



COURT FILE NUMBER 25-2965622

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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File No.: A171561

Attention: Tom Cumming / Sam Gabor / Stephen Kroeger

**APPLICATION BEFORE THE HONOURABLE JUSTICE M.J. LEMA
SEPTEMBER 22, 2023 AT 2:00 PM ON THE CALGARY COMMERCIAL LIST**

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I. INTRODUCTION

1. Mantle Materials Group, Ltd. (“**Mantle**”) carries on the business of extracting, processing and selling gravel and other aggregates from pits (collectively, the “**Aggregate Pits**”) that it operates in the Province of Alberta.
2. 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**”).¹
3. 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 period within which Mantle is required under section 50.4(8) of the *BIA* to file a proposal by an additional 45 days from September 27, 2023 to November 6, 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**”); and
 - (b) such further and other relief as Mantle may request and this Honourable Court may grant.
4. This application is supported by an Affidavit sworn by Byron Levkulich, a director of Mantle, on September 15, 2023 (the “**September 15 Affidavit**”), together with the Affidavit of Byron Levkulich sworn August 7, 2023 (the “**August 7 Affidavit**”), the Affidavit of Cory Pichota, the President and Chief Executive Officer of Mantle, sworn August 8, 2023 (the “**August 8 Affidavit**”), and the supplemental Affidavit of Byron Levkulich sworn August 11, 2023 (the “**August 11 Affidavit**”). Capitalized terms that are not defined in this brief have the meanings given to them in the September 15 Affidavit.

¹ September 15 Affidavit, at para 12.

5. All references to monetary amounts referenced herein are in Canadian dollars, unless otherwise stated.

A. Background

6. Mantle operates and/or holds eleven (11) Aggregate Pits pursuant to surface material leases issued by Alberta Environment and Protected Areas (the “**AEPA**”) under the *Public Lands Act*, RSA 2000, c P-40 and the *Public Lands Administration Regulation*, AR 187/2011 and eight (8) Aggregate Pits under aggregate royalty agreements with private land owners.²
7. Prior to the filing of the NOI, Mantle operated those Aggregate Pits that had economically recoverable reserves of gravel and other aggregate (“**Aggregate**”, and such active Aggregate Pits, the “**Active Aggregate Pits**”). The remaining Aggregate pits did not have sufficient economically recoverable reserves of Aggregate (the “**Inactive Aggregate Pits**”).
8. Pursuant to a series of environmental protection orders (collectively, the “**EPOs**”)³ issued by AEPA, by its predecessor, Alberta Environment and Parks, in 2021, Mantle was required to reclaim the Inactive Aggregate Pits. As of June 30, 2023, the aggregate amount of the environmental reclamation obligations (the “**Environmental Reclamation Obligations**”) reflected on its balance sheet was \$3,666,893.⁴ Mantle has posted security with the AEP in respect of its Environmental Reclamation Obligations in the amount of \$1,057,961.24 (the “**AEPA Security**”).⁵
9. Since its acquisition of the Aggregate Pits in and about May of 2021, Mantle has been carrying out reclamation work in accordance with the EPOs (the “**Reclamation Work**”) on the Inactive Pits. It has also been carryout out Reclamation Work on the Active Aggregate Pits as it has been extracting and processing Aggregate in order to ensure that

² *Ibid*, at para 7.

³ Summarized in August 11 Affidavit, at para 13.

⁴ August 7 Affidavit, at para 40.

⁵ *Ibid*, at para 41.

the Environmental Reclamation Liabilities associated with those Aggregate Pits do not accumulate.

10. While a majority of the Reclamation Work required for the Inactive Aggregate Pits will be completed in the fall of 2023, there is a two-year waiting period after such completion during which the AEPA will assess whether the Reclamation Work has successfully addressed the Environmental Reclamation Obligations affecting those Aggregate Pits. Upon addressing any issues identified in those assessments or by Mantle, Mantle will apply to the AEPA for reclamation certificates in November of 2025.
11. Mantle has secured loan facilities with Fiera Private Debt Fund VI LP and Fiera Private Debt Fund V LP, to whom it owes approximately \$8,200,000, ATB Financial, to whom it owes approximately \$16,000, Travelers Restructuring Capital Inc. (“**Travelers**”), to whom it owes approximately \$1,022,000, Pathward, National Association (“**Pathward**”), to whom it owes approximately \$474,000, Canadian Western Bank, to whom it has contingent indebtedness of approximately \$1,000,000, and its affiliate RLF Canada Lender Limited (“**RLF Lender**”), to whom it owes approximately \$1,774,000.⁶
12. Mantle leases equipment used in its operations from a variety of equipment lessors and a premises and yard in the Town of Bonnyville and head office in Edmonton.⁷
13. Based on the books and records of Mantle, as of June 30, 2023 the aggregate book value of its assets was approximately \$7,450,000 and its aggregate liabilities were approximately \$15,050,000.⁸

B. Proposal Proceedings

14. As discussed above, Mantle filed the NOI commencing the Proposal Proceedings on July 14, 2023. In advance of the 30 day initial Stay Period expiring, Mantle applied to this Honourable Court for an Order, among other things, (a) extending the Stay Period, (b) approving an interim financing facility by RLF Lender in favour of Mantle (the “**Interim**

⁶ *Ibid*, at paras 20-28.

⁷ *Ibid*, at paras 30-33.

⁸ *Ibid*, at paras 38 & 39.

Facility”), (c) creating (i) a charge in favour of the Proposal Trustee, counsel to the Proposal Trustee and counsel to the Monitor securing their professionals fees and disbursements in the maximum amount of \$425,000, (ii) a charge in favour of RLF Lender securing the Interim Facility, and (iii) a charge in favour of the directors and officers of Mantle securing Mantle’s obligation to indemnify them for certain liabilities incurred in such capacities following the filing of the NOI in the maximum amount of \$150,000 (collectively, the “**BIA Charges**”), (d) granting priority to the BIA Charges, and (e) providing certain other relief. The application was to be heard on August 8, 2023 but on that day, Travelers filed an affidavit and brief opposing that relief in part.

15. On August 8, 2023, the Honourable Justice Campbell extended the Stay Period to August 18, 2023 but adjourned the balance of the application.
16. On August 15, 2023, the Honourable Justice Feasby granted an Order (the “**August 15 Order**”) extending the Stay Period to September 27, 2023, creating the *BIA* Charges and providing certain other relief, but reserved any determination of the priority of the *BIA* Charges as against Travelers’ security.
17. On August 28, 2023, Feasby J. released his reasons for decision (the “**August 28 Decision**”).⁹ In the August 28 Decision, Feasby J. concluded that the BIA Charges were necessary to complete the Reclamation Work and must rank in priority to Travelers’ security, and ordered that the August 15 Order be amended to reflect these Reasons.¹⁰
18. On September 7, 2023, Travelers filed an application for leave to appeal the August 28 Decision, which leave application is to be heard on October 18, 2023.
19. Mantle commenced the Proposal Proceedings because it required a procedure that would permit it to satisfy its Environmental Reclamation Obligations and distribute the value remaining in its estate to its creditors. Because of the decision of the Supreme Court of Canada in *Orphan Well Association v Grant Thornton Ltd.*,¹¹ it had to accomplish the former before it could do the latter, and as indicated in paragraph 10 of this Brief, the time

⁹ September 15 Affidavit, Exhibit “A”, attaching the reasons of Justice Feasby’s decision, 2023 ABKB 488.

¹⁰ August 28 Decision, at para 43.

¹¹ *Orphan Well Association v Grant Thornton Ltd.*, 2019 SCC 5 [**Redwater**].

line for completely addressing the Environmental Reclamation Obligations was two years. The specific tasks that Mantle planned to accomplish during the Proposal Proceedings were as follows:

- (a) Mantle would carry out the Reclamation Work required under the EPOs in the Inactive Aggregate Pits to the satisfaction of the AEPA;¹²
- (b) Mantle would perform its remaining contracts to sell or supply Aggregate to its customers where the performance of such contracts is economically beneficial to Mantle's estate and stakeholders;¹³
- (c) in consultation with the Proposal Trustee and the secured creditors with an interest therein, Mantle would market and sell in a commercially reasonable manner:
 - (i) the equipment and other personal property of Mantle (the "**Equipment**"); and
 - (ii) the Active Aggregate Pits subject to the purchasers thereof being acceptable to the AEPA and assuming the Environmental Reclamation Obligations associated with the Active Aggregate Pits;¹⁴
- (d) as soon as the Environmental Reclamation Obligations have been addressed or provided for in a manner acceptable to the AEPA, Mantle would distribute the proceeds of sale of Equipment and Active Aggregate Pits, and the amount of the AEPA Security, to the creditors entitled thereto after payment of costs and liabilities incurred in the Proposal Proceedings; and¹⁵
- (e) Mantle would develop a proposal which would permit the forgoing to be completed, given that the period to satisfy the Environmental Reclamation Obligation extends

¹² August 7 Affidavit, at paras 53(a) & 54; August 11 Affidavit, at para 16.

¹³ *Ibid*, at para 53(b); September 15 Affidavit, at para 20.

¹⁴ August 7 Affidavit, at para 53(c).

¹⁵ *Ibid*, at paras 55 & 56.

beyond the maximum six (6) month period for filing a proposal, the terms of which proposal are summarized in the September 15 Affidavit.¹⁶

20. Since the August 15 Order, Mantle has been working expeditiously to advance the Proposal Proceedings and accomplish the tasks summarized in paragraph 19 of this Brief, including:
- (a) Mantle entered into agreements and arrangements with its contractors and consultants to permit the performance of the Reclamation Work in respect of the Inactive Aggregate Pits;¹⁷
 - (b) Mantle sought and obtained from the AEPA a temporary field authorization permitting it to carry out de-watering of the Inactive Aggregate Pit identified as SML 060060, which is a necessary prerequisite to carrying out Reclamation Work on SML 060060;¹⁸
 - (c) Mantle has completed over 50% of the Reclamation Work required in connection with the Kucy Inactive Aggregate Pit and all of the Reclamation Work required in connection with the Buksa and Megley Inactive Aggregate Pits (other than any Reclamation Work identified as being required in the two year assessment period referred to in paragraph 10 of this Brief);¹⁹
 - (d) Mantle finalized arrangements with suppliers to permit it to complete its sale and supply contracts with its customers and starting performing those customer contracts;²⁰
 - (e) Mantle has received from Pathward the proceeds of accounts receivable collected by Pathward following the filing of the NOI and has sent a direction to all of its account debtors requiring that they pay the accounts receivable directly to Mantle;²¹

¹⁶ September 15 Affidavit, at paras 26 & 27.

¹⁷ *Ibid*, at paras 21 & 22.

¹⁸ *Ibid*, at para 23.

¹⁹ *Ibid*.

²⁰ *Ibid*, para 20.

²¹ *Ibid*, at para 17.

- (f) Mantle has been working with the Proposal Trustee to obtain proposals from multiple potential equipment auctioneers and dealers in order to permit the sale of the Equipment. As soon as it has received these proposals, Mantle and the Proposal Trustee will consult with the secured creditors with an interest in the Equipment with a review to maximizing the proceeds available to Mantle's stakeholders in a commercially reasonable manner;²² and
 - (g) Mantle has been working with the Proposal Trustee to develop a sale and marketing process with respect to the Active Aggregate Pits, including creating an electronic data room, a draft non-disclosure agreement, marketing and information materials and a sale process, and Mantle's management has been discussing the potential sale of Active Aggregate Pits with interested parties who have approached Mantle.²³
21. While Mantle has been proceeding in good faith and with due diligence to accomplish the tasks summarized in paragraph 19, it requires the additional time provided for by an extension of the Stay Period in order to:
- (a) continue developing a proposal;
 - (b) complete the Reclamation Work scheduled to be performed this year;
 - (c) complete its Aggregate sale and supply contracts;
 - (d) collect its accounts receivable; and
 - (e) sell its Equipment and the Active Aggregate Pits.²⁴
22. Based on the updated cash flow projections attached to the second report of the Proposal Trustee (the "**Cash Flow Projections**"), Mantle will have sufficient cash in order to operate and carry out the Reclamation Work during the extended Stay Period being applied for.²⁵

²² *Ibid*, at para 24.

²³ *Ibid*, at para 25.

²⁴ *Ibid*, at para 27.

²⁵ *Ibid*, at para 29.

II. ISSUE

23. The sole issue this Brief addresses is whether this Honourable Court should extend the time within which Mantle is required to file a proposal.

III. LAW AND ARGUMENT

24. The Stay Period expires on September 27, 2023. Under section 50.4(8) of the BIA, a proposal must be filed prior to the expiry of the initial 30 day Stay Period, or any extension thereof, failing which Mantle would be deemed to have filed an assignment in bankruptcy.
25. Under 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.²⁶
26. The burden of proof is on the debtor under section 50.4(9) of the BIA to show on the balance of probabilities that an extension is justified,²⁷ although the evidentiary threshold to meet the onus that it has satisfied the section 50.4(9) factors is low.²⁸
27. The Court assesses the likelihood of the debtor making a viable proposal under section 50.4(9) of the *BIA* on an objective standard. The Court must consider what a reasonable creditor might expect to happen or what might reasonably be expected to occur, rather than

²⁶ *BIA*, s 50.4(9) [Tab 1]

²⁷ *Re Heritage Flooring Ltd.* (2004), 46 CBR (3d) 280 at paras 31,32 and 37 [Tab 2]

²⁸ *Re Scotian Distribution Services Limited*, 2020 NSSC 131 at para 24 [Tab 3]; *Re T & C Steel Ltd*, 2022 SKKB 236 at para 20 [Tab 4]

what a specific creditor would do, and in particular a creditor opposing the request for an extension.²⁹

28. In *Re Baldwin Valley Investors Inc.* (“**Baldwin**”), Farley J. of the Ontario Court of Justice provided guidance on the interpretation of the words in section 50.4(9)(b) that “the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted”:

4 ... While that need not be a certainty: see my views at pp. 10-11 in *Re Cumberland Trading Inc.* released January 24, 1994 [now reported at 23 C.B.R. (3d) 225 , at p. 231]. "Likely" as defined in The Concise Oxford Dictionary of Current English, 7th ed. (1987; Oxford, The Clarendon Press) means:

likely 1. such as might well happen , or turn out to be the thing specified; probable . 2. to be reasonably expected . [emphasis added]³⁰

29. Referring to *Baldwin*, in *Nautican v Dumont*, the Prince Edward Island Supreme Court confirmed that to satisfy the Court that a viable proposal can be made, the standard is objective and is not tied to a specific creditor, even when a creditor opposes the request for an extension.³¹ The test requires a dispassionate evaluation, not the position of an advocate of a specific creditor³² and requires the Court to consider what a reasonable creditor might expect to happen or what might reasonably be expected to occur.³³
30. It is respectfully submitted that for the reasons that follow, each of the factors under section 50.4(9) have been met by Mantle:
- (a) In order for creditors to receive any distributions from Mantle’s estate, it is necessary for the AEPA to be satisfied that the Environmental Reclamation Obligations have either been fully performed or satisfactorily provided for.³⁴

²⁹ *Nautican v Dumont*, 2020 PESC 15 at paras 16-18 [*Nautican*] [Tab 5]

³⁰ *Baldwin Valley Investors Inc., Re*, 1994 CarwellOnt 253 [*Baldwin*] [Tab 6]

³¹ *Nautican* at paras 16 and 17 [Tab 5].

³² *Ibid* at para 18 [Tab 5].

³³ *Baldwin* at para 4 [Tab 6].

³⁴ See the decision of the Supreme Court of Canada in *Orphan Well Association v Grant Thornton Ltd.*, 2019 SCC 5, at paras 158-160 [Tab 7], where the court determined that all environmental obligations must be satisfied in order for there to be available any distribution for either secured or unsecured creditors. See also the decision of the Honourable Justice Neufeld of this Court in *Orphan Well Association v Trident Exploration Corp.*, 2022 ABKB 839, at para 67 [Tab 8], where he confirmed that this priority applied to all assets of the debtor.

Mantle is the only party in these proceedings that has a viable plan for addressing the Environmental Reclamation Obligations. Mantle has in place the Interim Financing, which will permit it to fund the performance of the Reclamation Work;

- (b) Mantle has made significant efforts towards a viable proposal to its creditors as outlined above. A proposal in the form being prepared by Mantle will allow it to ensure that the Reclamation Work is performed notwithstanding that the time line to fully address the Environmental Reclamation Obligations is two (2) years;
 - (c) Mantle is seeking to maximize the value that is available for distribution to the secured creditors by collecting all of the accounts receivable, developing a sale process for the Active Aggregate Pits (which will provide for the Environmental Reclamation Obligations relating thereto to be assumed by purchasers acceptable to the AEPA) and seeking sale proposals with respect to the Equipment. Seeking the sale of assets has been found by courts to be evidence of good faith.³⁵ By taking the forgoing steps with respect to the Environmental Reclamation Obligations, it will also be able to recover the security previously provided to the AEPA for the benefit of the creditors; and
 - (d) The Cash Flow Projections confirm that Mantle will have sufficient cash flow during the extended Stay Period to carry out the activities described above.
31. The forgoing demonstrate that Mantle has been acting in good faith and with due diligence, and that there is a realistic likelihood that it will be able to present a viable proposal in the form described above to its creditors.
32. The Cash Flow Projections show that there will be sufficient cash flow to fund Mantle's operations and Reclamation Work during the extended stay period. There is no evidence that any creditor would be materially prejudiced by an extension. However, if the Stay Period is not extended, there will be no mechanism for addressing Mantle's Environmental Reclamation Obligations. Not only would this result in the cessation of the Reclamation Work, the AEP would be unlikely to release the AEPA Security and no creditor would

³⁵ *Re Colossus Minerals*, 2014 ONSC 514 at para 39 [Tab 9]

receive any distributions until the Environmental Reclamation Obligations were satisfied. This would be materially prejudicial to both the public, because those obligations would remain unsatisfied, and to the creditors of Mantle, because they would not be entitled to any distributions while those obligations remained unsatisfied.

IV. CONCLUSION AND RELIEF SOUGHT

33. For the reasons above, Mantle requests the Order sought be granted as it is fair, necessary and reasonable in the circumstances and represents the best option to permit Mantle to present a viable proposal which will benefit its creditors.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of September, 2023.

GOWLING WLG (CANADA) LLP

Per: 

Tom Cumming/Sam Gabor/Stephen Kroeger
Counsel for Mantle Materials Group, Ltd.

TABLE OF AUTHORITIES

TAB	AUTHORITY
1.	<i>Bankruptcy and Insolvency Act</i> , RSC 1985, c B-3
2.	<i>Plancher Heritage Ltée / Heritage Flooring Ltd., Re 2004 NBBR</i> , 2004 NBQB 168
3.	<i>Scotian Distribution Services Limited (Re)</i> , 2020 NSSC 131
4.	<i>T & C Steel Ltd. (Re)</i> , 2022 SKKB 236
5.	<i>Nautican v. Dumont</i> , 2020 PESC 15
6.	<i>Baldwin Valley Investors Inc., Re</i> , 1994 CarwswellOnt
7.	<i>Orphan Well Association v. Grant Thornton Ltd.</i> , 2019 SCC 5
8.	<i>Orphan Well Association v Trident Exploration Corp</i> , 2022 ABKB 839
9.	<i>Colossus Minerals Inc. (Re)</i> , 2014 ONSC 514