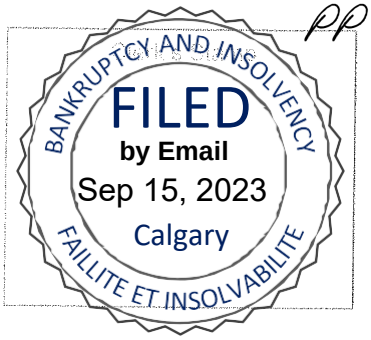

COURT FILE NO.	25-2965622/ B201 965622
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, RSC 1985, C C-8, AS AMENDED AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF MANTLE MATERIALS GROUP, LTD.
APPLICANTS	MANTLE MATERIALS GROUP, LTD.
DOCUMENT	**AFFIDAVIT**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Gowling WLG (Canada) LLP** 1600, 421 – 7th Avenue S.W. Calgary, AB T2P 4K9 Telephone (403) 298-1938 / (403) 298-1018 Facsimile (403) 263-9193 File No. A171561 **Attention: Tom Cumming / Sam Gabor / Stephen Kroeger**

C91001

AFFIDAVIT OF BYRON LEVKULICH

SWORN ON SEPTEMBER 15, 2023

I, BYRON LEVKULICH, of the City of Denver, in the State of Colorado, **MAKE OATH AND SAY THAT**:

1. I am a director of the applicant, Mantle Materials Group, Ltd. ("**Mantle**") and have personal knowledge of the matters herein deposed to, except where stated to be based upon information and belief, in which case I verily believe same to be true. I am also a Principal with Resource Land Holdings, LLC ("**RLH LLC**"), which manages private equity funds that invest in land resources and is based in Denver, Colorado. Mantle is an indirect, wholly owned subsidiary of one of these funds.

2. I am authorized to swear this Affidavit as a corporate representative of Mantle.

3. In preparing this Affidavit, I have consulted with Mantle's management team together with the legal, financial and other advisors of Mantle. I have also reviewed the business records of Mantle relevant to these proceedings and have satisfied myself that I am possessed of sufficient information and knowledge to swear this Affidavit.

4. This Affidavit is filed in support of Mantle's application for an order extending the time within which to file a proposal under section 50.4(9) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended (the "***BIA***", and these proceedings, the "**Proposal Proceedings**"). Additional background information in connection with the Proposal Proceedings is contained in my Affidavit sworn August 7, 2023 (the "**August 7 Affidavit**"), the Affidavit of Cory Pichota sworn August 8, 2023 (the "**August 8 Affidavit**"), my Affidavit sworn August 11, 2023 (the "**August 11 Affidavit**") and my Affidavit sworn August 14, 2023 (the "**August 14 Affidavit**").

Relief Requested

5. This Affidavit is sworn in support of an Application for an Order seeking, inter alia, the following relief from this Honourable Court:

   (a) abridging the time for service of notice of this Application, deeming service of notice of this Application to be good and sufficient, and declaring that there is no other person who ought to have been served with notice of this Application;

   (b) extending the 45 day period within which the Proposal Trustee is required to file a proposal with the official receiver under sections 50.4(8) and 50.4(9) of the BIA by an additional 45 days, ending November 13, 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

   (c) such further and other relief as Mantle may request and this Honourable Court may grant.

Background

6. Mantle was incorporated in British Columbia on July 17, 2020 as 1257568 B.C. Ltd. ("**125**"), continued in Alberta on April 30, 2021 and amalgamated with JMB Crushing Systems Inc. ("**JMB**") and 2161889 Alberta Ltd. ("**216**") on May 1, 2021 to form "Mantle Materials Group, Ltd.". Mantle is a wholly owned subsidiary of RLF Canada Holdings Limited ("**RLF Holdco**"), 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 RLH LLP.

7. Mantle carries on the business of extracting, processing and selling gravel and other aggregates ("**Aggregate**") in connection with which it operates and/or holds eleven (11) aggregate pits (the "**Aggregate Pits**") under 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.

8. As related in the August 7 Affidavit, Mantle acquired the business and Aggregate Pits from JMB and 216 on May 1, 2021 during the proceedings of JMB and 216 under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (the "***CCAA***") in a purchase and corporate arrangement transaction where Mantle's predecessor amalgamated with JMB and 216 (the "**Reorganization Transaction**"). JMB and 216 had previously been subsidiaries of RLF LP.

9. During the proceedings of JMB and 216 under the *CCAA*, the AEPA issued environmental protection orders requiring that the environmental reclamation obligations associated with the Aggregate Pits be addressed (such orders being the "**EPOs**", and the environmental reclamation obligations being the "**Environmental Reclamation Obligations**"). The environmental reclamation work (the "**Reclamation Work**") that the AEPA required to be addressed in respect of the Inactive Aggregate Pits (as defined below) pursuant to the EPOs is summarized in the Progress Update Report dated October 28, 2022 attached as Exhibit V to the August 7 Affidavit. The deadlines for completing the Reclamation Work on the Inactive Aggregate Pits were between August 31, 2023 and October 31, 2023.

10. Following the completion of the Reorganization Transaction, Mantle extracted, processed and sold Aggregate from the active Aggregate Pits (collectively, the "**Active Aggregate Pits**") and carried out reclamation work during such operations to ensure that Environmental Reclamation Obligations in respect of the Active Aggregate Pits did not accumulate. JMB and 216 had ceased operating in certain other Aggregate Pits as their economically recoverable reserves had been exhausted (collectively, the "**Inactive Aggregate Pits**"). Since the completion of the Reorganization Transaction, Mantle has carried out reclamation work on the Inactive Aggregate Pits in accordance with the EPOs.

11. From a business perspective, in the two years since the completion of the Reorganization Transaction, Mantle found that a large number of the projects where its customers and potential customers required Aggregate were not proximate to the Active Aggregate Pits. Because transportation costs forms a significant component of the pricing for Aggregate, Mantle's pricing for Aggregate was rendered uncompetitive in many instances. Mantle was unable to generate sufficient sales and cash flow to be financially viable. The resulting working capital shortfalls negatively impacted Mantle's ability to pay trade creditors, lenders and real property and equipment lessors, and to pay the contractors to perform its Environmental Reclamation Obligations under the EPOs.

12. As a result of these circumstances, Mantle's management and directors determined that the best course of action was to commence the Proposal Proceedings to ensure that the Environmental Reclamation Obligations were satisfied and to allow the net proceeds of its assets to be paid to the creditors with an economic interest therein. Therefore, 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 *BIA*, and FTI Consulting Canada Inc. ("**FTI**"), a licensed trustee, was named as the proposal trustee of Mantle (in such capacity, the "**Proposal Trustee**").

13. On August 8, 2023 the Honourable Justice Campbell granted an order, *inter alia* extending the Stay Period and time within which Mantle was required to file a proposal Period to August 18, 2023.

14. On August 18, 2023, the Honourable Justice Feasby granted an order, *inter alia*, extending the Stay Period to September 27, 2023 and granting certain court ordered charged.

Travelers Capital Corp. ("**Travelers**") opposed the application on the basis that Travelers' purchase-money security interest should have priority over environmental obligations. Feasby J. advised that a written decision would be released within two weeks of the said application.

15. On August 28, 2023, Feasby J. released his reasons for decision. Attached to my affidavit as **Exhibit "A"** is a copy of Feasby J.'s decision, 2023 ABKB 488 (the "**Decision**").

16. On September 7, 2023, Travelers filed an application for leave to appeal the Decision. I am informed by Tom Cumming, lawyer with Gowling WLG (Canada) LLP, counsel to Mantle, and do verily believe that the Court of Appeal Application will be heard on October 18, 2023

Current Status

17. Since the August 15 Order, Mantle has been working with its suppliers to permit the continuation of its operations during the Proposal Proceedings, selling and delivering Aggregate to its customers pursuant to its supply and sale contracts, continuing the reclamation of the Inactive Aggregate Pits in accordance with the EPOs, working with the Proposal Trustee to enable Mantle to market and sell its equipment and the Active Aggregate Pits, developing a proposal to secured creditors, and dealing with other issues which have arisen in in the course of the Proposal Proceedings.

18. As set out in the August 7 Affidavit Mantle made arrangements with Pathward, National Association ("**Pathward**"), which provided a working capital facility to Mantle under which Mantle owed $509,146.27 as of the Filing Date, to deliver the proceeds of all accounts receivable of Mantle that Pathward had received following the Filing Date. On or about August 21, 2023, Pathward wired $479,273.84 to Mantle's counsel. Mantle also directed, in coordination with the Proposal Trustee, all of its account debtors to pay amounts owing on account of accounts receivable to Mantle.

19. By the end of next week, Mantle is anticipated to have drawn $985,000 under the Interim Facility to fund its working capital requirements arising subsequent to the Filing Date, including to pay employees, contractors, landlords for the premises leased by it in

Edmonton and Bonnyville, insurers, internet service providers, lessors under leases of equipment that Mantle is utilizing to perform its sale and supply contracts with its customers and carry out Reclamation Work. Mantle has, with the consent of the Proposal Trustee, and pursuant to the August 15 Order, paid payables where it was required in order to secure the continued supply of critical goods and services.

20. In completing supply and sale contracts that are beneficial to the estate, Mantle has been working to complete its sale and supply contracts with customers such as Ledcor Highways Ltd. ("**Ledcor**"), Cenovus, E-Construction, Kehewin Cree Nation, Absolute MultiCorp Ltd. and Accurate Industries, which required the deployment of contractors and equipment and arranging transportation and delivery. In order to do so, Mantle did the following:

(a) at the request of the truckers who had been retained to deliver Aggregate to Ledcor in connection with the supply contract with Mantle, Mantle arranged for weekly payments to the truckers together with a reserve to be held by the Proposal Trustee from amounts paid by Ledcor in order to provide some assurance to the truckers with respect to their ultimate payment; and

(b) Mantle has made arrangements with suppliers of fuel who had threatened to cease supplies as a result of indebtedness owed to them prior to the Filing Date, the continuance of which supplies were critical to Mantle carrying on its sale, supply and reclamation operations.

21. On August 1, 2023, the AEPA wrote to Mantle confirming Mantle's duties to address the Environmental Reclamation Obligations under the EPOs, and that the Reclamation Work had to be completed by no later than November 1, 2023. Mantle had been and remains in regular communication with the AEPA regarding the progress of the Reclamation Work required under the EPOs on the Inactive Aggregate Pits. As related in paragraph 54 of my August 7 Affidavit, the Reclamation Work consists of removing marketable Aggregate, rough grading and contouring to tie the Inactive Aggregate Pits into the surrounding landscape, removing piles and oversized rocks, de-watering and re-contouring water bodies, placing topsoil and seeding the topsoil with vegetation. Once that is completed, there is a two-year monitoring period during which the AEPA will carry out at least two

assessments of soil stability, success of planting and the presence of weeds, and Mantle will be required to address any shortfalls discovered in the assessments. Once this is completed, Mantle will be able to obtain reclamation certificates in respect of the reclaimed Inactive Aggregate Pits.

22. In order to perform the Reclamation Work, Mantle continued its engagement with CPP Environmental, an environmental engineering firm which provides consulting services to Mantle, and Location Cats Ltd. ("**Location Cats**"), which prior to the commencement of the Proposal Proceedings was performing grading and other Reclamation Work on the Inactive Aggregate Pits identified as SML 060060, Buksa, MacDonald, Megley and Kucy. However, before Location Cats agreed to re-commence the Reclamation Work, it requested that Mantle pay all invoices relating to Reclamation Work carried out before the Filing Date. Because Mantle would be unable to perform the required Reclamation Work on the Inactive Aggregate Pits within the time period required under the EPOs, Mantle and Location Cats agreed that such arrears would be paid in a series of tranches once Location Cats had performed and completed specified components of the Reclamation Work within time frames specified in that agreement. An escrow fund was created to assure payment of these amounts. The Proposal Trustee approved the agreement on the basis that Mantle would be unable to carry out the Reclamation Work without Location Cats, and the performance of the Reclamation Work was a necessary pre-requisite to the secured creditors receiving any distributions from the proceeds of realization of Mantle's assets.

23. Since the August 15 Order, where this Honourable Court approved the Interim Financing Facility and created the Interim Financing Charge, Mantle has completed the Reclamation work required for the Buksa and Megley Inactive Aggregate Pits, and completed over 50% of the Reclamation Work required in the Kucy Inactive Aggregate Pit. In addition, on September 14, 2023, the AEPA issued a temporary field authorization permitting to Mantle to carry out the de-watering of a pond located on the SML 060060 Inactive Aggregate Pit. Once the de-watering process is complete (which will take approximately 6 to eight weeks), Location Cats will carry out the grading and contouring work on SML 060060. It is uncertain, however, whether Mantle will be able to place the topsoil and plant the wetland and dryland vegetation before the onset of winter. If the topsoil placement and

planting cannot be achieved before winter, then subject to the approval of the AEPA, it will be carried out in the spring.

24. Mantle has been working with the Proposal Trustee and various equipment auctioneers in order to determine the most effective strategy for maximizing the amounts realized on the sale of its equipment. Mantle has approached Ritchie Bros., Michener Allen, GD Auctions, McDougall Auctioneers and Global Machinery and is still receiving feedback from them. Once it has sufficient information, Mantle will consult with the secured creditors with interest therein as to the process for selling the assets.

25. In addition, Mantle and the Proposal Trustee have been preparing marketing materials and information with respect to the Active Aggregate Pits and have been developing a marketing and sale process appropriate to those pits. This involves the creation of an electronic data room, which Mantle and the Proposal Trustee are working on currently and a relatively short due diligence period. Mantle and the Proposal Trustee are discussing the merits of a one or two stage bid deadline process, although given the relatively small number of Aggregate Pits involved, a relatively simple process is preferred. To date, Mantle has been approached to date by a number of parties who are potentially interested in purchasing one or more Active Aggregate Pits and I am optimistic that Mantle will be able to carry out actual sales to the benefit of its stakeholders.

26. Finally, as related in paragraphs 8 and 9 of my August 14 Affidavit, because the AEPA must be satisfied with the Reclamation Work prior to distributions being made to creditors, and because the timeline for completing the Reclamation Work extends beyond the maximum six (6) month period for filing a proposal pursuant to sections 50.4(8) and (9) of the *BIA*, a mechanism is required to ensure that the Reclamation Work can continue and the proceeds of sale of the assets of Mantle can be distributed to the creditors with an economic interest in those assets. Further, as related in paragraph 10 of my August Affidavit, the book value of Mantle's assets is less than the amount of its liabilities to secured creditors, as recorded in Mantle's books and records, and therefore there may not be sufficient value to make a distribution to unsecured creditors. However, as long as

Mantle's Environmental Reclamation Obligations are addressed, there should be potentially significant value available for distribution to secured creditors.

27. Based on the forgoing, Mantle has been developing a proposal based on the following:

(a) Mantle would continue to carry out the Reclamation Work in respect of the Inactive Aggregate Pits in accordance with the time-line permitted by the AEPA;

(b) Mantle, in consultation with the Proposal Trustee, would:

(c) market and sell the Active Aggregate Pits to purchasers acceptable to the AEPA on the basis that such purchasers assume all of the Environmental Reclamation Obligations associated with the Active Aggregate Pits that they are purchasing;

(d) would sell the equipment and other assets in a commercially reasonable manner pursuant to auctions or otherwise so as to maximize the proceeds thereof available to its secured creditors;

(e) the payment of indebtedness to secured creditors would be postponed until the Environmental Reclamation Obligations were addressed or provided for to the satisfaction of the AEPA, whereupon proceeds available in the estate would be distributed to the secured creditors in accordance with their entitlement under applicable law;

(f) prior to the implementation of the proposal, Mantle would seek a reverse vesting order from this Honourable Court under which all unsecured claims would be vested in a corporation to be incorporated, and at the same time, upon such order becoming effective, Mantle would issue to such corporation an unsecured, non-interest bearing debenture in a principal amount equal to the aggregate amount of those liabilities, which would only become payable in the event that the amount realized by Mantle from the sale of its assets, after performing the Environmental Reclamation Obligations and the payment of restructuring costs, exceeded the amount of its secured indebtedness, but the amount payable under the debenture would be limited to the amount of such excess.

28. As related in paragraph 13 of the August 14 Affidavit, the benefit of the proposal summarized in paragraph 27 above is that it would permit the completion of the Reclamation Work, which Mantle's counsel informs me is required before distributions are made to creditors, permits the release of security previously provided to the AEPA, and provides for the ultimate distribution to creditors of the net proceeds of realization of Mantle's assets. As related in paragraph 41 of my August 7 Affidavit, the aggregate amount of the security provided to the AEPA in the form of cash and letters of credit is $1,057,961.24.

29. Based on the cash flow projections of Mantle for the period from the week ending September 22, 2023 to the week ending December 29, 2023, which will be attached to the report of the Proposal Trustee filed in connection with this Application, Mantle will have sufficient cash in order to operate and carry out Reclamation Work during the Stay Period and to December 29, 2023.

30. An extension of the Stay Period would give Mantle additional time to complete the majority of the Reclamation Work that is required in order to fully address its Environmental Reclamation Obligations. Further, since RLF Lender is the only party that has been willing to provide the Interim Financing Facility required to fund the Reclamation Work, the completion of Mantle's sale and supply contracts, and the sale of its assets, and all such work would halt in the event of a bankruptcy, not only are no creditors prejudiced by an extension, if the Stay Period is not extended to allow Environmental Reclamation Obligations to be addressed, there is no apparent mechanism available to creditors to receive any distributions from Mantle's estate.

31. As related above, Mantle has been diligently seeking to advance this matter for the benefit of all stakeholders, including the public in respect of its Environmental Reclamation Obligations and its creditors.

32. I swear this Affidavit in support of an Application for the relief set out in paragraph 5 of this Affidavit and for no other or improper purpose.

Sworn before me at the City of Denver, in the State of Colorado, on this 15th day of September, 2023

A Notary Public in
and for the State of Colorado

Byron Levkulich

ROBIN GRACE WHITE
NOTARY PUBLIC
STATE OF COLORADO
NOTARY ID 20134069976
MY COMMISSION EXPIRES November 16, 2025

ROBIN GRACE WHITE
NOTARY PUBLIC
STATE OF COLORADO
NOTARY ID 20134069976
MY COMMISSION EXPIRES November 16, 2025

This is **Exhibit** "**A**" referred to in the Affidavit of
Byron Levkulich sworn before me this 15th day of September, 2023

A Notary Public for the State of Colorado

ROBIN GRACE WHITE
NOTARY PUBLIC
STATE OF COLORADO
NOTARY ID 20134069976
MY COMMISSION EXPIRES November 16, 2025

2023 ABKB 488
Alberta Court of King's Bench

Re Mantle Materials Group, Ltd

2023 CarswellAlta 2276, 2023 ABKB 488

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

Colin C.J. Feasby J.

Heard: August 15, 2023
Judgment: August 28, 2023
Docket: Calgary 2301-10358

Counsel: Tom Cumming, Stephen Kroeger, for Mantle Materials Group, Ltd.
Alexis Teasdale, Joel Schachter, for Travelers Capital Corp
Pantelis Kyriakakis, for Proposal Trustee, FTI Consulting Canada Inc.
Doug Nishimura, for Alberta Environment and Protected Areas
Darren Bieganek, for 945441 Alberta Ltd

Subject: Civil Practice and Procedure; Environmental; Insolvency

Headnote

Bankruptcy and insolvency
Environmental law
Judges and courts

Table of Authorities

Cases considered by *Colin C.J. Feasby J.*:

Manitok Energy Inc (Re) (2022), 2022 ABCA 117, 2022 CarswellAlta 806, [2022] 6 W.W.R. 1, 98 C.B.R. (6th) 1, 468 D.L.R. (4th) 434 (Alta. C.A.)

Orphan Well Association v. Grant Thornton Ltd. (2019), 2019 SCC 5, 2019 CSC 5, 2019 CarswellAlta 141, 2019 CarswellAlta 142, 66 C.B.R. (6th) 1, 81 Alta. L.R. (6th) 1, [2019] 3 W.W.R. 1, 430 D.L.R. (4th) 1, 22 C.E.L.R. (4th) 121, 9 P.P.S.A.C. (4th) 293, [2019] 1 S.C.R. 150, [2019] 1 R.C.S. 150 (S.C.C.)

Orphan Well Association v. Trident Exploration Corp (2022), 2022 ABKB 839, 2022 CarswellAlta 3672, 4 C.B.R. (7th) 258 (Alta. K.B.)

R. v. Comeau (2018), 2018 SCC 15, 2018 CSC 15, 2018 CarswellNB 124, 2018 CarswellNB 125, 420 D.L.R. (4th) 199, [2018] 1 S.C.R. 342, [2018] 1 R.C.S. 342 (S.C.C.)

R. v. Henry (2005), 2005 SCC 76, 2005 CarswellBC 2972, 2005 CarswellBC 2973, 33 C.R. (6th) 215, 202 C.C.C. (3d) 449, 260 D.L.R. (4th) 411, 49 B.C.L.R. (4th) 1, 219 B.C.A.C. 1, 361 W.A.C. 1, 376 A.R. 1, 360 W.A.C. 1, 136 C.R.R. (2d) 121, [2006] 4 W.W.R. 605, (sub nom. *R. c. Henry)* [2005] 3 S.C.R. 609, 342 N.R. 259 (S.C.C.)

R. v. Kirkpatrick (2022), 2022 SCC 33, 2022 CSC 33, 2022 CarswellBC 2013, 2022 CarswellBC 2014, 471 D.L.R. (4th) 440, 414 C.C.C. (3d) 417, 82 C.R. (7th) 1 (S.C.C.)

R. v. Sullivan (2022), 2022 SCC 19, 2022 CSC 19, 2022 CarswellOnt 6589, 2022 CarswellOnt 6590, 80 C.R. (7th) 86, 413 C.C.C. (3d) 447, 472 D.L.R. (4th) 521 (S.C.C.)

South Side Woodwork (1979) Ltd. v. R.C. Contracting Ltd. (1989), 33 C.L.R. 43, 95 A.R. 161, 1989 CarswellAlta 516 (Alta. Q.B.)

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 50.4 [en. 1992, c. 27, s. 19]

s. 50.4(8) [en. 1992, c. 27, s. 19]

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally

Environmental Protection and Enhancement Act, R.S.A. 2000, c. E-12

s. 140

***Colin C.J. Feasby J.*:**

Introduction

1 Mantle Materials Group, Ltd. applied for an extension of time to make a proposal pursuant to the Bankruptcy and Insolvency Act, RSC 1985, c Bndash;3 s 50.4(8), approval of various charges on the bankrupt estate ("Restructuring Charges") including the priority of those charges, and approval of the payment of certain prendash;filing debts to creditors whose support is required to perform environmental reclamation work that will be integral to the pending proposal. The application was granted with a temporary proviso with respect to the priority of the Restructuring Charges over certain equipment to ensure that Travelers Capital Corp, a secured lender, was not prejudiced prior to the release of these Reasons.

2 Mantle advises that the proposal that it intends to make will not allow payment to any creditors before Mantle has satisfied its endndash;ofndash;life obligations stemming from Environmental Protection Orders issued by Alberta Environment and Protected Areas ("AEPA" formerly Alberta Environment and Parks) with respect to several gravel producing properties. Mantle submits that this is what is required by Orphan Well Association v Grant Thornton Ltd, 2019 SCC 5 (" because the environmental remediation obligation is an obligation of the company that must be satisfied prior to distributions to creditors. AEPA supports Mantle's position.

3 Travelers asserts that it has priority with respect to security in certain equipment and Travelers' ability to realize on its security should not be postponed until after the remediation work has been completed to AEPA's satisfaction and subordinated to the Restructuring Charges. Travelers offers a different interpretation of *Redwater*. Travelers contends that *Redwater* held that an endndash;ofndash;life environmental obligation need only be satisfied using assets encumbered by or related to the endndash;ofndash;life obligation. Travelers submits the Court should find that a creditor with security over assets unrelated to assets burdened with the environmental remediation obligation may realize on such security without delay.

Background

4 Mantle operates 14 gravel pits on public land pursuant to surface material leases issued by AEPA. Mantle also operates 10 gravel pits on private land pursuant to royalty agreements with the landowners.

5 Mantle acquired its gravelndash;producing assets in 2021 in the *Companies' Creditors Arrangement Act* proceedings for JMB Crushing Systems Inc. and associated companies. [1] Financial liabilities of JMB were compromised and undesired assets were transferred to a residual company pursuant to a Reverse Vesting Order. The desired assets remained in JMB and its subsidiary 2161889 Alberta Ltd, both of which then amalgamated with Mantle on May 1, 2021.

6 Following the commencement of the JMB CCAA proceedings, AEPA issued Environmental Protection Orders ("EPOs") to JMB and 216 in respect of some of the gravelndash;producing properties.

7 EPOs are issued pursuant to AEPA's authority under the Environmental Protection and Enhancement Act, RSA 2000, c Endash;12 s 140. An AEPA inspector is permitted to "issue an environmental protection order regarding conservation and reclamation to an operator directing the performance of any work or the suspension of any work if in the inspector's opinion the performance or suspension of the work is necessary in order to conserve and reclaim the land."

8 An EPO issued by AEPA in respect of endndash;ofndash;life reclamation is similar in nature to an Abandonment and Reclamation Order ("ARO") issued by the Alberta Energy Regulator ("AER"). Indeed, all the parties in the present case proceeded on the basis that an EPO issued by AEPA had the same legal effect and should be subject to like treatment in insolvency proceedings as an ARO issued by the AER.

9 The EPOs issued by AEPA to JMB address endndash;ofndash;life reclamation steps to be taken at various gravelndash;producing or formerly gravelndash;producing assets operated by JMB on both public and private land.

10 The original Reverse Vesting Order presented to the Court in the JMB CCAA proceedings sought to absolve the directors of JMB and 216 of responsibility for the EPOs and sought to usurp AEPA's regulatory role by putting the Court in a supervisory role with respect to the performance of reclamation work by Mantle and compliance with the EPOs. AEPA objected to the original proposed Reverse Vesting Order.

11 As a result of AEPA's objections, the Court approved a revised Reverse Vesting Order that provided that the order did not affect the liability of JMB, 216, or the directors of those companies for "Compliance Issues" or performing "Reclamation Obligations" in respect of the various gravelndash;producing properties. Mantle accordingly remained liable for the EPOs issued with respect to both the properties acquired in the amalgamation with JMB and 216 and the properties now possessed by the residual company. Mantle negotiated a plan with AEPA for the reclamation work to be done to satisfy the EPOs.

12 Following completion of the JMB CCAA proceedings, Mantle entered a loan transaction with Travelers. Travelers loaned Mantle $1,7000,000 for the acquisition of equipment for use in its operations. Mantle granted Travelers a purchasendash;money security interest (PMSI) over the equipment. The security interest was registered in the Alberta Personal Property Registry. Pursuant to an agreement between Travelers, Mantle, and Fiera Private Debt Fund V LP, which holds a general security interest in all of Mantle's present and after acquired property, Travelers' security interest in the equipment was designated to have first priority. As of July 21, 2023, Mantle owed Travelers just short of $1.1 million.

13 Mantle experienced operational problems and was burdened with excessive debt inherited from the JMB CCAA proceedings and incurred in the period following the acquisition of the gravelndash;producing properties. Mantle's difficulties were compounded by the significant reclamation obligations it was required to complete to satisfy the EPOs. On July 14, 2023, Mantle filed a notice of intention to make a proposal under s 50.4 of the BIA.

14 On August 15, 2023, I granted an extension of the BIA stay period and the time period to permit Mantle to make its proposal. I further approved the creation and priority ranking of various Restructuring Charges, including an Administration Charge, a Directors & Officers Charge, and an Interim Lending Facility Charge. I was satisfied that the participation of lawyers, insolvency professionals, and directors and officers was required for the proposal to succeed. I was further satisfied that the Interim Lending Facility, which is to be primarily used to fund reclamation work, is necessary for the success of the proposal.

15 Travelers' argued that the Restructuring Charges should not have priority over Travelers' security interest in the equipment and that Travelers should be able to be paid out or realize on its security without delay. Mantle, supported by AEPA, submitted that the Restructuring Charges were necessary to put the proposal into effect and that the main plank of the proposal was the completion of the reclamation work to satisfy the EPOs. Mantle is of the view that the value of the gravel pits that are still active exceeds the amount of the reclamation obligations. Mantle has also posted more than $1 million as security with AEPA which will be returned upon completion of the reclamation obligations to AEPA's satisfaction. Mantle submits that Travelers should not be permitted to realize on its security prior to the completion of the reclamation work because if it were allowed to do so, that would jeopardize Mantle's ability to complete the reclamation work and thereby jeopardize its ability to make a proposal to its creditors.

16 I granted an Order to allow work on the pending proposal, including reclamation work, to get underway while preserving Travelers' position pending these Reasons. The Order provided, in part, as follows:

> The Charges shall constitute a security and charge on the Property and, with the exception of the security interests in favour of Travelers registered in the Alberta Property Registry as base registration number 21100725361 (the "**Travelers' Security Interests**"), such Charges shall rank in priority to all other security interests, trusts, liens, charges, deemed trusts, encumbrances and claims of secured creditors, statutory or otherwise in favour of any person, including liens and trusts created by federal and provincial legislation (collectively, the "**Encumbrances**"), provided, however, that the relative priority of Charges and the Travelers' Security Interests is subject to further order of the Court . . .

Redwater, Manitok, Trident, and Stare Decisis

17 Mantle and AEPA submit that three decisions dictate the outcome of this case: *Redwater;* Manitok Energy Inc (Re), 2022 ABCA 117; and Orphan Well Association v Trident Exploration Corp, 2022 ABKB 839. These decisions, they say, stand for the principle that endndash;ofndash;life environmental obligations must be satisfied before any creditors may recover and that the whole estate of the insolvent entity is to be used to satisfy such endndash;ofndash;life environmental obligations. This rule leaves no room for those with security in assets unrelated to the environmental condition or damage to realize on that security until endndash;ofndash;life obligations have been satisfied using, if necessary, the unrelated assets in which they have security.

18 Travelers submits that Mantle and AEPA are wrong that *Redwater* and *Manitok* are controlling and that instead the present case is one of "first instance." *Redwater* and *Manitok* indicate that there is an exception to the rule posited by Mantle and AEPA for assets unrelated to the environmental condition or damage and that it is for this Court to give that exception shape. Travelers, citing R v Comeau, 2018 SCC 15 and R v Sullivan, 2022 SCC 19, further asserts that *Trident* at para 66ndash;67 is inconsistent with *Redwater* and *Manitok* and "violates the doctrine of vertical *stare decisis* . . . " *Trident*, Travelers argues, should not be followed because of its conflict with *Redwater* and *Manitok*.

19 Rather than discussing a basic concept like *stare decisis* in Reasons, I normally just ask what the relevant cases and statutes say the law is and then apply the law to the facts of the case before me. Travelers, however, has raised the issue of *stare decisis* and provided me with some authorities, making it clear that they attach some importance to it.

20 As a judge of a court of first instance, the principle of vertical *stare decisis* provides that I am bound to follow the *ratio decidendi* of decisions of higher courts. The inimitable Master Funduk explained: "The judicial pecking order does not permit little peckers to overrule big peckers. It is the other way around": South Side Woodwork v R.C. Contracting, 1989 CanLII 3384 (AB KB) at para 53.

21 The Court held in *Comeau* at para 26 "[s]ubject to extraordinary exceptions, a lower court must apply the decisions of higher courts to the facts before it." None of the exceptions apply in the present case. The issue, as will be come clear later in these Reasons, is whether there is a decision that is on point that must be followed or whether the reasons of the Supreme Court of Canada and the Court of Appeal left the question open.

22 The principle of horizontal *stare decisis* requires that judges of the same Court pay heed to each others' decisions. This is particularly important in the commercial arena where parties plan their affairs and make significant investment decisions based on the law that emerges from this Court.

23 Kasirer J, writing for the Court, observed in *Sullivan* at para 65 "Horizontal *stare decisis* applies to courts of coordinate jurisdiction within a province . . . While not strictly binding in the same way as vertical *stare decisis*, decisions of the same court should be followed as a matter of judicial comity, as well as for the reasons supporting *stare decisis* generally."

24 Kasirer J explained in *Sullivan* at para 75 that a Court should only depart from horizontal *stare decisis* if:

1. The rationale of an earlier decision has been undermined by subsequent appellate decisions;

2. The earlier decision was reached per incuriam ("through carelessness" or "by inadvertence"); or

3. The earlier decision was not fully considered, e.g. taken in exigent circumstances.

25 Vertical *stare decisis* requires me to determine the *ratio decidendi* of *Redwater* and *Manitok* while horizontal *stare decisis* demands that I determine the *ratio decidendi* of *Trident* with respect to the question before me - whether the whole of a debtor's estate, including unrelated assets, must be used to satisfy endndash;ofndash;life environmental obligations prior to any distribution to creditors.

26 Justices Côté, Brown, and Rowe writing for themselves and Wagner CJC in dissent in R v Kirkpatrick, 2022 SCC 33 at para 127 explained what the *ratio decidendi* of a decision is:

> The *ratio decidendi* of a decision is a statement of law, not facts, and "[q]uestions of law forming part of the *ratio* . . . of a decision are binding
>
> . . . . .
>
> as a matter of *stare decisis.*" A question of law cannot, therefore, be confused with the various factual matrices from which that question of law might arise [citations omitted].

27 The *ratio decidendi* of a case can be difficult to separate from *obiter dictum*, which is an expression of opinion that is not essential to a decision. Binnie J explained in R v Henry, 2005 SCC 76 at para 52: "the submissions of the attorneys general presuppose a strict and tidy demarcation between the narrow *ratio decidendi* of a case, which is binding, and *obiter*, which they say may safely be ignored. I believe that this supposed dichotomy is an oversimplification of how the common law develops."

28 The discussion that follows shows that the issue in the present case is not one of distinguishing between *ratio decidendi* and *obiter dictum*; rather, it is to what extent the Court is bound by what *Redwater* and *Manitok* imply or, perhaps more accurately, what the parties infer from those decisions. With *Trident*, the question is whether the *ratio decidendi*, which is clear, applies on the facts of the present case.

29 What does *Redwater* say about environmental obligations and unrelated assets? Wagner CJC, writing for the majority, pointed out that Redwater's environmental liabilities were not required to be satisfied with unrelated assets. He held at para 159:

> it is important to note that Redwater's only substantial assets were affected by an environmental condition or damage. Accordingly, the Abandonment Orders and LMR requirements did not seek to force Redwater to fulfill endndash;ofndash;life obligations with assets unrelated to the environmental condition or damage. In other words, recognizing that the Abandonment Orders and LMR requirements are not provable claims in this case does not interfere with the aims of the *BIA* — rather, it facilitates them [emphasis added].

30 Travelers submits that Wagner CJC chose his words carefully and that the only plausible inference from those words is that unrelated assets cannot be conscripted to satisfy endndash;ofndash;life environmental obligations. Though he may have chosen his words carefully in the sense that he did not want to foreclose a scenario where assets were so unrelated to an environmental obligation that they should not be called upon to satisfy the environmental obligation, he did not provide any guidance as to what he meant by "assets unrelated" or how unrelated the assets must be to escape the reach of the regulator.

31 The Court of Appeal in *Manitok* addressed the question of whether a debtor's oil and gas assets could be divided into two pools, one consisting of valuable assets and the other consisting of assets burdened by environmental obligations. The Court viewed the situation in *Manitok* to be the same as in *Redwater* where the proceeds of the sale of valuable oil and gas assets "had to be used by Redwater's trustee to satisfy abandonment and reclamation obligations before any distribution to secured creditors" (para 31). The Court went on at para 31 to explain how it interpreted *Redwater*:

> The point is that the outcome of ***Redwater*** demonstrates that the Supreme Court of Canada did not treat Redwater's assets as falling into different pools. All of the oil and gas assets were treated collectively as being contaminated, and they all had to answer for the abandonment and reclamation obligations attached to the disclaimed assets. None of the other oil and gas assets were 'assets unrelated' to the other oil and gas assets. Manitok is in exactly the same position. The 'substantial assets' of Manitok are the same as the 'substantial assets' of Redwater.

32 Though the Court of Appeal adverted in *Manitok* to the question of whether in theory unrelated assets could not be called upon to satisfy environmental obligations it deferred the question because it did not have to be decided given the Court's conclusion that all of Manitok's substantial assets were related to the environmental obligations. The Court held at para 36:

> ***Redwater*** confirms that the proceeds of the sale of those assets must be applied first towards the satisfaction of abandonment and reclamation obligations. To the extent that there is any issue about it, the status of assets completely unrelated to the oil and gas business can be left for another day [emphasis added].

33 Mantle and AEPA argue that Wagner CJC's words in para 159 must be viewed in the context of the whole ruling in *Redwater*. Wagner CJC held that environmental obligations are a corporate or estate obligation that must be satisfied before any creditor claims (para 98; see also, *Manitok* at para 17, 30, & 35). According to Mantle and AEPA, the logic of this ruling leaves no room for the exception for assets unrelated to the environmental condition or damage asserted by Travelers.

34 The reference to "assets unrelated" in *Redwater* unaccompanied by any explanation followed by the Court of Appeal's statement in *Manitok* that it was leaving the issue for "another day" indicates that there is no *ratio decidendi* in those cases that binds me in the present case. As I will explain below, the facts of the present case do not require me to decide whether Travelers is correct that some category of assets unrelated to the environmental condition or damage in issue may not be used to satisfy environmental regulatory obligations or Mantle and AEPA are correct that all the assets that comprise the estate of a debtor must be used to address environmental regulatory obligations before creditor claims are paid.

35 That Redwater and Manitok's substantial assets were all oil and gas assets was not surprising. Many oil and gas companies do not own much in the way of assets other than oil and gas rights and the equipment required to produce oil and gas from those interests in land such as compressors, pumpjacks, and tanks. And even this kind of equipment may be leased instead of owned. Jack R Maslen & Tiffany Bennett, "Going Green? New Interpretations of Redwater from Canada's Natural Resource Sectors" in in Jill Corrani Nadeau & D. Blair Nixon, eds., *Annual Review of Insolvency Law*, (Toronto: Thomson Reuters, 2022) 105 concluded at 119, "based on *Manitok*, assets or proceeds that relate in any way to the debtor's oil and gas business will be used to satisfy nonndash;monetary endndash;ofndash;life obligations. For most oil and gas producers, this likely means all of their property." A question to be considered later in these Reasons is whether Mantle, a gravel company, is any different than oil and gas companies like Redwater and Manitok.

36 Whether assets of an oil and gas company other than oil and gas rights are unrelated assets was tested in *Trident*. Justice Neufeld in *Trident* was required to consider whether a receiver was required to allocate proceeds of the sale of assets, including "nonndash;licensed assets such as real estate and equipment" (para 80) to satisfy environmental obligations in priority to municipal tax claims. Neufeld J took a pragmatic approach, refusing to get engaged in a debate over how to draw a line between related and unrelated assets of an oil and gas company. He concluded that because Trident had one business, oil and gas exploration and production, that all assets were related to the environmental obligation. He wrote at para 67:

> I also find that the assets subject to the AER super priority are not limited to licenced oil and gas wells, pipelines and production facilities. Trident had certain real estate assets that were used for office or equipment storage and the like. However, Trident had only one business: exploration and production of oil and gas. It makes no sense to differentiate real estate assets from other assets used in that business, just as it made no sense in ***Manitok*** to carve out economic licensed assets from uneconomic ones. In either case, the result would be to undermine the policy purposes upon which the super priority principle is based.

37 Neufeld J's statement of the law in *Trident* is consistent with *Redwater* and *Manitok* though his application of the law breaks new ground. Whereas in *Redwater* and *Manitok*, it was held that all oil and gas assets should be treated as related to environmental obligations that attached only to some of the oil and gas assets, *Trident* extended this principle to other assets used in an oil and gas business even if they were not directly involved in oil and gas production (e.g. the real estate used to store equipment).

38 None of the exceptions to the principle of horizontal *stare decisis* apply to *Trident*. The decision was fully considered, carefully reasoned, and has not been undermined by appellate authority. That means that the question in the present case is whether Mantle's equipment subject to the Travelers security interest is analogous to the equipment and real estate in *Trident*.

39 Warren Miller, Vice President of Structured Finance and Capital Markets at Travelers, deposed that it was his understanding that Mantle sought financing from Travelers so that it could "purchas[e] the equipment necessary to operate its business (instead of renting it)." Mr. Miller's Affidavit attached as part of an exhibit a Notice of Intention to Enforce Security which listed all Mantle's equipment that Travelers had financed. The descriptions include the following: Jaw Crushing Plant, Cone Crushing Plant, Screen Plant, Aggregate Feeder, Aggregate Surge Bin, Material Washer, Conveyor, Truck Scale, Articulated Dump Truck, Tracked Excavator, and the like. The equipment in which Travelers has a security interest appears to be part to Mantle's gravel production business.

40 In my view, no sensible distinction can be made between the equipment and real estate in *Trident* and the equipment in the present case. The equipment over which Travelers has a security interest is as much a part of Mantle's gravel business as the equipment and real estate in *Trident* was a part of Trident's oil and gas business. Based on this factual finding, I am bound by the principle of horizontal *stare decisis* to follow *Trident*. In finding that the equipment in the present case is part of Mantle's gravel business, I make no comment on how in theory a line should be drawn between related and unrelated assets or even if a line should be drawn. As the Court of Appeal said in *Manitok*, that "can be left for another day."

41 Travelers advanced policy arguments as to why it should not have to wait to realize upon its security until after Mantle completes the reclamation work required by the EPOs. Mantle and AEPA responded with policy arguments supporting the deferral of realization of all secured creditors, including Travelers, until after the satisfactory completion of the reclamation work. Given my conclusion that the equipment subject to the Travelers security interest is related to the assets to which Mantle's environmental obligations pertain in the sense that the equipment is used in gravel production, it is not necessary to explore these policy arguments.

42 Though I decline to debate the wisdom of the policy of effectively subordinating secured creditors to environmental obligations in these Reasons, it is noteworthy that the evidential record shows that Travelers conducted due diligence prior to entering the financing arrangement with Mantle. Among the materials available to Travelers as part of that due diligence process were documents indicating the existence of Mantle's environmental reclamation obligations and the security posted by Mantle with AEPA. Prior to entering the financing arrangement, Travelers had the opportunity to assess the risk of doing business with Mantle, make an informed decision whether to do business with Mantle, and to negotiate a cost of borrowing that reflected the risk inherent in Mantle's business.

Conclusion

43 The Travelers security interest in the equipment must be subordinated to the Restructuring Charges because the Restructuring Charges are necessary to the completion of the environmental remediation work that is an important part of the pending proposal. Travelers cannot realize on its security until the environmental reclamation work is completed to AEPA's satisfaction and the only way that such work can be done is with the support of the officers and directors of Mantle, lawyers and insolvency professionals, and the interim lender who are all protected by the Restructuring Charges.

44 Paragraph 10 of the Order dated August 15, 2023 shall be amended to provide that the Restructuring Charges have priority over the Travelers security interest in the equipment identified in the Travelers security registration.

Footnotes

1 For a discussion of the restructuring of JMB and the use of a reverse vesting order in that case, see Candace Formosa, "Dampening the Effect of Redwater Through a Reverse Vesting Order," in Jill Corrani & D. Blair Nixon, eds., *Annual Review of Insolvency Law*, (Toronto: Thomson Reuters, 2021) 697.

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