

**COURT OF APPEAL OF ALBERTA**

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REGISTRY OFFICE CALGARY

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 JMB  
CRUSHING SYSTEMS INC. AND 2161889  
ALBERTA LTD.

APPLICANT JERRY SHANKOWSKI and 945411 ALBERTA  
LTD.

STATUS ON APPEAL APPELLANTS  
STATUS ON APPLICATION APPLICANTS

RESPONDENTS JMB CRUSHING SYSTEMS INC. and 2161889  
ALBERTA LTD.

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DOCUMENT **MONITOR'S MEMORANDUM OF  
ARGUMENT (STAY PENDING APPEAL)**

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BY ITS GENERAL PARTNER  
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GP INC. AND FIERA PRIVATE DEBT  
FUND V LP BY ITS GENERAL  
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**AND TO: BALANCE OF SERVICE LIST**

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## I. INTRODUCTION

1. This Memorandum of Argument is submitted by FTI Consulting Canada Inc., in its capacity as the court-appointed monitor (the “**Monitor**”) of JMB Crushing Systems Inc. (“**JMB**”) and 2161889 Alberta Ltd. (“**216**”, JMB and 216 are collectively referred to as, the “**Companies**”), in response to certain applications filed by Jerry Shankowski (“**Jerry**”) and 945411 Alberta Ltd. (“**945**”, Jerry and 945 are collectively referred to as, “**Shankowski**”) seeking a stay of the Reverse Vesting Order (the “**RVO**”) and the Order (Amended and Restated Mantle Sale Approval and Vesting Order) (the “**SAVO**”), both granted on October 16, 2020, pending Shankowski’s proposed appeal of the RVO and the SAVO (the “**Proposed Appeal**”).

2. This Memorandum of Argument is submitted in connection with the Monitor’s Memorandum of Argument (the “**Leave Memorandum**”) responding to Shankowski’s application seeking leave to appeal the SAVO and RVO. Capitalized terms used herein and not otherwise defined shall have the meanings ascribed to such terms in the Leave Memorandum.

3. If this Honourable Court is inclined to grant Shankowski leave to appeal the RVO and SAVO, Shankowski’s application seeking a stay, pending the proposed appeal, should be dismissed as any such stay would unduly prejudice and derail the sole going concern transaction available. The Companies have limited resources to fund ongoing operations, which must be maintained until closing. If the Proposed Appeal delays the closing of the Mantle Transactions and operations cannot be sustained the Mantle Transactions will fail and there is no alternative. As a result, the effect of any stay, which delays closing, may be to eliminate the Companies’ chances of a successful restructuring and to prejudice numerous employees, creditors, and stakeholders.

4. Comparatively, Shankowski's lien or trust claims will suffer no prejudice as a result of the SAVO, RVO, or closing of the Mantle Transactions. The prejudice alleged by Shankowski with respect to the SAVO and RVO is derived entirely from a misguided interpretation that Shankowski's trust/lien claim is affected by such Orders or, alternatively, Shankowski's desire to renegotiate a better deal.

5. The applicable facts are set out in the Monitor's Leave Memorandum.

## **II. ISSUE**

6. Should the Court grant Shankowski leave to appeal, the remaining issue before this Honourable Court is whether Shankowski's application seeking a stay of the SAVO and RVO, pending the Proposed Appeal, should be granted.

## **III. LAW**

7. To obtain a stay pending the hearing of an appeal, the applicant must satisfy the following tripartite test: (i) there must be an arguable issue to be determined on appeal; (ii) the applicant will suffer irreparable harm if the stay is not granted; and, (iii) the balance of convenience must favour granting the stay.<sup>1</sup>

## **IV. ARGUMENT**

### **A Stay Pending Appeal Is Not Appropriate in the Circumstances**

8. If this Honourable Court grants Shankowski leave to appeal the RVO and SAVO, a stay,

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<sup>1</sup> See *e.g.*, *Canadian Natural Resources Limited v Arcelormittal Tubular Products Roman SA*, [2013 ABCA 357](#) at para. 6; *Siri Guru Nanak Sikh Gurdwara of Alberta v Sandhu*, [2014 ABQB 169](#) at paras. 10-11, *aff'd* [2014 ABCA 181](#).

pending such appeal, is not appropriate in the circumstances, as: (i) there is no arguable issue to be determined; (ii) Shankowski will suffer no irreparable harm if a stay is not granted; and, (iii) the balance of convenience favours not granting the stay.

**(i) No Arguable Issue**

9. There is no arguable issue with respect to the SAVO or RVO that could justify a stay. The Proposed Appeal is based entirely on allegations of procedural irregularity, which provide no justification for a stay of the underlying discretionary Orders.

10. Due to the absence of any arguable legal grounds or merit concerning the Proposed Appeal, Shankowski alleges non-disclosure of facts which they consider material; namely, the Bonnyville Contract. This allegation is contradicted by Shankowski's own evidence. As addressed in the Leave Memorandum: (i) the RVO and SAVO were properly granted, are not a plan of arrangement, and do not affect Shankowski's lien/trust claims; and, (ii) Shankowski had notice of all relevant materials prior to the October 16 Application. Finally, it remains unclear how the Bonnyville Contract relates to the SAVO or the RVO or could possibly affect the decision of the Court below. Shankowski's trust/lien claims have nothing to do with whether the SAVO and the RVO should have been approved and are not affected by same; therefore, no stay is required.

11. As described in detail in the Leave Memorandum, Shankowski appears to be advancing the Proposed Appeal, in part, for a collateral purpose; obtaining leverage to renegotiate a deal with Mantle. This is not a proper use of the appeals process and is relevant when evaluating the merits of the Proposed Appeal.

**(ii) No Irreparable Harm**

12. Shankowski incorrectly states “...the Applicants will have no remedy in respect of the Trust if the Orders are not stayed pending appeal...” This is incorrect.

13. The prejudice alleged by Shankowski consists of a bald statement that assets are being vested in Mantle while liabilities are being vested in 216. This is in no way correct. The Remaining JMB Assets (including the Mantle APA purchase price), the Remaining JMB Liabilities, and the Remaining JMB Encumbrances all transfer to 216. For clarity, the Acquired Assets to be vested in Mantle under the SAVO do not include any assets subject to Shankowski’s trust or lien claims (*i.e.* any Bonnyville Contract proceeds). The Bonnyville Contract proceeds, along with Shankowski’s claims, will be transferred to 216, with their priority preserved.

**(iii) The Balance of Convenience Favours Dismissing the Stay Application**

14. The balance of convenience favours denying the stay sought by Shankowski.

15. The Supreme Court of Canada describes the remedial purposes of the CCAA as follows: “[a]mong these objectives, the CCAA generally prioritizes “avoiding the social and economic losses resulting from liquidation of an insolvent company” ...”.<sup>2</sup>

16. In evaluating the balance of convenience within CCAA proceedings, the Court should consider, among other factors, “the interest of all other parties in bringing the CCAA process to a timely conclusion”.<sup>3</sup> Specifically, whether a stay might destabilize the situation in a way that could threaten the restructuring itself is a relevant consideration.<sup>4</sup>

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<sup>2</sup> 9354-9186 *Québec Inc. v. Callidus Capital Corp.*, [2020 SCC 10](#) at para. 41, citing *Century Services Inc. v Canada (Attorney General)*, [2010 SCC 60](#) at para. 70.

<sup>3</sup> *Hollinger Inc. (Re)*, [2011 ONCA 765](#) at para. 12.

<sup>4</sup> See *e.g.*, *North American Tungsten Corporation v. Global Tungsten and Powders Corp.*, [2015 BCCA 426](#) at paras. 16-17.





**Table of Authorities**

1. *Canadian Natural Resources Limited v Arcelormittal Tubular Products Roman SA*, [2013 ABCA 357](#);
2. *Siri Guru Nanak Sikh Gurdwara of Alberta v Sandhu*, [2014 ABQB 169](#);
3. *Siri Guru Nanak Sikh Gurdwara of Alberta v Sandhu*, [2014 ABCA 181](#);
4. *9354-9186 Québec inc. v Callidus Capital Corp.*, [2020 SCC 10](#);
5. *Century Services Inc. v Canada (Attorney General)*, [2010 SCC 60](#);
6. *North American Tungsten Corporation v. Global Tungsten and Powders Corp.*, [2015 BCCA 426](#);
7. *Hollinger Inc. (Re)*, [2011 ONCA 765](#).