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COURT OF APPEAL OF ALBERTA



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REGISTRY OFFICE: CALGARY

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

STATUS ON APPEAL: Respondent
STATUS ON APPLICATION: Applicant

RESPONDENT: **TRAVELERS CAPITAL CORP.**

STATUS ON APPEAL: Appellant
STATUS ON APPLICATION: Respondent

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

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

Tel: (403) 298-1938 / (403) 298-1992
Fax: (403) 263-9193
Email: tom.cumming@gowlingwlg.com / caireen.hanert@gowlingwlg.com
File: A171561

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

CONTACT INFORMATION OF ALL OTHER PARTIES:

Lawson Lundell LLP

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

Attn: Alexis Teasdale / Joel Schachter

Tel: (403) 218-7565 / (604) 631-9238

Email: ateasdale@lawsonlundell.com / jschachter@lawsonlundell.com

Counsel for Travelers Capital Corp.

Field LLP

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

Attn: Douglas S. Nishimura

Tel: (403) 260-8500

Email: DNishimura@fieldlaw.com

Counsel for Alberta Environment and Protected Areas

McCarthy Tétrault LLP

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

Attn: Sean Collins / Pantelis Kyriakakis

Tel: (403) 260-3531 / (403) 260-3536

Email: scollins@mccarthy.ca / pkiriakakis@mccarthy.ca

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

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PART 1 – FACTS

1. Travelers Capital Corp. (“**Travelers**”) seeks to appeal an order granted on August 15, 2023 and amended August 28, 2023 (“**Amended Order**”)¹ in an application by Mantle Materials Group, Ltd. (“**Mantle**”) in its proposal proceedings (“**Proposal Proceedings**”) under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended (“**BIA**”). Under s. 195 of the *BIA*, unless otherwise ordered by the Court, proceedings under an order or judgment appealed from are stayed until the appeal is disposed of.²

2. Mantle produces, processes and sells aggregate in Alberta. Mantle commenced the Proposal Proceedings to: (a) reclaim its inactive gravel pits (the “**Pits**”) as required by environmental protection orders (“**EPOs**”) of Alberta Environment and Protected Areas (“**AEPA**”); and (b) sell its inventory, equipment, operational Pits and other assets, prepare a proposal, and make distributions to its creditors (“**Restructuring Work**”).³

3. Because Mantle required interim financing (“**Interim Financing**”) to fund the Reclamation Work and Restructuring Work,⁴ it applied for the Amended Order⁵ approving the Interim Financing, granting charges securing the Interim Financing (“**Interim Charge**”), the fees of the proposal trustee, its counsel and Mantle’s counsel (“**Administration Charge**”) and an indemnity in favour of officers and directors, and ranking these charges in priority to all other security and encumbrances, including a purchase-money security interest (“**PMSI**”) in equipment

¹ The reasons for the decision are cited *Re Mantle Materials Group, Ltd.*, 2023 ABKB 488 [*Mantle*], Affidavit of Alex Henze affirmed September 7, 2023 (“**Henze Affidavit**”), Exhibit “B”, p 0016-0025.

² If an appeal is as of right under s. 193(c), the stay is effective on the filing of an appeal, and if leave is required under s. 193(e), it is effective once leave is granted; see *Robson Estate v Robson*, 2002 CanLII 53241 (ONCA) at paras 5-6; *Flightcraft Inc v Parsons (Trustee of)*, 1999 BCCA 370 at paras 28-29.

³ Henze Affidavit, Exhibit “F”, para 53, p. 0134; Henze Affidavit, Exhibit “I”, paras 12-13, p 1161-1162.

⁴ Henze Affidavit, Exhibit “D”, paras 60(a)-(b), p 0069; Henze Affidavit, Exhibit “F”, para 69, p 0140.

⁵ Henze Affidavit, Exhibit “F”, paras 68(e)(i)-(ii), p 0140.

used in Mantle’s business (“**Equipment**”) that was financed by Travelers.

4. Travelers applies for an order that it has an appeal as of right under s. 193(c) of the *BIA*, or alternatively, seeks leave to appeal under s. 193(e) (the “**193 Application**”), arguing that environmental liabilities do not have to be satisfied before holders of PMSIs in personal property unaffected by environmental conditions or damage.⁶ Mantle submits in the 193 Application that Travelers requires leave under s. 193 of the *BIA*, which should not be granted here.

5. If Travelers is successful on the 193 Application, Mantle seeks an order under s. 195 of the *BIA*: (a) lifting the stay of proceedings; or (b) in the alternative, limiting the stay’s scope to the provisions of the Amended Order giving priority to the Interim Charge over Travelers’ PMSI for Reclamation Work.

PART 2 – LAW AND ARGUMENT

6. A court may vary or cancel the automatic stay of proceedings under s. 195 on any grounds it deems proper.⁷ The two principal factors considered are the merits of the appeal and the relative prejudice of the affected parties.⁸ The applicant has the burden of establishing the grounds for lifting the stay.⁹ The approach is contextual, considering the facts of the case, the relative prejudice to the affected parties and the interests of justice generally.¹⁰ In considering the merits of an appeal, the court does not have to conclude that the appeal is entirely meritless, but only that its chances

⁶ Travelers cites *Orphan Well Association v Grant Thornton Ltd.*, 2019 SCC 5 [*Redwater*] for this proposition.

⁷ This includes the power, if the court sees fit, to partially lift the stay and permit certain acts; see *Royal Bank v Saskatoon Sound City Ltd.* (1989), 77 CBR (NS) 127 (SKCA) at paras 15-16.

⁸ *Yewdale v Campbell, Saunders Ltd.*, 1994 CanLII 1548 (BCCA) at paras 14-15.

⁹ *Dugas v Price Waterhouse Coopers Inc.*, 2003 CanLII 48296 (NBCA) at para 14.

¹⁰ *After Eight Interiors Inc. v Glenwood Homes Inc.*, 2006 ABCA 121 at para 6.

of success are not high.¹¹

7. In considering relative prejudice, courts have found the balance of convenience can favour lifting the stay where it is in the best interests of creditors,¹² it substantially prejudices the interests of creditors,¹³ or it imperils the realization of assets.¹⁴

8. Travelers asserts, based on an isolated observation in *Redwater*, that assets unaffected by an environmental condition or damage are not subject to Redwater's environmental priority, and therefore, that Travelers should not be subordinated to Reclamation Costs.¹⁵ In other proceedings, courts have not endorsed that argument, suggesting it runs contrary to the *Redwater* principles, declining to apply it to the facts before them, and leaving consideration of the argument for another day.¹⁶ The lower Court's treatment of this argument is consistent with those cases.¹⁷ Travelers' argument is not supported by the decided cases, which strongly favour lifting the stay.

9. Staying the Amended Order will cause significant and likely irreparable harm to Mantle, its creditors and other stakeholders. Without Interim Financing, Mantle will be unable to pay for the Reclamation Work and Restructuring Work and will have to suspend both.¹⁸ The condition to availability (the approval of the Interim Facility and priority of the Interim Charge) is not satisfied

¹¹ See *Royal Bank of Canada v Bodanis*, 2020 ONCA 185 at paras 12-13; *Business Development Bank of Canada v Paletta & Co Hotels Ltd.*, 2012 MBCA 115 [*Paletta*] at paras 14-15 (the court was not satisfied that the appellant had an arguable case or a reasonable prospect of success); *Re Battery Plus Inc.*, 2002 CanLII 41830 (ONCA) at para 7 (the appeal was of questionable merit and highly unlikely to succeed).

¹² *Re Churchill Forest Industry Ltd.*, 1971 CanLII 960 (Man CA) at p 81-82.

¹³ *Bank of Montreal v Plaza Mining Corp.* (1983), 49 BCLR 199 (CA) at para 20.

¹⁴ *Badlands Land & Cattle Co v Walker Ranch Ltd (Trustee of)* (1996) 144 Sask R 2 at paras 4, 6-7; *Paletta* at paras 9, 15.

¹⁵ Memorandum of Argument of Travelers filed September 7, 2023, paras 38-47.

¹⁶ *Manitok Energy Inc (Re)*, 2022 ABCA 117 at paras 26, 28-29, 35-36; *Orphan Well Association v Trident Exploration Corp.*, 2022 ABKB 839 at para 67; *Redwater* at paras 114, 159.

¹⁷ *Mantle* at paras 39-40.

¹⁸ Henze Affidavit, Exhibit "H", para 19, p 0691; Henze Affidavit, Exhibit "I", para 15, p 1162.

where the Amended Order is stayed.¹⁹

10. The Reclamation Work faces two imminent time deadlines: (a) the EPOs require it to be completed by November 1, 2023, failing which Mantle will be in breach;²⁰ and (b) it cannot continue once the winter freeze sets in.²¹ Even if the EAPA extends EPOs' deadline, the Reclamation Work will be more expensive if carried over to the spring of 2024,²² and there is no certainty about whether additional funding will be available. Hence, the stay increases the risk to the public of Alberta that Mantle will be unable to complete the Reclamation Work.

11. The Restructuring Work is not related to the Reclamation Work. It benefits the creditors generally because it permits Mantle to realize its assets and advance the Proposal Proceedings. If the Interim Facility is stayed, Mantle will be unable to pay its employees, the employees will be terminated, the assets will be unprotected in a high crime area,²³ and the sale of inventory and other assets and all other steps in the Proposal Proceedings will be suspended, thereby prejudicing all stakeholders.²⁴

12. Travelers provides no evidence that the recovery of its loan is at risk as a result of the Interim Charge's priority. In fact, the evidence suggests its prejudice is limited. From July 28-December 29, 2023, projected receipts of inventory sales are \$4,655,407, operating costs (including Reclamation Costs) are \$4,628,347, professional costs are \$920,115, Interim Financing draws are \$2,195,000, the ending cash is \$1,302,806, which applied to the Interim Facility reduces

¹⁹ Henze Affidavit, Exhibit "F", paras 68(e)(i)-(ii), p. 0140; Henze Affidavit, Exhibit "D", para 58(d)(ii), p 0068.

²⁰ Henze Affidavit, Exhibit "G", para 8, p 0575.

²¹ Henze Affidavit, Exhibit "J", para 8, p 1168.

²² Henze Affidavit, Exhibit "J", para 7, p 1168.

²³ Henze Affidavit, Exhibit "H", paras 16-18, p 0690-0691.

²⁴ Henze Affidavit, Exhibit "H", para 19, p 0691.

the latter's balance to \$892,194. With the sale of active pits and the reclamation of the inactive Pits, reclamation liabilities of \$3,553,179 are eliminated, and Mantle should be entitled to a return of its AEPA security of \$1,057,961, which would repay the Interim Financing in full. Hence, Traveler's prejudice appears to be just delay, while the prejudice for Mantle and other stakeholders, as outlined above, is very significant.²⁵

13. Finally, Travelers has appealed the whole Amended Order, yet its arguments in support are limited to whether the Reclamation Costs rank in priority to its PMSI. The automatic stay therefore significantly overreaches and does not attempt to limit the very real prejudice to Mantle's other stakeholders.²⁶ If Travelers is permitted to appeal the Amended Order and this Honourable Court does not lift the automatic stay, Mantle seeks an Order varying the scope of such stay to limit it to the grant of priority to the Interim Charge priority for the Reclamation Work.

PART 3 – RELIEF SOUGHT

14. Mantle respectfully submits that the stay be lifted, or in the alternative, be limited to the priority given to the Interim Facility over Travelers' PMSI for Reclamation Costs. Mantle also seeks costs of this application payable forthwith and in any event of the cause.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of October, 2023.

GOWLING WLG (CANADA) LLP

DocuSigned by:

Thomas Cumming

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

²⁵ Henze Affidavit, Exhibit "D", para 32, 0059; Affidavit of Samah Zeinedinne sworn October 10, 2023, para 2, Exhibit "A", para 26.

²⁶ The stay suspends the Interim Facility, the Interim Charge, the Administration Charge, the directors' and officers' charge, and the priority of these charges, including for Restructuring Costs and as against all other creditors.

TABLE OF AUTHORITIES

Legislation
<u>Bankruptcy and Insolvency Act</u> , RSC 1985, c B-3
Case Law
<u>After Eight Interiors Inc. v Glenwood Homes Inc.</u> , 2006 ABCA 121
<u>Badlands Land & Cattle Co v Walker Ranch Ltd (Trustee of)</u> (1996) 144 Sask R 2
<u>Bank of Montreal v Plaza Mining Corp.</u> (1983), 49 BCLR 199 (CA)
<u>Business Development Bank of Canada v Paletta & Co Hotels Ltd.</u> , 2012 MBCA 115
<u>Flightcraft Inc. v. Parsons</u> , 1999 BCCA 370
<u>Dugas v Price Waterhouse Coopers Inc.</u> , 2003 CanLII 48296 (NBCA)
<u>Manitok Energy Inc (Re)</u> , 2022 ABCA 117
<u>Orphan Well Association v Grant Thornton Ltd.</u> , 2019 SCC 5
<u>Orphan Well Association v Trident Exploration Corp.</u> , 2022 ABKB 839
<u>Re Battery Plus Inc.</u> , 2002 CanLII 41830
<u>Re Churchill Forest Industry Ltd.</u> , 1971 CanLII 960 (Man CA)
<u>Re Mantle Materials Group, Ltd.</u> , 2023 ABKB 488
<u>Robson Estate v. Robson</u> , 2002 CanLII 53241 (ON CA)
<u>Royal Bank of Canada v Bodanis</u> , 2020 ONCA 185
<u>Royal Bank v Saskatoon Sound City Ltd.</u> (1989), 77 CBR (NS) 127 (SKCA)
<u>Yewdale v Campbell, Saunders Ltd.</u> , 1994 CanLII 1548 (BCCA)