



COURT FILE NUMBER 2301- 10358
COURT COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE CALGARY

IN THE MATTER OF THE *BANKRUPTCY AND
INSOLVENCY ACT*, RSC 1985, C B-3, AS AMENDED

AND IN THE MATTER OF THE NOTICE OF INTENTION
TO MAKE A PROPOSAL OF MANTLE MATERIALS
GROUP, LTD.

DOCUMENT BENCH BRIEF OF MANTLE MATERIALS GROUP, LTD.

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**APPLICATION BEFORE THE HONOURABLE JUSTICE CAMPBELL
AUGUST 8, 2023 AT 3:00 PM ON THE CALGARY COMMERCIAL LIST**

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I. INTRODUCTION

1. Mantle Materials Group, Ltd. (“**Mantle**”) is in the business of operating aggregate and gravel pits in Alberta. Mantle crushes and sells the aggregate and gravel to customer specifications in order to supply construction projects throughout Alberta.
2. Mantle was incorporated in British Columbia on July 17, 2020 as 1257568 B.C. Ltd., and changed its name on September 21, 2020 to Mantle Materials Group, Ltd. (“**Mantle BC**”). Mantle BC was continued in Alberta under the *Business Corporations Act*, RSA 2000, c B-9, as amended on April 30, 2021 and amalgamated on May 1, 2021 with JMB Crushing Systems Inc. and its wholly owned subsidiary 2161889 Alberta Ltd. to form Mantle.¹
3. Mantle is a wholly owned subsidiary of RLF Canada Holdings Limited, a Colorado corporation, which in turn is a wholly owned subsidiary of Resource Land Fund V, LP (“**RLF LP**”), a Delaware limited partnership, which is a fund managed by Resource Land Holdings LLP.²
4. Mantle operates and holds interests in aggregate and gravel pits (the “**Aggregate Pits**”) in the Province of Alberta consisting of:
 - (a) fourteen (14) Aggregate Pits held pursuant to surface material leases issued by Alberta Environment and Parks (the “**AEP**”) under the *Public Lands Act*, RSA 2000, Ch P-40 and the *Public Lands Administration Regulation*, AR 187/2011 (collectively, the “**Public Lands Legislation**”); and
 - (b) ten (10) Aggregate Pits held pursuant to aggregate royalty agreements with private land owners.³
5. Mantle acquired its interest in the Aggregate Pits and certain other assets through a sales transaction and reorganization (the “**Reorganization Transaction**”) approved under this

¹ Affidavit of Byron Levkulich to be sworn (the “**Levkulich Affidavit**”), at para 7.

² Levkulich Affidavit, at para 8.

³ Levkulich Affidavit, at para 10.

Honourable Court's supervision under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended (the "CCAA"). The transaction closed on May 1, 2021.⁴

6. In the period since the closing of the Reorganization Transaction, Mantle implemented improved management and operational practices and performed reclamation work to address the Environmental Reclamation Liabilities in accordance with the Reclamation Plans.⁵ It also attempted to secure short term sales of aggregate and enter into long term secure aggregate supply contracts which would have produced the income necessary to support ongoing operations and allow it to repay its indebtedness. Mantle produced inventory to facilitate such sales and/or supply contracts, but was unable to generate sufficient sales or secure sufficient supply contracts, and therefore continued to suffer working capital shortfalls. Mantle's Aggregate Pits were too far in distance from the current projects of potential customers. Because the costs of trucking aggregate are a significant component of the price of aggregate, it was difficult for Mantle to successfully bid on supplying those projects.⁶
7. Since May 1, 2021, Mantle has faced significant financial and operational difficulties, including:
 - (a) Mantle's Aggregate Pits being too far from potential customer projects;
 - (b) Mantle being unable to successfully bid on supplying projects due to the elevated costs of trucking aggregate from Mantle's Aggregate Pits to customers projects;
 - (c) the recovery being experienced in Alberta economy did not lead to a sufficient increase in demand for aggregate;
 - (d) Mantle's legacy Environmental Reclamation Obligations;

⁴ Levkulich Affidavit, at para 16.

⁵ The capitalized terms "Environmental Reclamation Liabilities" and "Reclamation Plans" are defined in the Levkulich Affidavit, at paras 13 and 16 .

⁶ Levkulich Affidavit, at para 17.

- (e) Mantle's debt levels from the legacy indebtedness inherited from JMB's Reorganization Transaction and the need to secure working capital financing since then;
 - (f) Mantle being unable to generate sufficient sales or secure sufficient supply contracts, and therefore suffering significant working capital shortfalls.⁷
8. As a result of Mantle's financial circumstances, on July 14, 2023 (the "**Filing Date**") Mantle filed a notice of intention to make a proposal (the "**NOI**") under section 50.4 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "**BIA**"), and FTI Consulting Canada Inc. ("**FTI**"), a licensed insolvency trustee, was named as the proposal trustee of Mantle (in such capacity, the "**Proposal Trustee**") (the "**Proposal Proceedings**").⁸
9. This Bench Brief is submitted on behalf of Mantle in support of an Application seeking from this Honourable Court an Order, among other things:
- (a) extending the 30 day period, ending August 13, 2023, within which Mantle is required under section 50.4(8) of the *BIA* to file a proposal by an additional 45 days to September 27, 2023 (such period, as extended from time to time under section 50.4(9) of the *BIA*, being the "**Stay Period**", and the date on which the Stay Period expires being the "**Expiry Date**");
 - (b) declaring that Mantle's counsel, Gowling WLG (Canada) LLP ("**Gowling**"), the Proposal Trustee and the Proposal Trustee's counsel, McCarthy Tétrault LLP (collectively, the "**Administrative Professionals**"), as security for their reasonable professional fees and disbursements incurred both before and after the granting of the requested Order, shall have the benefit of and are hereby granted a security and charge (the "**Administration Charge**") on all present and after-acquired property of Mantle (the "**Property**"), which Administrative Charge shall be in the aggregate amount of \$425,000, and authorizing the payment to the Administrative

⁷ Levkulich Affidavit, at paras 17 and 34.

⁸ Levkulich Affidavit, at paras 35 and 36.

Professionals of their reasonable fees and disbursements incurred in connection with the preparation for the Proposal Proceedings (as defined below);

- (c) approving a secured, non-revolving interim financing facility in the maximum principal amount of \$1,400,000 (the “**Interim Financing Facility**”) provided under a letter loan agreement dated August 2, 2023 (the “**Interim Financing Agreement**”) between RLF Canada Lender Limited (the “**Interim Lender**”) and Mantle;
- (d) declaring that the Property is subject to a security and charge (the “**Interim Lender’s Charge**”) in favour of the Interim Lender to secure the payment and performance of the Interim Financing Facility and Mantle’ indebtedness, liabilities and obligations under the Interim Financing Agreement;
- (e) declaring that the Property is subject to a security and charge in favour of the directors and officers of Mantle (all such directors and officers being collectively referred to as the “**Directors**”) over the Property to indemnify the Directors against obligations and liabilities that they may incur as Directors of Mantle after the commencement of the Proposal Proceedings in an amount not to exceed \$150,000 (the “**D&O Charge**”), other than obligations and liabilities incurred as a result of their gross negligence or wilful misconduct;
- (f) declaring that the Administration Charge, Interim Financing Charge and D&O Charge (collectively, the “**BIA Charges**”) are priority charges that rank ahead of any and all charges, security interests, liens, trusts, deemed trusts and encumbrances against the Property, including liens and trusts created by federal and provincial legislation, and that the *BIA* Charges rank, as between themselves, in the following order of priority:
 - (i) first, the Administration Charge;
 - (ii) second, the Interim Financing Charge; and
 - (iii) third, the D&O Charge;

- (g) authorizing Mantle to pay such amounts as it, in consultation with the Proposal Trustee, deems necessary to Persons on account of debts arose prior to the Filing Date, in order to operate, collect, realize and dispose of the Property in an orderly manner and perform its environmental reclamation obligations (such payments being “**Emergency Payments**”), provided that such payments are contemplated by the Cash Flow Projections filed by the Proposal Trustee under section 50(6) of the *BIA*;⁹
- (h) to the extent that any Emergency Payments have been funded by advances under the Interim Financing Facility prior to the date of the Order being applied for hereunder, authorizing Mantle to repay such Advances from any amounts received by Mantle subsequent to the Filing Date;
- (i) declaring that:
- (i) in accordance with section 69(1) of the *BIA*, during the period between the Filing Date and the Expiry Date: (A) no creditor has any remedy against Mantle or the Property, or shall commence or continue any action, execution or other proceedings for the recovery of a claim provable in bankruptcy; (B) no provision of a security agreement between Mantle and a secured creditor that provides, in substance, that on Mantle`s insolvency, the default by Mantle of an obligation under the security agreement, or the filing by Mantle of the NOI, Mantle ceases to have rights to use or deal with Property secured under the security agreement as it would otherwise have, has any force or effect; and
- (ii) in accordance with section 65.1(1) of the *BIA* but subject to section 65.1(4), no person may terminate or amend any agreement with Mantle or claim an accelerated payment, or a forfeiture of the term, under any agreement with Mantle by reason only that Mantle is insolvent or a NOI has been filed with respect to Mantle;

⁹ The term “Cash Flow Projections” is defined in the Levkulich Affidavit, at para 57.

- (j) requiring that any Person that has collected, realized, seized or taken possession of any money or other Property subsequent to the Filing Date without the consent of the Proposal Trustee or the leave of this Honourable Court promptly deliver or surrender to Mantle such money or other Property; and
- (k) such further and other relief as Mantle may request and this Honourable Court may grant.

10. This application is supported by an Affidavit sworn by Byron Levkulich, a director of Mantle (the “**Levkulich Affidavit**”). The further facts with respect to this Application are more fully set out in the Levkulich Affidavit and capitalized terms not defined herein have the meanings given to them in the Levkulich Affidavit.
11. All references to monetary amounts referenced herein are in Canadian dollars, unless otherwise stated.

II. ISSUES

12. This Brief addresses whether this Honourable Court should:
- (a) extend the time within which Mantle is required to file a proposal;
 - (b) grant the Administration Charge;
 - (c) approve the Interim Financing Facility and grant the Interim Financing Charge;
 - (d) grant the D&O Charge; and
 - (e) authorize Mantle to pay pre-filing arrears owing to Critical Suppliers (as defined below), subject to approval of the Proposal Trustee.

III. LAW AND ARGUMENT

A. Extension of the Stay Period is Appropriate

13. The Stay Period expires on August 13, 2023. Mantle is required to file a proposal within the Stay Period unless Mantle obtains from this Honourable Court an Order extending the time period for filing a proposal prior to the said expiration.

14. Pursuant to section 50.4(9) of the *BIA*, a debtor in a proposal proceeding may apply to the Court for an order extending the time to file a proposal by a maximum of 45 days and up to the aggregate of five (5) months after the expiry of the 30-day period, provided that the Court is satisfied that:
- (a) the insolvent person has acted, and is acting, in good faith and with due diligence;
 - (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
 - (c) no creditor would be materially prejudiced if the extension be applied for were granted.¹⁰
15. Mantle is seeking a stay extension to September 27, 2023, in these Proposal Proceedings (the “**Stay Extension**”). Mantle respectfully submits that the Stay Extension ought to be approved for, *inter alia*, the following reasons:
- (a) among its other actions, Mantle has engaged legal counsel, continues to work with the Proposal Trustee, is developing a plan to address its Environmental Reclamation Obligations and to provide for a controlled liquidation in consultation with its secured creditors and other stakeholders, which may involve a plan or structure to accommodate the 2023, 2024 and 2025 time for the reclamation, monitoring, assessment, resolution and reporting which must be carried out in order to satisfy such Environmental Reclamation Obligations;
 - (b) Mantle is acting in good faith and with due diligence;
 - (c) the Stay Extension is required in order to permit Mantle to complete certain profitable aggregate supply contracts, to the benefit of Mantle, its customers and its other stakeholders, and to continue the collection of its accounts receivables;

¹⁰ *BIA* section 50.4(9) [Tab 1]

- (d) Mantle requires the extension in order to satisfy its Environmental Reclamation Obligations in a manner acceptable to the AEP, and consult with the AEP in connection therewith;
 - (e) Mantle must develop in consultation with its Secured Creditors¹¹ a plan to preserve and sell in a commercially reasonable manner its property so as to maximize any proceeds available for distribution to secured creditors after satisfying its Environmental Remediation Obligations;
 - (f) no creditor will be materially prejudiced if the Stay Extension is granted; and
 - (g) the Proposal Trustee supports the Stay Extension.
16. Mantle’s creditors will not be prejudiced by the extension of the Stay Period. Rather, the extension is critical to ensuring that the Environmental Reclamation Obligations are properly addressed, and the business and Property of Mantle is liquidated in an orderly and commercially reasonable manner.¹²
17. Most importantly, the Supreme Court of Canada’s 2019 decision in *Orphan Well Association v. Grant Thornton Ltd.* (“**Redwater**”) provides that no distribution can be made to Mantle’s creditors unless and until the Environmental Reclamation Obligations are satisfied.¹³ While Alberta Environment and Parks (“**AEP**”) and the public at large are not creditors according to the test set out in *Redwater* in respect of the Environmental Reclamation Obligations, as those obligations are not claims provable in bankruptcy, they are the *de facto* primary and first ranking stakeholders in Mantle because the Environmental Reclamation Obligations must be satisfied before any distributions are made to secured or unsecured creditors.¹⁴

¹¹ As the term “Secured Creditors” is defined in the Levkulich Affidavit, at para 43.

¹² Levkulich Affidavit, at paras 56(d) and 64.

¹³ *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5 at paras 159 and 160 [**Tab 10**]

¹⁴ *Ibid* at paras 122, 134-35; *PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2021 ABCA 16 at paras 137 to 140 [**Tab 11**]

18. Ultimately, without the extension of the Stay Period and approval of the Interim Financing Facility, as more particularly described below, Mantle will not have sufficient cash flow to move forward with fulfilling the Environmental Reclamation Obligations.
19. As discussed further below, the Interim Lender is prepared to provide the funding required for the Proposal Proceedings and to allow Mantle to discharge its public environmental obligations through an orderly and commercially reasonable process.¹⁵
20. It is submitted that the Stay Extension is in line with the BIA's goal in striking a balance between the public's interest in ensuring that the Environmental Reclamation Obligations are satisfied in a timely manner and in maximizing the value of a debtor's estate for the benefit of all stakeholders, including creditors. Accordingly, this Court should exercise its discretion to grant the Stay Extension requested.¹⁶

B. Stay of Proceedings and Stay of Enforcement

21. Following the Filing Date and notwithstanding the Stay Period, certain of Mantle's creditors have exercised self-help remedies or threatened to do so in order to collect amounts owing to them prior to the Filing Date. In particular:

(i) Actual Enforcement

- (a) in the period immediately following the Filing Date, Pathward collected at least \$328,000 from account debtors of Mantle pursuant to the Pathward Security over Mantle's accounts receivable and directions previously provided by Mantle to its account with debtors. Mantle's counsel Gowling has requested that Pathward's counsel to return those funds to Mantle, as they were not entitled to collect these accounts receivable after the Filing Date. This issue is still under discussion between Mantle and Pathward.¹⁷

- (b) Mantle leased portable toilets and garbage bins from Seven Lakes Oilfield Services Corp. and Wildrose Disposal Inc. ("**Seven Lakes**") but Seven Lakes on July 31,

¹⁵ *Manitok Energy Inc (Re)*, 2022 ABCA 117 at paras 38 to 41 [**Tab 7**]; Levkulich Affidavit, at para 75(c).

¹⁶ *Yukon (Government of) v. Yukon Zinc Corporation*, 2021 YKCA 2 at para 91 [**Tab 15**]

¹⁷ Levkulich Affidavit, at para 59.

2023 entered the Oberg gravel pit and removed these portable toilets. They did not have Mantle's consent and were aware of these proceedings.¹⁸

(c) Lafarge Canada Inc. ("**Lafarge**"), who granted to Mantle the right to enter on and extract aggregate from an extraction area known as the Oberg Pit threatened to terminate the underlying agreement. Lafarge has been advised by Gowling that the stay of proceedings which arose automatically upon the filing of the NOI prevents it from exercising remedies against Mantle or its Property, but it was not clear that Lafarge would comply with the stay of proceedings.¹⁹

(d) Diversity Equipment, which leases equipment to Mantle and as of the Filing Date were owed \$100,418.85, threatened to terminate its equipment lease with Mantle and repossess the equipment. Diversity Equipment has been advised by the Proposal Trustee that the stay of proceedings which arose automatically upon the filing of the NOI prevented it from exercising remedies against Mantle or its Property, but it was not clear that Diversity Equipment would comply with the stay of proceedings.²⁰

22. Sections 65(1) and 69(1) of the *BIA* sets out the extent of the stay with respect to the ability of creditors to, among other things, terminate or amend agreements, seek remedies for the recovery of property of the debtor and to take steps to enforce a security agreement:

Certain rights limited

65.1 (1) If a notice of intention or a proposal has been filed in respect of an insolvent person, no person may terminate or amend any agreement, including a security agreement, with the insolvent person, or claim an accelerated payment, or a forfeiture of the term, under any agreement, including a security agreement, with the insolvent person, by reason only that

(a) the insolvent person is insolvent; or

(b) a notice of intention or a proposal has been filed in respect of the insolvent person.

¹⁸ Levkulich Affidavit, at para 33.

¹⁹ Levkulich Affidavit, at para 60(a).

²⁰ Levkulich Affidavit, at para 60(b).

...

Stay of proceedings — notice of intention

69 (1) Subject to subsections (2) and (3) and sections 69.4, 69.5 and 69.6, on the filing of a notice of intention under section 50.4 by an insolvent person,

(a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy,

(b) no provision of a security agreement between the insolvent person and a secured creditor that provides, in substance, that on

(i) the insolvent person's insolvency,

(ii) the default by the insolvent person of an obligation under the security agreement, or

(iii) the filing by the insolvent person of a notice of intention under section 50.4,

the insolvent person ceases to have such rights to use or deal with assets secured under the agreement as he would otherwise have, has any force or effect,²¹

23. Courts have granted orders in insolvency proceedings pursuant to section 69(1) of the *BIA* requiring that creditors return property to the debtor company when a remedy is enforced upon by the creditor post filing of the insolvency proceeding on the basis of pre-filing claim provable in bankruptcy. Courts have also determined that it is a violation of the stay to exercise a remedy even if the creditor is not aware of the stay of proceedings and accordingly, any property received by the creditor by the exercise of a remedy must be returned.²²
24. In a number of instances, including those referenced above, creditors of and counterparties to agreements with Mantle do not appear to understand that as a result of the automatic stay in section 69(1) of the *BIA* and the prohibitions in section 65.1, they cannot exercise remedies and terminate contracts with Mantle as a result of unpaid claims that arose prior to the Filing Date. Accordingly, Mantle seeks:²³

²¹ *BIA* sections 65.1(1) and 69(1) [**Tab 1**]

²² *Startek Computer Inc. (Trustee of) v. Samtack Computer Inc.*, 2000 BCSC 1316 at paras 9 to 13 [**Tab 13**]

²³ Levkulich Affidavit, at para 6(i).

- (a) declarations from this Honourable Court re-stating the restrictions on creditors and counterparties under sections 69(1) and 65.1 of the *BIA*. Granting such an Order would greatly assist Mantle and Mantle's stakeholders, as Mantle would have in hand a court order which it could directly serve on creditors who may not understand the stay of proceedings and prohibitions that arise upon the filing of Mantle's NOI.
 - (b) an order requiring that any Person that has collected, realized, seized or taken possession of any money or other Property subsequent to the Filing Date without the consent of the Proposal Trustee or the leave of this Honourable Court promptly deliver or surrender to Mantle such money or other Property. This order provides a cost efficient mechanism for Mantle to recover its property enforced upon post the Filing Date without the need to bring specific applications against each creditor not adhering to the restrictions under Sections 65.1 and 69(1) of the *BIA*. The Order further helps ensure that the restrictions under Sections 65.1 and 69(1) of the *BIA* are adhered to by Mantle's creditors, which are statutory restrictions under the *BIA*.
25. Mantle submits that based on the current practices of certain of its creditors, without the aforementioned declarations and order, certain of Mantle's creditors will continue to take steps without regard to sections 65.1 and 69(1), which could jeopardize Mantle's ability to carry on with the Proposal Proceedings, successfully carry out a controlled liquidation, and satisfy its Environmental Reclamation Obligations, for the benefit of all of its stakeholders. Without such an order, certain creditors may continue to take self-help steps to give themselves priorities over Mantle's other stakeholders, including the AEP and other secured creditors. Mantle's request is reasonable and appropriate in the circumstances and necessary for the benefit of its estate and its stakeholders.

C. The Administration Charge is Appropriate

26. Mantle seeks the Administration Charge to secure the fees of the Administrative Professionals whose services are critical to these proceedings. The Administrative Charge is to rank in priority to all other security interests in the Property.

27. On notice to Mantle's secured creditors, this Honorable Court has jurisdiction under section 64.2 of the *BIA* to grant the Administration Charge and give it super priority:

64.2(1) Court may order security or charge to cover certain costs: 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 person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) 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 trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;

(b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division;

[...]

64.2(2) Priority: The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.²⁴

28. Mantle seeks the Administration Charge in an amount up to \$425,000 to secure the fees and expenses of its own counsel, of the Proposal Trustee and of the Proposal Trustee's counsel. Such a charge is necessary and appropriate in the circumstances to ensure that Mantle have access to professional advisors throughout the course of these proceedings.
29. Administration charges have been approved in *BIA* proposal proceedings where, as in the present case, the participation of insolvency professionals is necessary to ensure a successful proceeding under the *BIA*.²⁵
30. Mantle submits that the present case is an appropriate circumstance for this Honourable Court to grant the Administration Charge with priority over any pre-existing security interests and other encumbrances. The quantum of the proposed Administration Charge is both fair and reasonable given the size and complexity of Mantle's business and the extant reclamation obligations required by AEP. The Administrative Professionals have played, and will continue to play, a critical role in these proceedings.²⁶

²⁴ *BIA* section 64.2 [Tab 1]

²⁵ *Mustang GP Ltd., Re*, 2015 ONSC 6562 at paras 32-33 [Tab 8]

²⁶ Levkulich Affidavit, at paras 64 and 65.

31. Mantle has numerous secured creditors, each of whom have been given notice of this application. In addition, AEP with whom Mantle has negotiated the Reclamation Plans to address the Environmental Reclamation Obligations, has been given notice of this application.²⁷
32. As a result of the foregoing, Mantle respectfully submits that this Honourable Court should exercise its discretion to grant the Administration Charge.

D. The Interim Financing Facility and the Interim Financing Charge are Necessary and Appropriate

33. On notice to Mantle's secured creditors, Section 50.6 of the *BIA* confers this Honourable Court with the jurisdiction to approve the Interim Financing Facility and the Interim Financing Agreement and declare the Property to be subject to Interim Financing Charge:

50.6(1) *Interim Financing*: On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the debtor's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(6)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made. [emphasis added]²⁸

34. Section 50.6(5) of the *BIA* provides a non-exhaustive list of factors to be considered by this Honourable Court in deciding whether to declare Mantle's Property subject to the Interim Financing Charge:

50.6(5) Factors to be considered: In deciding whether to make an order, the court is to consider, among other things,

- (a) the period during which the debtor is expected to be subject to proceedings under this Act;
- (b) how the debtor's business and financial affairs are to be managed during the proceedings;

²⁷ Levkulich Affidavit, at para 63.

²⁸ *BIA* section 50.6(1) [Tab 1]

- (c) whether the debtor's management has the confidence of its major creditors;
- (d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;
- (e) the nature and value of the debtor's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

35. Mantle respectfully submits that this Honourable Court should approve the Interim Financing Facility and Interim Lender's Charge because they are essential to provide Mantle with the financing it requires to continue to operate their business and make a viable proposal to its creditors. The following factors support the this relief:

- (a) Mantle initiated the Proposal Proceedings in order to obtain the stability offered by the stay of proceedings. The Interim Financing Facility is the only source of funding available to Mantle for it to maintain operations during the Proposal Proceedings. The Interim Financing Facility is needed immediately and during the initial 30 day stay period and is conditional upon Court approval. During the course of Proposal Proceedings Mantle intends to, in conjunction with the Proposal Trustee, present a proposal to its creditors which will, among other things, allow Mantle to complete a reclamation project to fully and properly address the Environmental Reclamation Obligations;²⁹
- (b) Mantle will manage its business and financial affairs during these proceedings in a cost-effective and efficient manner, with oversight from advisors and key stakeholders. Mantle's management has extensive experience in the aggregate and gravel industry and will be essential to Mantle through these proceedings. In addition, the Proposal Trustee will monitor Mantle's cash flow and financial affairs and report any material adverse changes to Mantle's stakeholders and this Honourable Court. The Interim Financing Facility provides funds for Mantle to operate with an established cash flow and capital expenditure budget and to make

²⁹ Levkulich Affidavit, at para 56.

regular reports to the Interim Lender and to AEP as required by the Reclamation Plans;³⁰

- (c) RLF LP, which is a major creditor of Mantle, has confidence that Mantle's management has the experience and expertise with which to manage and successfully complete the Environmental Reclamation Project;³¹
- (d) Currently, the EAP is the primary stakeholder in Mantle given that the Environmental Reclamation Obligations must be satisfied before distributions can be made to any secured or unsecured creditors of Mantel. Given the limited working capital currently available to Mantle, the only way that Mantle will be able to perform its Environmental Reclamation Obligations is if RLF Lender provides the Interim Facility. Absent the Interim Financing Facility, there is no prospect that mantle would be able to do this, as is demonstrated and supported by Mantle's Cash Flow Projections appended to the Levkulich Affidavit as **Exhibit "W"**.³²
- (e) The nature and value of Mantle's property is such that the Interim Financing Facility is essential to maximizing its values. The most valuable assets of Mantle are the accounts receivable, equipment and Mantle's interest in the producing Aggregate Pits. Failure to approve the Interim Financing Facility would have a drastic impact on the value of the assets because in face of the Environmental Reclamation Obligations, secured lenders may not even incur the costs necessary to dispose of any assets that might have a commercial value, as they may not even recover those amounts. In contrast to the controlled liquidation Mantle is attempting should maximize value for the benefit of Mantle's stakeholders;³³
- (f) By funding the satisfaction of the Environmental Reclamation Obligations, both the public and potentially the creditors benefit. Remediation will ensure that Mantle's Environmental Reclamation Obligations are not left unremedied, or to the Province's tax payers bear the financial burden of funding the remediation.

³⁰ Levkulich Affidavit, at paras 16 and 56.

³¹ Levkulich Affidavit, at para 16.

³² Levkulich Affidavit, at para 56(c), Exhibit "W".

³³ Levkulich Affidavit, at para 64(d).

Furthermore, unless and until the Environmental Reclamation Obligations are fully satisfied, Mantle’s creditors will receive no distributions from the estate based on the Supreme Court of Canada’s decision in *Redwater*.³⁴

- (g) The benefit of approving the Interim Financing Facility and Interim Financing Charge materially outweighs any resulting prejudice. Any prejudice to Mantle’s creditors that may result from the Interim Financing Facility or Interim Financing Charge is minimal given the amount of the facility and Mantle’s urgent need for funding for ordinary course expenses. The Cash Flow Projections provide that without the Interim Financing Facility Mantle will not have sufficient capital to continue as a going concern or have the breathing room to conduct a sales process. If the Interim Financing Facility and the corresponding Interim Financing Charge are not granted, a resulting bankruptcy or receivership will significantly decrease the prospects of any recovery for Mantle’s creditors;³⁵ and
- (h) The Proposal Trustee supports the relief sought by Mantle.

36. This Honourable Court has the jurisdiction under section 50.6(3) of the *BIA* to order that the Interim Financing Charge rank in priority over the claim of any creditor, including secured creditors. Section 60.6(3) provides that, “the court may order that the security or charge [granted in favour of the interim lender] rank in priority over the claim of any secured creditor of the debtor”.³⁶

37. In the context of a proceeding under the *Companies’ Creditors Arrangement Act*, RSC 1985, c C-36 (the “*CCAA*”), Morawetz J. in *Timminco* considered whether to grant a super priority charge in favour of an interim lender. The Court granted the charge and stated as follows:

[i]t is unrealistic to expect that any commercially motivated DIP Lender will advance funds without receiving the priority that is being requested on this motion. [...] The alternative [...] of a DIP Charge without super priority [...] is not, in my view, realistic, nor is directing the Monitor to investigate alternative financing without providing super priority. If there is going to be

³⁴ *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5 at paras 159 and 160 [Tab 10]

³⁵ Levkulich Affidavit, at para 76.

³⁶ *BIA* section 50.6(3) [Tab 1]

any opportunity for the Timminco Entities to put forth a restructuring plan, it seems to me that it is essential and necessary for the DIP Financing to be approved and the DIP Charge granted. The alternative is a failed CCAA process.³⁷

38. Importantly, and critical to these proceedings, the Interim Financing Facility is contingent on this Honourable Court granting an Order approving the Interim Financing Facility and Interim Financing Agreement and declaring the Property to be subject to the Interim Financing Charge ranking in priority to all other charges and security other than the Administration Charge.
39. While there seems little prospect of an actual proposal in these Proposal Proceedings, it is respectfully submitted that the plan of action described above is within the purview and scope of the *BIA*'s broader function, which is to preserve value in insolvency situations in order to derive the greatest benefit possible in the circumstances for the stakeholders of a debtor's estate. Indeed, in *Re Komtech Inc.*, Kane J. of the Ontario Superior Court of Justice pointed out that a sale pursuant to section 65.13 of the *BIA* or section 36 of the *CCAA* could effect a successful "restructuring", and that the presentation of a proposal is not a condition to a court's approval of a sale.³⁸ By analogy, the presentation of a proposal ought not to be a condition to Mantle utilizing the Proposal Proceedings to carry out a controlled liquidation and satisfy its Environmental Reclamation Obligations.
40. For all of these reasons, Mantle respectfully submits that an Order approving the Interim Financing Facility in a maximum amount of \$1,400,000, approving the Interim Financing Agreement and declaring that the Property is subject to the priority Interim Financing Charge is necessary and appropriate in the circumstances.

E. The D&O Charge is Appropriate and Necessary

41. Mantle also seeks a declaration that the Property is subject to the D&O Charge, in the maximum amount of \$150,000, indemnifying the Directors for obligations and liabilities which they may incur in their capacities as officers and directors after the commencement of these proceedings, except to the extent that the obligation or liability was incurred as a

³⁷ *Timminco Ltd., Re*, 2012 ONSC 948 at paras 46, 47 [Tab 14]

³⁸ *Komtech Inc. Re*, 2011 ONSC 3230t paras 31-33 [Tab 16]

result of the director or officer's gross negligence or willful misconduct. In addition, Mantle seeks a declaration that the D&O Charge rank in priority to any other security or charge other than the Administration Charge and Interim Financing Charge.

42. The *BIA* permits this Honourable Court the statutory jurisdiction to grant the D&O Charge:

64.1(1) *Security or charge relating to director's indemnification.* On application by a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the property of the person is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention or the proposal, as the case may be.

64.1(2) *Priority.* The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

64.1(3) *Restriction – indemnification insurance.* The court may not make the order if in its opinion the person could obtain adequate indemnification insurance for the director or officer at a reasonable cost.³⁹

43. The purpose of the D&O Charge is to:

(a) keep the Directors in place during a restructuring by providing them with protection against liabilities they could incur during the restructuring and to avoid the inevitable destabilization of the business of Mantle that would arise if the Directors did not remain in place, or were concerned about potential liabilities that they may incur in carrying out their functions; and

(b) enable Mantle to benefit from the experience and expertise of the Directors.⁴⁰

44. While there is directors' and officers' liability insurance in place, the Directors remain concerned with respect to the many exclusions in that policy and the willingness of insurers to deny or limit coverage.⁴¹

³⁹ *BIA* sections 64.1(1), 64.1(2) and 64.1(3) [Tab 1]

⁴⁰ *Northstar Aerospace Inc., Re*, 2013 ONSC 1780 at para 29 [Tab 9]; *Canwest Global Communications Corp., Re*, 2009 CarswellOnt 6184 at para 48 [Tab 4]

⁴¹ *Levkulich Affidavit*, at para 73.

45. D&O Charges, as in the immediate case, have been approved in *BIA* proposal proceedings where:
- (a) the charge is only available to the extent that the directors and officers do not have coverage under existing policies;
 - (b) there is a possibility the directors and officers whose participation in the process is critical, may not continue their involvement; and
 - (c) the Proposal Trustee states the charge is reasonable and is supportive of the same.⁴²
46. Mantle respectfully submits that these circumstances are appropriate for this Honourable Court to grant the D&O Charge.⁴³
47. The quantum of the proposed D&O Charge is both fair and reasonable given the size and complexity of Mantle's business. The Directors have played, and will continue to play a critical role in these Proposal Proceedings.
48. Accordingly, Mantle respectfully submits that this Honourable Court should exercise its discretion to grant the D&O Charge.

F. Priority of *BIA* Charges

49. Mantle requests that the *BIA* Charges should rank in priority to all other charges and security, and as between the *BIA* Charges, rank as follows:
- Firstly, the Administration Charge, up to the maximum amount of \$425,000;
 - Secondly, the Interim Financing Charge, up to the maximum amount of \$1,400,000; and
 - Thirdly, the D&O Charge up to a maximum amount of \$150,000.

⁴² *Colossus Minerals Inc., Re*, 2014 ONSC 514 at paras 18-21[**Tab 5**]; *Mustang* at para 35 [**Tab 8**]

⁴³ *Levkulich Affidavit*, at paras 72 and 74.

50. This Honourable Court has the discretion to make a declaration granting the *BIA* Charges in priority to any other security or charge.⁴⁴
51. As set out above, Mantle’s secured creditors and AEP have been given notice of this application.⁴⁵

In *Canada North*, the Supreme Court of Canada endorsed prior authority stating that the granting of super-priority charges is critical as a “key aspect of the debtor’s ability to attempt a workout”, although it noted that a Canadian Court in granting a charge with priority over Crown interests should do so only when necessary. The Supreme Court did not determine in *Canada North* whether the Crown’s deemed trust for employee withholdings renders it a “secured creditor” for the purposes of determining whether the Crown can be primed by charges created by ss. 50.6(1), 50.6(3) and 50.6(5) of the *BIA*...⁴⁶

52. While the Cash Flow Projections for Mantle provide for sufficient revenues during the initial thirteen (13) week period to cover operational expenditures, Mantle's revenues are insufficient to pay for restructuring costs, including the professional fees and disbursements of the Administrative Professionals, or potential liabilities of Directors. Accordingly, it is critical that the Court grant the priority charges to ensure Mantle has the necessary operating funds in order to successfully proceed forward through the Proposal Proceedings.
53. Mantle respectfully submits that this Court should exercise its discretion to rank the *BIA* Charges in the priority requested.

G. Pre-Filing Payments to Creditors

54. Mantle is seeking authorization to pay certain payables incurred prior to the Filing Date where this is necessary in order to motivate suppliers of essential services and products (“**Critical Suppliers**”) to continue such supplies, provided that such payments are supported by the Cash Flow Projections.
55. The proposed form of order provides that payments will only be made to Critical Suppliers following the express authorization of the Proposal Trustee. This form of order is intended

⁴⁴ *BIA* section 50.6(3), 64.1(2) and 64.2(2) [Tab 1]

⁴⁵ *BIA* section 67(3) [Tab 1]

⁴⁶ *Canada v. Canada North Group Inc.*, 2021 SCC 30 [Tab 3] at paras 67 and 72

to give Mantle the flexibility required to pay Critical Supplier where this is required to obtain critical supplies and services while ensuring such payments are subject to appropriate scrutiny by the Proposal Trustee.

56. Mantle is not seeking an order declaring any specific supplier a “Critical Supplier” as seen in *CCAA* cases as the *BIA* does not provide express statutory authority to declare a supplier a critical supplier.⁴⁷
57. Although the Proposed Proceedings fall under the *BIA*, case law under the *CCAA* does provide guidance to this Honourable Court. Courts in *CCAA* proceedings have previously permitted payments for pre-filing claims to be made to unsecured suppliers if those suppliers refused to continue to supply a debtor company and failure to supply would imperil the debtor company’s business. In such cases, Courts have empowered the monitor to exercise its discretion in approving payments to critical unsecured suppliers with respect to their pre-filing claims.⁴⁸
58. *CCAA* courts have also permitted the payment of pre-filing obligations owing to suppliers where those payments would be of considerable future benefit to the debtor company and to the value of the estate as a whole.⁴⁹ Courts in *BIA* proceedings have approved payments to suppliers made in good faith after the date the proposal proceedings are commenced, even payments of pre-filing claims.⁵⁰
59. The Critical Suppliers are essential to Mantle's on-going operations and its ability to continue working towards a proposal. Further, there are no readily available alternatives to the Critical Suppliers.
60. The Proposal Trustee supports the payment of certain pre-filing arrears (subject to its review and approval), and is supportive of the proposed form of order. The Interim Lender is also supportive of the proposed form of order.

⁴⁷ *CCAA* section 11.4 [Tab 2]

⁴⁸ *Re Toys “R” Us (Canada) Ltd.*, 2017 ONSC 5571 at para 9 [Tab 12]

⁴⁹ *EarthFirst Canada Inc., Re*, 2009 ABQB 78 at para 9 [Tab 6]

⁵⁰ *1732427 Ontario Inc. v. 1787930 Ontario Inc.*, 2019 ONCA 947 at paras 13 to 15 [Tab 17]

61. Mantle respectfully submits that this Court should exercise its discretion to authorize payment of pre-filing arrears owing to Critical Suppliers, subject to approval of the Proposal Trustee.

IV. CONCLUSION AND RELIEF SOUGHT

62. For the reasons above, Mantle requests the Orders sought be granted as they are fair, necessary and reasonable in the circumstances and represent the best option to permit Mantle to present a proposal to the benefit of its creditors.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of August, 2023.

GOWLING WLG (CANADA) LLP

Per:  _____
Tom Cumming/Sam Gabor/Stephen Kroeger
Counsel for Mantle