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COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NUMBER: 2301-0216AC

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REGISTRY OFFICE: CALGARY

APPLICANT: **MANTLE MATERIALS GROUP, LTD.**

STATUS ON APPEAL: Respondent

STATUS ON APPLICATION: Respondent

RESPONDENT: **TRAVELERS CAPITAL CORP.**

STATUS ON APPEAL: Appellant

STATUS ON APPLICATION: Applicant

DOCUMENT: **MEMORANDUM OF LAW OF THE RESPONDENT MANTLE MATERIALS GROUP, LTD.**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT: **Gowling WLG (Canada) LLP**
1600, 421 – 7th Avenue SW
Calgary, AB T2P 4K9

Telephone (403) 298-1938 / (403) 298-1992
Facsimile (403) 263-9193
File No. A171561

Attention: Tom Cumming / Caireen E. Hanert / Sam Gabor / Stephen Kroeger

CONTACT INFORMATION OF ALL OTHER PARTIES:

Lawson Lundell LLP
1100, 225 – 6th Avenue SW
Calgary, AB T2P 1N2

Attn: Alexis Teasdale / Joel Schachter
Tel: (403) 218-7565 / (604) 631-9238
Email: ateasdale@lawsonlundell.com / jschachter@lawsonlundell.com

Counsel for Travelers Capital Corp.

Field LLP
400, 444 – 7th Avenue SW
Calgary, AB T2P 0X8

Attn: Douglas S. Nishimura
Tel: (403) 260-8500
Email: DNishimura@fieldlaw.com

Counsel for Alberta Environment and Protected Areas

McCarthy Tétrault LLP
400, 421 – 7th Avenue SW
Calgary, AB T2P 4K9

Attn: Sean Collins / Pantelis Kyriakakis
Tel: (403) 260-3531 / (403) 260-3536
Email: scollins@mccarthy.ca / pkiriakakis@mccarthy.ca

Counsel for FTI Consulting Inc., in its capacity as Proposal Trustee of Mantle Materials Group, Ltd.

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PART 1 – INTRODUCTION

1. Travelers Restructuring Corp. (“**Travelers**”) seeks to appeal the Amended Order (defined below), which approved an interim financing (“**Interim Facility**”) in favour of Mantle Materials Group, Ltd. (“**Mantle**”) in its proposal proceedings under the *Bankruptcy and Insolvency Act* (“**BIA**”) and granted three charges ranking in priority to Travelers’ purchase-money security interest (“**PMSI**”) in Mantle’s equipment (“**Equipment**”). The Interim Facility in part funds Mantle’s reclamation work (“**Reclamation Work**”) under environmental protection orders (“**EPOs**”) issued by Alberta Environment and Protected Areas (“**AEPA**”).

2. Travelers asserts that reclamation liabilities are not required to be satisfied before holders of equipment PMSIs are able to realize on their security and receive distributions.¹ Mantle submits that leave is required and should not be granted in the circumstances of this case.

PART 2 – FACTS

3. Mantle produces, processes and sells gravel and aggregate in Alberta. Travelers funded Mantle’s acquisition of certain Equipment in 2021 and holds a PMSI in the Equipment. Mantle has interests in 19 parcels of land with gravel pits (“**Pits**”), of which 9 pits are active (“**Active Pits**”) and 10 are inactive (“**Inactive Pits**”). The Inactive Pits have environmental reclamation liabilities (“**Reclamation Liabilities**”) equal to approximately \$1,678,309. Mantle is required to undertake the Reclamation Work in accordance with the EPOs.²

4. On July 14, 2023, Mantle filed a notice of intention to make a proposal under the *BIA* and applied for an order approving the Interim Facility provided by an affiliate of Mantle and granting

¹ Travelers cites *Orphan Well Association v Grant Thornton Ltd.*, 2019 SCC 5 [*Redwater*] for this proposition.

² Affidavit of Alex Henze affirmed August 8, 2023 (the “**Henze Affidavit**”), Exhibit “D”, para 32, p 0059.

three charges (collectively, “**BIA Charges**”).³ Advances under the Interim Facility are conditional on the Interim Charge having priority to all security except the Administration Charge.⁴

5. Mantle requires the Interim Facility in order to carry out the Reclamation Work on the Inactive Pits, to sell its inventory, Equipment and Active Pits, to collect its accounts receivable, to prepare a proposal and to make distributions to its creditors.⁵ The AEPA requires the Reclamation Work to be completed by November 1, 2023, and in any event such work must be completed before the winter freeze or wait until the spring. Mantle’s employees are familiar with the compliance process and how to reclaim the Inactive Pits, but it is unknown if they will be available in the spring. Alternative arrangements are likely to require additional expenditures.⁶

6. Travelers filed materials objecting to the BIA Charges attaching to the Equipment and taking priority to its PMSI. On August 15, 2023, the Court approved the Interim Facility and granted the BIA Charges, but reserved on their priority as against Travelers’ PMSI. On August 28, 2023, the Court determined that the BIA Charges should rank in priority to Travelers’ PMSI and amended the first order (“**Amended Order**”).⁷

PART 3 – LAW AND ARGUMENT

A. RIGHT OF APPEAL UNDER SECTION 193(C) OF THE BIA

7. Section 193(c) of the *BIA* permits appeals without leave where the order under appeal puts

³ The BIA Charges secure the Interim Facility (“**Interim Charge**”), the professional fees and costs of the proposal trustee, its counsel and Mantle’s counsel (“**Administration Charge**”), and the directors’ and officers’ indemnity.

⁴ Henze Affidavit, Exhibit “F”, paras 68(e)(i)-(ii), p 0139-0140.

⁵ Henze Affidavit, Exhibit “F”, paras 66, 67, 69, p 0139-0140; Exhibit “D”, paras 60(a)-(b), p 0069.

⁶ Henze Affidavit, Exhibit “J”, para 7, p 1168; Exhibit “G”, paras 7-8, p 0574-0575.

⁷ [*Re Mantle Materials Group, Ltd.*](#), 2023 ABKB 488 [*Mantle*].

in jeopardy the value of the debtor's property or results in a loss⁸ in excess of \$10,000, and contains an element of final determination of the claimant's economic interest in the debtor.⁹ The test in s. 193(c) is not satisfied simply where the value of property subject to the order exceeds \$10,000,¹⁰ as that interpretation would render the requirement for leave in s. 193(e) meaningless and undermine one of the *BIA*'s most important purposes – the efficient, expeditious and final resolution of issues to permit the disposition of a debtor's property and the distribution of the proceeds.¹¹ The section also does not apply to orders that are procedural in nature, orders that do not bring into play the value of the debtor's property, or orders that do not result in a loss.¹² The approach taken recently by a Saskatchewan court appears to differ, as it held that the analysis of an order starts with determining if the value of the property involved exceeds \$10,000, rather than if it is procedural, but added that the test is the loss resulting from the order, the value in jeopardy, or the money at stake, which must be grounded in the evidence.¹³

8. Although there have been differing approaches to s. 193(c), the differences are superficial.¹⁴ At its core, the analysis requires an examination of the economic effect of the order, the grounds of the appeal advanced, the reasons of the lower court, and the record before the appeal court. The inquiry is fact-specific and evidence-based, aimed at determining whether a loss or risk

⁸ *Hillmount Capital Inc. v Pizale*, 2021 ONCA 364 [*Hillmount*] at paras 34-35; *2403177 Ontario Inc. v Bending Lake Iron Group Ltd.*, 2016 ONCA 225 [*Bending Lake*] at para 59.

⁹ *Manitok Energy Inc. (Re)*, 2022 ABCA 260 [*Manitok*] at para 30, citing *Bending Lake* at para 61. Courts have construed s. 193(c) narrowly to permit the efficient, expeditious and final resolution of bankruptcy proceedings. See *Athabasca Workforce Solutions Inc. v Greenfire Oil & Gas Ltd.*, 2021 ABCA 66 [*Athabasca*] at para 12; *Manitok* at para 26; *Bending Lake* at paras 47, 49, 50-51, 53. The addition of s. 193(e) allows appeals with leave, removing the need to give s. 193(c) a broad interpretation.

¹⁰ This would permit an appeal as of right in almost every insolvency, as most involve property in excess of the threshold.

¹¹ *Bending Lake* at para 51; *Athabasca* at para 12; *Manitok* at para 26.

¹² *Athabasca* at para 13; *Manitok* at para 27; *Bending Lake* at para 55; *Hillmount* at paras 36-39.

¹³ *MNP Ltd v Wilkes*, 2020 SKCA 66 at para 61. The court noted though that a procedural order will be within the scope of s. 193(c) if it results in a loss of value in excess of \$10,000, as shown by the evidence (paras 63-64).

¹⁴ *Hillmount* at para 45.

of loss in excess of \$10,000 has been proven. Bald assertions are not sufficient.¹⁵

9. Hence, s. 193(c) will not apply to: (a) sale process orders, as any loss is speculative and not crystallized, and proprietary and monetary interests are not directly impacted;¹⁶ (b) vesting orders, as they are only mechanisms or procedures for monetizing assets and are not themselves a determination resulting in a loss, and of value;¹⁷ or (c) interim financing orders, as they permit the funding of the steps required during insolvency proceedings to monetize assets, and do not themselves result in a gain or loss to an interested party.¹⁸

10. The Amended Order allows Mantle to access the funding required to secure and safeguard its assets, sell its gravel and capital assets, collect its accounts receivable, prepare a proposal, and perform the Reclamation Work.¹⁹ The completion of the Reclamation Work is intimately connected with the process of realizing on Mantle's assets and making funds available for distribution to creditors, as the latter cannot occur without the former.²⁰ While the Amended Order results in Travelers' PMSI being subordinated to the BIA Charges, it simply sets out the process to be undertaken with the goal of maximizing distributions to all creditors. The Amended Order does not itself crystallize any loss.

11. Travelers argues that the Amended Order puts in jeopardy value in excess of \$10,000,²¹ but has not filed with the Court evidence showing the value of the Equipment. Without this,

¹⁵ [Hillmount](#) at paras 34, 41-43; [Bending Lake](#) at paras 54, 62, 66.

¹⁶ [Re Harmon International Industries Inc.](#), 2020 SKCA 95 at paras 34-35.

¹⁷ [Athabasca](#) at paras 14-15; [Manitok](#) at para 28, where although the vesting order would not have otherwise been subject to s. 193(c), a decision excluding certain monies from its scope was subject to s. 193(c). See also para 29.

¹⁸ [Ibid.](#); [Hillmount](#) at para 38, where a receivership order did not bring the value of property into play, as it just preserved value and monetized assets; [Bending Lake](#) at paras 55-57, and [Hillmount](#) at para 39, where orders stipulating procedures to be applied in realizing or monetizing assets were "procedural" and outside s. 193(c).

¹⁹ Henze Affidavit, Exhibit "F", paras 66, 67, 69, p 0139-0140; Exhibit "H", paras 16-19, p 0690-0691.

²⁰ [Redwater](#) at para 160.

²¹ See Travelers' Memorandum of Argument filed September 7, 2023 ("**Travelers' Memorandum**"), para 22.

Travelers has not shown that its recovery is in jeopardy. Accordingly, because the Amended Order is procedural in nature and there is no evidence that the recovery of Travelers' loan is actually in jeopardy, s. 193(c) is not available and Travelers requires leave to appeal.

B. LEAVE TO APPEAL UNDER SECTION 193(E) OF THE *BIA*

12. The test for leave to appeal under s. 193(e) of the *BIA* is whether: (a) the point on appeal is of significance to the practice; (b) the point is of significance to the action itself; (c) the appeal is *prima facie* meritorious; and (d) the appeal will unduly hinder the progress of the action. In addition, leave should only be granted if the judgment appears to be contrary to law, amounts to an abuse of judicial power, or involves an obvious error, causing prejudice for which there is no remedy.²²

Merits of the proposed appeal

13. The proposed appeal must raise legitimately arguable points that create a realistic possibility of success for the appellant. There must appear to be an error in principle of law, or a palpable and overriding error of fact.²³

14. Travelers argues that environmental reclamation obligations associated with licensed assets are not required to be satisfied with “unrelated assets”, which it defines as assets unaffected by environmental conditions or damage.²⁴ Travelers bases this argument on a single comment in the lengthy majority reasons in *Redwater*.²⁵ However, the fundamental principle in *Redwater* is

²² *Athabasca* at paras 17-18.

²³ *Ravelston Corp (Re)*, 2005 CanLII 63802 (ONCA) at paras 28-30.

²⁴ Travelers' Memorandum, paras 38-40, 42-43.

²⁵ *Redwater* at para 159, where the Court observes that the regulator was not seeking “to force the estate to fulfill end-of-life obligations with assets unrelated to the environmental condition or damage”.

that regulatory obligations continue to be binding upon a debtor notwithstanding an insolvency proceeding.²⁶ The majority was clear and emphasized repeatedly that the estate – all of a debtor’s property – is liable for environmental obligations,²⁷ which must be performed by the estate before any distribution is made to creditors.²⁸ Until they have been performed, the obligation remains binding to the extent of assets in the estate,²⁹ and the priority scheme in the *BIA* does not come into play. In commenting that this does not disrupt the *BIA*’s priority scheme, the Court observed what the regulator was not doing. It did not state that the regulator can only seek to force a debtor to fulfill its environmental obligations from assets related to the environmental condition or damage.³⁰ A distinction made for “unrelated assets” would have been clearly specified: that the estate is only required to perform the environmental obligations using proceeds of assets “related” to the environmental condition or damage. Guidance as to what constitutes “related” would have been included. There is no such discussion.³¹

15. Further, the comment that the priority scheme of the *BIA* is not disrupted by requiring a debtor to perform its environmental obligations before distributing value to creditors (because it replicates s. 14.06(7)’s effect) cannot mean the regulator’s recourse is limited to assets affected by environmental conditions or damage or related assets. The regulatory obligations in *Redwater* work differently than the charge created by s. 14.06(7). Such obligations bind the debtor and its

²⁶ [Newfoundland and Labrador v AbitibiBowater Inc](#), 2012 SCC 67. See the majority decision at paras 2, 59 and the dissent at paras 72-74, with which the majority agreed. Monetary claims for reimbursement of costs incurred or monetary claims in substance are not treated like regulatory obligations,

²⁷ [Redwater](#) at paras 7, 74-79, 81-84, 86, 88, 93, 96-100, 102-104, 113, 114, 118, 135, 155-157, 160-162. Under s. 71 of the *BIA*, all of the debtor’s property vests in the trustee, which then becomes the estate.

²⁸ Unless the environmental obligation is a provable claim.

²⁹ [Redwater](#) at para 114.

³⁰ [Redwater](#) at para 159.

³¹ In [Manitok Energy Inc \(Re\)](#), 2022 ABCA 117 [*Manitok 2*] at paras 26, 28-29, 35-36. The Court stated there is no clear boundary between licensed assets and other assets and *Redwater* did not support such a distinction, but left the status of assets completely unrelated to the oil and gas business for another day.

estate (which includes all assets), are not provable claims under the three-part test, and are not “security” charging specific real property under the *BIA*’s priority scheme. By contrast, s. 14.06(7) creates a charge only against environmentally affected and contiguous, related real property, and only secures claims for reclamation costs actually incurred by the Crown, which qualify as provable claims without the three-part test because they are not contingent. The “effect” being replicated is that environmental obligations must be satisfied before creditor claims.

16. Even if *Redwater* could support a distinction between related and unrelated assets, it provided no guidance on how such a distinction could be applied. The Court below correctly found there was no *ratio decidendi* on that distinction, and in any event found that the Equipment was used in Mantle’s gravel extraction and production business and was therefore related.³²

Significance to the practice; significance to the action

17. Travelers’ argument that the question is of significance to the practice is not supported by evidence, including that: (a) lenders have reduced loans to businesses with significant environmental liabilities following *Redwater*; (b) PMSI lenders do not take into account *Redwater* in making loans; (c) PMSI lenders are unable to carry out due diligence on borrower’s environmental liabilities; or (d) PMSI lenders will refuse to lend if they do not have priority over environmental liabilities. In absence of a robust evidentiary record, this is not an appropriate case for leave to appeal.

18. Travelers asserts that it is unreasonable and impractical to expect PMSI lenders to dedicate

³² [Mantle](#) at paras 39-40. This conclusion is consistent with the decisions in [Manitok 2](#); [Redwater](#) at paras 114, 159; [Orphan Well Association v Trident Exploration Corp](#), 2022 ABKB 839 at para 67.

time and capital to perform proper environmental risk quantification and assessment, but this is exactly what it did. Advances were conditional on Travelers being satisfied with environmental reports on Mantle's real property. This condition was marked as satisfied/waived.³³ Mantle disclosed to Travelers the quantum of the environmental liabilities and the security posted with the AEPA.³⁴ The Court below noted Travelers' environmental due diligence and found that Travelers had been able to assess the risk of doing business with Mantle, make an informed decision, and negotiate a cost of borrowing that reflected that risk.³⁵

19. Travelers further asserts that lenders are not able to monitor or control a borrower's environmental compliance,³⁶ yet it included an explicit environmental condition and environmental warranty, which are environmental risk mitigation provisions.³⁷

20. With respect to the subordination of PMSIs, courts order priority interim financing charges if they are satisfied that the benefits of the financing outweigh the potential prejudice to the parties being subordinated.³⁸ Even if certain creditors are materially affected by the priority of the financing, a court must look to the broader picture.³⁹ The court determines whether the criteria in s. 50.6 of the *BIA* is satisfied, and then weighs the appropriateness by balancing the interests of the stakeholders.⁴⁰ Justice Feasby reviewed those factors together with the evidentiary record, and determined that the BIA Charges were necessary to complete the Reclamation Work, which is a

³³ Henze Affidavit, Exhibit "G", paras 5-6, p 0573.

³⁴ Henze Affidavit, Exhibit "G", Exhibit "A", s 4(k), p 0583.

³⁵ [Mantle](#) at para 42.

³⁶ Travelers Memorandum, paras 30-31.

³⁷ Henze Affidavit, Exhibit "G", Exhibit "A", ss 4(k), 15(h), p 0583, 0589.

³⁸ [Re AbitibiBowater inc.](#), 2009 QCCS 6453 [*Abitibi 2*] at paras 30-31.

³⁹ [Re White Birch Paper Holding Co.](#), 2010 QCCS 1176 at para 33.

⁴⁰ [Re Mustang GP Ltd.](#), 2015 ONSC 6562 at paras 26-31; [Re Eureka 93 Inc.](#), 2020 ONSC 1482 at paras 16-24.

critical part of the pending proposal.⁴¹ If it was ultimately concluded that Travelers received no benefit from certain activities undertaken by Mantle and financed by the Interim Facility, that issue can be addressed when the burden of the BIA Charges is allocated before distributions are made.⁴²

21. From July 28 to December 29, 2023, projected receipts of inventory sales are \$4,655,407, operating costs (including Reclamation Costs) are \$4,628,347, professional costs are \$920,115, Interim Financing draws are \$2,195,000, the ending cash is \$1,302,806, which applied to the Interim Facility reduces the latter's balance to \$892,194. With the sale of Active Pits and the reclamation of the Inactive Pits, all of the Reclamation Liabilities (\$3,553,179) are addressed, Mantle should be entitled to a return of its AEPA security (\$1,057,961), which would repay the Interim Financing in full.⁴³ Travelers' prejudice appears to be limited to a delayed recovery, and hence the balance "definitely tips towards the benefits that the [Interim Facility] brings."⁴⁴

22. While Travelers' appeal is significant to it, there are no other creditors raising this issue. This factor must be balanced against other factors.⁴⁵

Potential prejudice of proposed appeal

23. If Travelers is granted leave to appeal, the Amended Order is automatically stayed pursuant to s. 195 until the appeal is determined. This will result in significant prejudice to Mantle and its stakeholders. Mantle does not have resources to fund the Reclamation Work,⁴⁶ and advances under

⁴¹ [Mantle](#) at para 43.

⁴² [Re Medican Holdings Ltd.](#), 2013 ABQB 224 at paras 42, 44. See also [Re Respec Oilfield Services Ltd.](#), 2010 ABQB 277 at paras 85, 87, 94; [Re Indalex Ltd.](#), 2013 SCC 6 at paras 126-128; [Canada v Canada North Group Inc.](#), 2021 SCC 30 at paras 31, 62, 67. Such allocations must be *prima facie* fair and equitable.

⁴³ Henze Affidavit, Exhibit "D", para 32, 0059; Affidavit of Samah Zeinedinne sworn October 10, 2023, para 2, Exhibit "A", Appendix A.

⁴⁴ [Abitibi 2](#) at para 31.

⁴⁵ [Athabasca](#) at para 20.

⁴⁶ Henze Affidavit, Exhibit "F", para 66, p 0139.

the Interim Facility are conditional on the Interim Charge ranking first in priority subject only to the Administration Charge.⁴⁷ Without those advances, the Reclamation Work cannot proceed.

24. Further, the Reclamation Work is extremely time sensitive and must be completed before the winter freeze, and in any event, before November 1, 2023 as mandated by the EPOs.⁴⁸ Even if the APEA extends the time, the cost would likely increase,⁴⁹ and there is no certainty that additional funding or the requisite human resources would then be available. The delay increases the risk to the public that the Reclamation Work will not be completed. Unless the Reclamation Work is completed, or the AEPA is satisfied that sufficient provision has been made for it to be performed during the assessment period,⁵⁰ there can be no distributions to creditors. Finally, the appeal stops the funding required to sell the assets, collect receivables and draft a proposal, which prejudices all creditors.

25. There are no apparent measures to mitigate the prejudice. Accordingly, granting leave to Travelers would unduly hinder the progress of the Proposal Proceedings to the detriment of Mantle's stakeholders.

PART 4 – RELIEF SOUGHT

26. Mantle respectfully submits that leave to appeal be denied, with costs payable forthwith and in any event of the cause to Mantle.

⁴⁷ Henze Affidavit, Exhibit "F", para 68(e)(i), p 0140; Exhibit "H", Exhibit "G" (Interim Facility Agreement), s. 4.1(b), p 1105; definition of "Interim Financing Order", p 1120; Henze Affidavit, Exhibit "D", para 58(d)(i), p 0068.

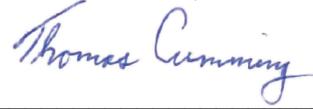
⁴⁸ Henze Affidavit, Exhibit "G", paras 7-8, p 0574-0575; Henze Affidavit, Exhibit "J", para 8, p 1168.

⁴⁹ Henze Affidavit, Exhibit "J", para 7, p 1168.

⁵⁰ Henze Affidavit, Exhibit "F", para 54, p 0134. Once the Reclamation Work is completed, there is an assessment period during which Mantle assesses whether there is erosion, planting, or other issues, and resolves them. In November 2025, Mantle can apply for reclamation certificates.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of October, 2023.

GOWLING WLG (CANADA) LLP

A handwritten signature in blue ink that reads "Thomas Cumming". The signature is written in a cursive style and is positioned above a horizontal line.

Per: Tom Cumming / Caireen E. Hanert
Counsel for the Respondent
Mantle Materials Group, Ltd.

TABLE OF AUTHORITIES

Legislation
<i>Bankruptcy and Insolvency Act</i> , RSC 1985, c B-3
Case Law
2403177 Ontario Inc. v. Bending Lake Iron Group Limited , 2016 ONCA 225
Athabasca Workforce Solutions Inc v Greenfire Oil & Gas Ltd , 2021 ABCA 66
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