Major Reclamation Work;
>
> (b) perform the Assessment Period Reclamation Work;
>
> (c) complete the collection of Mantle's accounts receivable;
>
> (d) complete the sale, if possible, of the Active Aggregate Pits to purchasers who assume the Reclamation Liabilities associated therewith, and if such sales are not possible, provide for such Reclamation Liabilities to be addressed;
>
> (e) complete the sale of the remaining assets of Mantle; and
>
> (f) once reasonable reserves are provided for, make distributions to Mantle's creditors.

[26] It bears repeating here that the continuation under the *CCAA* is not contested by any of the parties. Further, no other options for what to do with Mantle and its assets have been proposed.

[27] As noted by the proposed monitor (being FTI), proceeding under the *CCAA* would be the only available means by which the reclamation obligations and the sale of the active pits could be completed. I also note that FTI supports the continuation of the *BIA* proceedings under the *CCAA*.

[28] As noted above, one of the motivations underlying the conversion of the Mantle proceedings from the *BIA* to the *CCAA* concerns the inflexible timing issues legislated in the *BIA*. Under the current timelines stipulated in the *BIA*, Mantle would be adjudged bankrupt by the expiration of the period within which it may file a proposal, the ultimate deadline being

January 13, 2024. As discussed in ***Callidus***, the appropriateness of the *CCAA* for liquidation depends on the facts of each individual case, and these factors are particularly pertinent.

[29] Based on the evidence and my analysis of the law, I find that Mantle has satisfied the Second Factor. I make this determination because liquidation is not necessarily inconsistent with the remedial objectives of the *CCAA*: *Callidus* at para 45. This is particularly the case in these circumstances because the ultimate remedial objective of Mantle is to address its reclamation obligations.

c. Has Mantle filed evidence which serves as a reasonable surrogate for the information which section 10(2) of the *CCAA* requires accompany any initial application under the Act (the "Third Factor")?

[30] Finally, under section 10(2) of the *CCAA*, Mantle must provide:

> (a) a statement indicating, on a weekly basis, the projected cash flow of the debtor company;
>
> (b) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and
>
> (c) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

[31] This material was provided as exhibits attached to the affidavit of Byron Levkulich, dated November 27, 2023. Mr. Levkulich is a director of Mantle. There are also cash-flow statements attached to the fourth report of the proposed monitor FTI.

[32] Based on the evidence and my analysis of the law, I find that Mantle has satisfied the Third Factor.

[33] Based on my review of the evidence and my analysis of the law, I find Mantle has satisfied the three factors forming the test in ***Modern***. As a result, it is appropriate to continue this matter from the *BIA* to the *CCAA*.

B. Should the proposed extension to the stay of proceedings be granted?

[34] Under section 11.02(2) of the *CCAA*, on application from a debtor company other than during an initial application, a court may stay for any period considered necessary all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph 1(a) of section 11.02.

[35] On such an application, under section 11.02(3) of the *CCAA*, the burden of proof is on the applicant to satisfy the court that circumstances exist to make the order appropriate, and the applicant has acted, and is acting, in good faith and with due diligence.

[36] Based on my review of the evidence and my analysis of the law, I find it appropriate to grant the proposed extension to the stay of proceedings against Mantle until January 20, 2024. I make this determination because I find that this is the best method by which Mantle can accomplish the liquidation while continuing its reclamation work and attempting to sell the Aggregate Pits.

[37] In making this determination, I also find that Mantle has been acting in good faith and with due diligence. This finding is supported by the evidence that the proposed monitor is also of the view that Mantle has been acting in good faith and with due diligence. Further, the proposed monitor supports this extension.

C. Should the charges be approved?

[38] Mantle seeks to take up and continue the restructuring charges including an administration charge, the interim financing charge, and the directors & officers ("**D&O**") charge that were granted on August 15 and August 28 from this Court by Justice Feasby (collectively, the "**Restructuring Charges**"): see ***Re Mantle Materials Group, Ltd***, 2023 ABKB 488 ["***Mantle ABKB #1***"]. That decision was upheld by the Alberta Court of Appeal in ***Mantle Materials Group, Ltd v Travelers Capital Corp***, 2023 ABCA 302 ["***Mantle ABCA #1***"] and ***Mantle Materials Group, Ltd v Travelers Capital Corp***, 2023 ABCA 339 ["***Mantle ABCA #2***"].

[39] Section 11.52 of the *CCAA* provides the Court with jurisdiction to make an order as follows:

> 11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
>
> > (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
> >
> > (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
> >
> > (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

[40] A non exhaustive list of factors to consider in determining the appropriateness of such charges is set out at paragraph 54 of ***Canwest Publishing Inc (Re)***, 2010 ONSC 222:

> (a) the size and complexity of the businesses being restructured;
>
> (b) the proposed role of the beneficiaries of the charge;
>
> (c) whether there is an unwarranted duplication of roles;
>
> (d) whether the quantum of the proposed charge appears to be fair and reasonable;
>
> (e) the position of the secured creditors likely to be affected by the charge; and
>
> (f) the position of the Monitor.

[41] I reiterate that the Restructuring Charges were initially approved by Justice Feasby under the *BIA*. Mantle has asserted that these charges should be taken up and continued under the *CCAA* proceeding. It makes that assertion because the Restructuring Charges have already been approved by Justice Feasby. Further, Mantle asserts that it is warranted in this case because: (i)

the proceedings will require the extensive involvement of professional advisors; (ii) the beneficiaries of the administrative charge will provide essential legal and financial advice throughout the *CCAA* proceedings; (iii) there is no unwarranted duplication of roles; (iv) the proposed administrative charge ranks in priority to the interests of the secured creditors who had received prior notice of Mantle's application for the charge and an opportunity to make submissions regarding same; and (v) the proposed monitor has indicated that the quantum of the proposed administrative charge is reasonable in the circumstances. In my view, these are all valid points, and I accept them for purposes of this analysis.

[42] Based on my review of the evidence and my analysis of the law, I find that it is appropriate for Mantle, in the context of the *CCAA* proceedings, to take up and continue the administration charge under section 11.52 of the *CCAA*.

[43] The authority to grant an interim financing charge is provided by section 11.2 of the *CCAA* and the factors are set out as follows:

> (4) In deciding whether to make an order, the court is to consider, among other things,
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> > (a) the period during which the company is expected to be subject to proceedings under this Act;
> >
> > (b) how the company's business and financial affairs are to be managed during the proceedings;
> >
> > (c) whether the company's management has the confidence of its major creditors;
> >
> > (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
> >
> > (e) the nature and value of the company's property;
> >
> > (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
> >
> > (g) the monitor's report referred to in paragraph 23(1)(b), if any.

[44] Mantle argues this interim financing charge is necessary because: (i) it allows the entity to continue operating in the ordinary course of business and to service associated professional fees in the period up to the week of March 1, 2024, (which date is based on how long the interim lending charge was estimated to be required for interim operational purposes); (ii) it provides the ability to draw on the interim financing facility which will allow Mantle to fund the reclamation work during the *CCAA* proceedings; and (iii) the interim financing charge will preserve the value and going concern operations of Mantle and enhance the probability of maximizing the amounts that will be available for distribution to the secured creditors, after the reclamation liabilities have been addressed. I also note that FTI supports the interim financing agreement and interim financing charge because it views it as being appropriate and limited to what is reasonably necessary in the circumstances. In my view, these are all valid points, and I accept them for purposes of this analysis.

[45] Based on my review of the evidence and my analysis of the law, I find that it is appropriate under 11.2 of the *CCAA* for Mantle to take up and continue the interim financing charge in the context of the *CCAA* proceeding.

[46] Finally, section 11.51 of the *CCAA* provides the Court with the jurisdiction to grant the D&O charge:

> 11.51 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

[47] The factors to be considered here are set out in ***Jaguar Mining Inc (Re)***, 2014 ONSC 494:

> [45] With respect to the Director's Charge, the court must be satisfied that:
>
> (i) notice has been given to the secured creditors likely to be affected by the charge;
>
> (ii) the amount is appropriate;
>
> (iii) the applicant could not obtain adequate indemnification insurance for the director or officer at a reasonable cost; and
>
> (iv) the charge does not apply in respect of any obligation incurred by a director or officer as a result of the director's or officer's gross negligence or wilful misconduct.

[48] Mantle argues that it would be appropriate in this case to take up and continue the D&O charge because: (i) the secured creditors have been notified of this application; (ii) the proposed monitor is of the view that D&O charge is reasonable and appropriate in the circumstances; (iii) the D&O charge will not provide protection in the event of a Mantle director or officer commits gross negligence or wilful misconduct; and (iv) it is proposed that the D&O charge will only be engaged if the D&O insurance fails to respond to a claim. In my view, these are all valid points, and I accept them for purposes of this analysis.

[49] Based on my review of the evidence and my analysis of the law, I find that it is appropriate under section 11.51 of the *CCAA* for Mantle, in the context of the *CCAA* proceedings, to take and continue the D&O charge.

[50] In summary, based on my review of evidence and my analysis of the law, I find that the Restructuring Charges granted by Justice Feasby in the August 15 and 28 orders be taken up and continued by Mantle in the context of the *CCAA* proceedings.

D. Should the stay be extended to RLF Canada?

[51] Mantle is a wholly owned subsidiary of RLF Canada. Notwithstanding its name, RLF Canada was incorporated in Colorado.

[52] Mantle submitted that the stay of proceedings should also be extended to RLF Canada. Mantle argues that this is necessary because the management of RLF Canada is the same as the management of Mantle.

[53] Pathward National Association ("**Pathward**") is a secured creditor of Mantle. Pathward has filed court proceedings against RLF Canada.

[54] Mantle asserts that if Pathward is able to exercise remedies against the shares of Mantle, it would divert time and attention of Mantle's management to respond to those remedies. Furthermore, Mantle argues that this would undermine Mantle's ability to address its reclamation obligations. As a result, Mantle argues the extension of the stay of proceedings to RLF Canada is appropriate in the circumstances.

[55] This is opposed by Travelers and Pathward. To support their position they highlight the wording of section 11.04 of the *CCAA*, which reads as follows:

> 11.04 No order made under section 11.02 has affect on any action, suit or proceeding against a person, other than the company in respect of whom the order is made, who is obligated under a letter of credit or guarantee in relation to the company.

[56] To further support their position, Travelers and Pathward reference the decision of Justice Dario in ***Northern Transportation Company Limited (Re)*** ["***Northern Transportation***"] and James D. Gage and Trevor Courtis's "Staying Guarantees by Non-Debtors and Section 11.04 of the *CCAA*", 2022 20th *Annual Review of Insolvency Law* ["**2022 ARIL Paper**"] to argue it would be inappropriate in the present case to extend the stay of proceedings to RLF Canada.

[57] The 2022 ARIL Paper acknowledges that the proper interpretation of section 11.04 of the *CCAA* has been the subject of varying interpretive approaches, from the narrow to the broad, for what is implied by the exception. I note that in ***Northern Transportation*** at paragraph 101, the decision leaves open that in certain exceptional circumstances it would be appropriate to grant a stay of proceedings that might appear contrary to section 11.04 of the *CCAA*.

[58] Of particular note is the conclusion in the 2022 ARIL Paper (at page 64) that:

> On balance, the factors seem to weigh in favour of a narrow interpretation of section 11.04 that would maintain the *CCAA* court's flexibility to grant stays of proceedings that are necessary to facilitate the restructuring of the debtor company while preserving the court's discretion to refuse to extend stays to issuers of letters of credit and guarantors if it is not appropriate to do so in the circumstances of a particular case. It that regard, it would be reasonable to expect that courts may draw a distinction between the treatment of letters of credit and guarantees in light of different policy and other considerations relating to them depending on their terms.

[59] The critical fact in this case are the existing reclamation obligations. Given the judicial direction issued in ***Redwater***, the outstanding work associated with those reclamation obligations must be given priority. That environmental responsibility constitutes an exception which must be recognized in these circumstances.

[60] Based on my review of evidence and my analysis of the law, I find it is appropriate to extend the stay of proceedings to RLF Canada. I make this determination because, as highlighted

at paragraph 13 of ***Mantle ABCA #2***, it is necessary to ensure that there is not further delay occurring for Mantle to complete its reclamation work.

E. Should FTI be appointed as monitor?

[61] Under section 11.7(1), the *CCAA* requires that the Court appoint a person to monitor the business and financial affairs of the company. This person must be a trustee within the meaning of subsection 2(1) of the *BIA*.

[62] FTI has been proposed as the monitor for these proceedings and this has not been opposed by any of the parties. Nor do any of the restrictions set out in section 11.7(2) of the *CCAA* apply in the present circumstances. Further, FTI is quite familiar with Mantle's financial records and business model as noted in FTI's reports.

[63] Based on my review of evidence and analysis of the law, I find that FTI should be appointed as monitor. I make this determination because of the supporting evidence in the preceding paragraph. I also take judicial notice of the fact that FTI has often been appointed a monitor by this Court in many proceedings that are analogous to the circumstances of this case.

F. Should the monitor's powers be enhanced?

[64] Travelers has made an application to enhance the monitor's powers for these *CCAA* proceedings. Travelers' argument is that Mantle has essentially finished most of the reclamation work and what remains is largely minor.

[65] Mantle opposes this application arguing that its management is the best fit to conduct the reclamation work and address its remaining reclamation liabilities. FTI, correctly in my view, takes no position on this question.

[66] The jurisdiction to enhance FTI's powers as a proposed monitor is derived from section 11 of the *CCAA*. That provision provides broad discretionary powers that allow this Court to "make any order that it considers appropriate in the circumstances". Similarly, section 23(k) of the *CCAA* allows this Court to direct the monitor to "carry out any other functions in relation to the company...".

[67] Travelers submits that there is a limited amount of work left to be done in the reclamation work, and that allowing Mantle's management to proceed with this work would be more costly than FTI if controlled the process. Travelers is of the view that FTI can handle these issues on its own.

[68] Travelers further argues that the Mantle management have a personal interest in this matter and that this might put them into conflict with their obligations throughout the *CCAA* proceedings.

[69] In contrast, Mantle argues that its management is best suited to this task and that there remain several unknown factors that might require more expertise. It also argues that the reclamation work left to accomplish is not as limited as suggested by Travelers.

[70] Mantle asserts that by the time FTI would hire the professionals needed to finish the reclamation work and to deal with other issues that may arise, it could well be as expensive if not more so. It also argues that it could take more time to accomplish.

[71] Mantle highlights that a member of its management team, Mr. Cory Pichota, has significant industry knowledge and experience in managing the reclamation of gravel and

aggregate pits. It also asserts that he has specific knowledge of Mantle's business, particularly in respect of its active and inactive Aggregate Pits. Mr. Pichota is noted as being key to the negotiations that have been ongoing, and this was agreed to by Mantle, Travelers and FTI.

[72] In his supplemental affidavit, Mr. Levkulich stated that Mr. Pichota is not prepared to work with FTI. Whether this will be the case is a matter of speculation because this assertion by Mr. Levkulich does not equate to evidence. I make this comment because we do not have sworn evidence from Mr. Pichota himself concerning the issue of whether he would work with FTI if the monitor's powers were enhanced.

[73] It was clear during oral submissions that everyone involved was of the view that Mr. Pichota is critical to the efficient progression of the reclamation efforts. To emphasize the point, FTI was clear in its oral submissions that the reclamation work would be much more efficient if Mr. Pichota is involved.

[74] Based on my review of the evidence and analysis of the law, I dismiss Travelers application to enhance the monitor's powers. I make this determination because the burden is on Travelers to establish that this will be a more effective approach. Given the evidence, I am of the view that the current management of Mantle would be best suited to dealing with the reclamation liabilities at issue here and to continue under the *CCAA* proceedings. I make this determination because the evidence supports the fact that Mr. Pichota is key to the reclamation work required in this case and Travelers has provided no evidence: (i) that FTI would be able to retain him if the enhanced powers were granted; or (ii) that FTI would be able to retain any other person who could effectively and efficiently advise on reclamation matters if the enhanced powers were granted.

[75] As a final comment, I acknowledge the comment during argument from Travelers to the effect that "[w]e have not attempted to sidestep the effect of ***Redwater***. We don't think that decision has any relevance." I also acknowledge the further assertions of Travelers that it "... has not sidestepped or tried to avoid that decision in ***Redwater***." While we can debate that point, I will simply highlight the careful reasoning of Justice Feasby in ***Mantle ABKB #1*** concerning the importance of end-of-life environmental obligations in this context as set out by ***Redwater***, ***Manitok Energy Inc (Re)***, 2022 ABCA 117 and ***Orphan Well Association v Trident Exploration Corp***, 2022 ABKB 839. This was confirmed in the reasoning of ***Mantle ABCA #1***. Given the development in the law, I am of the view that ***Redwater*** is relevant in this case concerning Mantle. The boundaries of the ***Redwater*** decision continue to be defined by the developing case law. In conclusion, to ensure that these environmental obligations are dealt with properly, I find that Mantle remains best suited to be in charge of the *CCAA* proceedings.

G. Should Mantle be compelled to respond to certain undertakings and questions posed by Travelers?

[76] Travelers has made an application to compel answers to certain undertakings and questions. *Rule* 5.25 of the *Alberta Rules of Court* addresses this issue. That *Rule* reads as follows:

> 5.25 (1) During questioning, a person is required to answer only
>
> (a) relevant and material questions, and
>
> (b) questions in respect of which an objection is not upheld under subrule

> (2) A party or a witness being questioned may object to an oral or written question during questioning but only for one or more of the following reasons:
>
> (a) privilege;
>
> (b) the question is not relevant and material;
>
> (c) the question is unreasonable or unnecessary;
>
> (d) any other ground recognized at law.

[77] What is relevant and material is defined in *Rule* 5.2 as follows:

> 5.2(1) For the purposes of this Part, a question, record or information is relevant and material only if the answer to the question, or the record or information, could reasonably be expected
>
> (a) to significantly help determine one or more of the issues raised in the pleadings, or
>
> (b) to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings.
>
> (2) The disclosure or production of a record under this Division is not, by reason of that fact alone, to be considered as an agreement or acknowledgment that the record is admissible or relevant and material.

[78] For reference, I am referring to the questions as set out in Schedule A of Travelers Application to Compel Answers filed on December 14, 2023.

[79] I find that questions m); n); u); v); and bb) are material and relevant and should be answered by Mantle. I make this determination because they are appropriately focused on questions of the liabilities and indemnities related to Mantle.

[80] I find that questions w) and x) should be answered by Mantle but only in regards to whether there is an ability to be indemnified from personal liability under the EPOs from Mantle, and not in regards to whether that ability exists regarding RLF Canada Lender, RLF V or RLH LLC.

[81] I find that the other questions do not have to be answered by Mantle. I make this determination because I am not satisfied that the questioning surrounding the other companies which are not parties to this application are relevant to these proceedings.

[82] I also find that Undertaking 30 must be answered by Mantle because it is relevant and material. However, it is stated in Mantle's responding brief to the Application to Compel Answers, filed on December 17, 2023, at paragraph 17 that this draft document was circulated to Travelers on December 8, 2023. If this is the case, then Mantle has already answered the undertaking.

[83] I find that Undertakings 1 and 2 need not be answered. I make this determination because I am not satisfied that the undertakings requiring copies of reporting on loans between RLF Canada Lender and RLF V are relevant to these proceedings because these bodies are not parties to the present application.

V. Conclusions

[84] In conclusion, I turn to address the issues that were frame above. Based on the evidence before me and my analysis of the law, I direct as follows.

a. Mantle's proposal under the *BIA* can be converted into a *CCAA* proceeding.

b. The stay of proceedings is extended until January 20, 2024.

c. The restructuring charges set out in Justice Feasby's August 15, 2023 and August 28, 2023 orders are to be taken up and continued by Mantle in the context of the *CCAA* proceedings.

d. The stay of proceedings is extended to RLF Canada.

e. FTI is appointed as monitor.

f. Travelers' application to enhance the monitor's powers is dismissed.

g. Mantle is compelled to answer m); n); u); v); and bb). Mantle is also compelled to answer questions w) and x) insofar as it relates to Mantle's ability to indemnify Mr. Levkulich and Mr. Aaron Patsch for personal liabilities under the EPOs. Mantle is not required to answer the remaining questions. As a final matter, Mantle is compelled to answer Undertaking 30 insofar as that has not already been answered by the draft document circulated on December 8, 2023.

Heard on the 18th day of December 2023.
Dated at the City of Calgary, Alberta this 10th day of January 2024.

D.B. Nixon
A.C.J.C.K.B.A.

Appearances:

T.S Cumming, S.A. Gabor, C.E. Hanert, S. Kroeger
for Mantle Materials Group Ltd

R. Zahara, M. McIntosh
for Travelers Capital Corp

P. Kyriakakis
for FTI Monitoring Consulting Canada Inc

D.R. Bieganek, KC
for 945441 Alberta Ltd and J. Shankowski

D.S. Nishimura
for Alberta Environment

R. Trainer
for Canadian Western Bank

N. Williams
for Pathward, National Association

P. Corney
for Fiera

T. Gusa
for ATB Financial