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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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Attention: Tom Cumming / Sam Gabor / Stephen Kroeger

**APPLICATION BEFORE THE HONOURABLE JUSTICE G.S. DUNLOP
NOVEMBER 8, 2023 AT 2:00 PM ON THE EDMONTON COMMERCIAL LIST**

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A. 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) an Order:
 - (i) 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;
 - (ii) declaring that the provision by Atlas Aggregates Inc. (“**Atlas**”) to Mantle of a list of Atlas’ shareholders, the number of securities held by each shareholder, the date and particulars of the issue and transfer of each security, and each shareholder’s respective address, phone number and email address (collectively the “**Shareholder Information**”) is not a violation of privacy law pursuant to the *Personal Information Protection Act* (Alberta);
 - (iii) authorizing and directing that Atlas forthwith provide the Shareholder Information to Mantle; and

¹ September 15 Affidavit, at para 12.

- (iv) 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 December 28, 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) an Order:
 - (i) approving a contract of auction between the Mantle and Ritchie Bros. Auctioneers (Canada) Ltd. (“**RB**”) dated October 31, 2023 (the “**Auction Agreement**”) providing for the auction and sale of the certain equipment owned by Mantle (the “**Equipment**”);
 - (ii) approving the sale of the Equipment in accordance with the terms of the Auction Agreement; and
 - (iii) vesting all of the right, title and interest of Mantle in and to the Equipment in each purchaser thereof in accordance with the Auction Agreement, free and clear of any security interest, charge, lien or other encumbrance;
 - (c) an Order sealing the Confidential Affidavit of Byron Levkulich, sworn November 1, 2023, containing an unredacted version of the Auction Agreement and the Bid Summary (as defined herein) on the Court Record subject to the terms set forth therein (the “**Confidential Affidavit**”); and
 - (d) 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 November 1, 2023 (the “**November 2 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**”), the supplemental Affidavit of Byron Levkulich sworn August

11, 2023 (the “**August 11 Affidavit**”) and Affidavit of Byron Levkulich sworn September 15, 2023 (the “**September 15 Affidavit**” and together with the November 2 Affidavit, August 7 Affidavit, August 8 Affidavit and August 11 Affidavit, the “**Affidavits**”).

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

B. FACTS

Background Facts

6. The facts forming the background to this Application are set out in more detail in the November 2 Affidavit and the other Affidavits filed in the Proposal Proceedings. Capitalized terms that are not defined in this brief have the meanings given to them in the November 2 Affidavit.

General Efforts to Sell Assets

7. Mantle, in consultation with the Proposal Trustee, worked to develop the most effective processes possible to sell both the Aggregate Pits that are either operational or have significant reserves (the “**Active Aggregate Pits**”) and the capital equipment which it owns (the “**Equipment**”). Mantle has also continued to sell its inventory of Aggregate.² Mantle goal is utilize the proceeds to complete its Reclamation Work and to provide a fund that will permit distributions to secured creditors.

Active Aggregate Pits Sale Process

8. In September 2023 Mantle, in conjunction with the Proposal Trustee, developed a sale solicitation process (the “**SSP**”) with respect to the nine (9) Active Aggregate Pits. This involved creating an electronic data room, preparing a non-disclosure agreement so that parties who may be interested in purchasing the Active Aggregate Pits would have access to the information on a confidential basis, and preparing marketing information and

² Affidavit of Byron Levkulich sworn November 2, 2023 [**November 2 Affidavit**], paras 24 & 25.

materials including a teaser letter. The deadline for receipt of letters of intent or expressions of intent from prospective purchasers was October 25, 2023.

9. Several parties submitted letters of intent and expressions of interest by the October 25, 2023 deadline and Mantle's management has been carrying on discussions with those parties to advance the process.³

Sale of Equipment

10. In order to market and sell the Equipment, Mantle in consultation with the Proposal Trustee approached auctioneers and equipment dealers seeking proposals and received five (5) proposals. Two (2) proposals were rejected and Mantle approached the three (3) remaining bidders, who each submitted revised bids that included net minimum guarantees. The Proposal Trustee consulted with Travelers, which has a PMSI in the majority of the Equipment. Travelers expressed a preference for the bid of RB.⁴
11. Based upon the analysis of Mantle and the Proposal Trustee, and Travelers' expressed preferences, the RB bid was chosen as the successful bid. Attached as Exhibit "B" to the Confidential Affidavit is a Bid Summary prepared by the Proposal Trustee. The RB bid was chosen as the successful bid because of RB's expertise in carrying out successful auctions of industrial equipment, its superior market reach, and its financial resources. This maximized Mantle's chances of maximizing the sale proceeds of the auction and minimized any credit risk that RB would not be able to pay to Mantle its share of the proceeds of sale.⁵
12. RB and Mantle negotiated and entered into the Auction Agreement.⁶ The Auction Agreement provides for RB to carry out a marketing process and to hold the auction of the Equipment over three days on December 13, 14 and 15, 2023 at RB's auction site in Alberta. RB provided a guarantee of the minimum gross proceeds ("**MGP**") from the sale

³ November 2 Affidavit, para 21.

⁴ November 2 Affidavit, paras 28 and 30.

⁵ November 2 Affidavit, para 32.

⁶ A redacted copy of the Auction Agreement is attached to the November 2 Affidavit as Exhibit "C" and an unredacted copy is attached to the Confidential Affidavit as Exhibit "B".

of the Equipment, which set a floor (after the deduction of RB's commission) for Mantle's recovery. Proceeds in excess of the MGP are to be split based upon agreed upon percentages. The Auction Agreement is conditional upon receiving the approval of this Honourable Court.⁷

Atlas Shareholder Information

13. Mantle owns approximately a third of the shares in Atlas, a private Alberta corporation. Atlas holds half of the shares in 13866194 Alberta Ltd. ("**1386**"). 1386 holds an interest in public lands under a surface material lease identified as SML 030074. Mantle has been advised that the lands subject to SML 030074 hold significant reserves of Aggregate. Therefore, along with its efforts to sell the Active Aggregate Pits pursuant to the SSP, Mantle intends to sell its shares in Atlas. Because Atlas is a private corporation, Mantle has assumed that the most likely purchasers of those shares are other shareholders in Atlas.⁸
14. Mantle has requested that Atlas give Mantle's representatives access to Atlas' securities register, in which Atlas is required to include the Shareholder Information, in order to enable Mantle to give notice to Atlas' shareholders of the opportunity to purchase Mantle's shares in Atlas.⁹
15. Atlas has refused to provide Mantle with the Shareholder Information on the basis of privacy concerns and because Atlas is considering offering to buy back Mantle's shares in Atlas. Atlas and its counsel have advised Mantle and its counsel that Atlas is only prepared to provide Mantle's contact information to Atlas' shareholders in the event Atlas does not purchase Mantle's shares and Atlas is not prepared to provide Mantle the Shareholder Information regardless if it purchases Mantle's shares in Atlas or not.¹⁰

⁷ November 2 Affidavit, para 32.

⁸ November 2 Affidavit, para 36.

⁹ November 2 Affidavit, para 37.

¹⁰ November 2 Affidavit, paras 38 and 39.

Other Activities

16. Mantle and its counsel were required to expend significant resources and time in responding to the appeal by Travelers of the KB Decision.
17. Mantle has continued its Reclamation Work on the Inactive Aggregate Pits.¹¹ Unless the Reclamation Liabilities of Mantle are addressed or provided for, no distribution can be made to creditors as a result of the 2019 decision of the Supreme Court of Canada in *Orphan Well Association v Grant Thornton Ltd.*
18. Mantle is in the process of preparing a plan of compromise and arrangement in order to permit distributions to secured creditors once Reclamation Liabilities have been addressed or provided for. This requires a future application to convert these Proposal Proceedings into proceedings under the *Companies' Creditors Arrangement Act* because the time periods in the Proposal Proceedings will not permit Mantle to accomplish the goals of addressing the Reclamation Liabilities and making distributions to the secured creditors.¹²

C. ISSUES

19. The issues this Brief addresses are whether this Honourable Court should:
 - (a) approve the Auction Agreement providing for the auction and sale the Equipment;
 - (b) order that the Equipment as auctioned by RB be vested in purchasers from RB free and clear of any mortgage, charge, security interest, lien or other encumbrance;
 - (c) seal the Confidential Affidavit;
 - (d) provide a declaration that the provision of the Shareholder Information by Atlas to Mantle does not violate privacy law;
 - (e) authorize and direct Atlas to make the Shareholder Information available to Mantle;

and

¹¹ November 2 Affidavit, paras 26 & 27.

¹² November 2 Affidavit, paras 41-43.

- (f) extend the time within which a proposal must be filed.

D. LAW AND ARGUMENT

Approval of the Auction Agreement is appropriate

(a) *Test and Factors*

20. Debtors who have filed an NOI are prohibited from selling their assets outside of the ordinary course of business unless authorized to do so by the Court.¹³
21. Section 65.13(4)¹⁴ of the *BIA* establishes factors for the Court to consider in determining whether a sale of assets outside of the ordinary course of business should be approved:

“Factors to be considered

(4) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the trustee approved the process leading to the proposed sale or disposition;

(c) whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.”

22. The factors outlined above are comparable to the criteria set out by the Ontario Court of Appeal in *Soundair*¹⁵ and those criteria have been applied in *BIA* proposal proceedings.¹⁶

¹³ *BIA* s.65.13(1) [Tab 1].

¹⁴ *BIA* s.65.13(4) [Tab 1].

¹⁵ *Royal Bank v Soundair Corp.* (1991), 1991 CarswellOnt 205, 7 CBR (3d) 1, 83 OLR (41) 76 [*Soundair*], at para 16 [Tab 9].

¹⁶ *PaySlate Inc. (Re)*, 2023 BCSC 608 at para 104 [Tab 10].

When considering whether to approve a bid accepted by a debtor, the Court is to consider and determine:

- (a) whether the debtor made sufficient effort to get the best price and has not acted improvidently;
 - (b) the interests of all parties;
 - (c) the efficacy and integrity of the process by which offers were obtained; and
 - (d) whether there has been unfairness in the working out of the process.¹⁷
23. The factors for consideration for the Court in approving a proposed sale outlined in s. 65.13(4) of the *BIA* are both non-exhaustive and non-determinative. The approval of a sale is ultimately a matter of judicial discretion to be exercised with a view to whether the proposed sale is appropriate, fair, and reasonable in the circumstances.¹⁸
24. The language found in s. 65.13(7) of the *BIA* is identical to s. 36(6) of the *Companies' Creditors Arrangement Act* (Canada)¹⁹ and provides for the sale of a debtor's assets free and clear of encumbrances:

“Assets may be disposed of free and clear

(7) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the insolvent person or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.”

¹⁷ *Soundair* at para 6 [**Tab 9**].

¹⁸ *Re White Birch Paper Holding Co.*, 2010 QCCS 4915 at paras 48, 49, 53 [**Tab 11**]; *Re Feronia Inc.*, 2020 BCSC 1372 at paras 38-39 [**Tab 12**].

¹⁹ *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508 at para 61 [**Tab 13**]; *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [**Tab 5**], s.36(6).

Sufficient Effort, Efficacy and Integrity of the Auction Process

25. The Proposal Trustee supports Mantle entering into the Auction Agreement.²⁰ Mantle also advised Fiera, a secured creditor of Mantle that it was entering into the Auction Agreement and Fiera did not object.
26. Mantle submits that the marketing efforts and SSP process undertaken were robust, reasonable, appropriate and meet the sufficiency factor contemplated in *Soundair*.

Interest of all Parties

27. In selecting RB's bid and entering into the Auction Agreement, Mantle consulted with the secured creditors who had the greatest economic interest in the Equipment, which is principally Travelers.²¹ In *Feronia* the Supreme Court of British Columbia held that the weight to be given to the factor of creditor consultation is dependent on, "the degree to which there was ever a realistic prospect of any recovery for them".²² In the immediate case, Mantle submits that the Auction Agreement provides the highest and best prospect of recovery for secured creditors.
28. Mantle has been advised by the Proposal Trustee that it will be filing a report stating that in its opinion, the Auction Agreement is commercially reasonable.
29. In these circumstances Mantle respectfully submits that it is commercially reasonable and in the best interest of Mantle's stakeholders that the Auction Agreement receive the approval of this Honourable Court.

Unfairness in the Process

30. Mantle submits that it has acted reasonably, prudently, fairly and not arbitrarily in selecting the Auction Agreement. In particular, at all times Mantle has consulted with the Proposal

²⁰ Third Report of FTI Consulting Canada dated November 3, 2023, para 63.

²¹ November 2 Affidavit, para 31 and 32.

²² *Feronia* at para 62 [Tab 12]

Trustee and the primary equipment stakeholders, namely Travelers, in good faith with a view of selecting a bid that will maximize recovery for its creditors.

31. Based on the foregoing, Mantle submits that the *Soundair* criteria have been satisfied, they have acted in a commercially reasonable manner and this Court should grant an Order approving and ratifying Mantle's acceptance of the Auction Agreement and the sale of the Equipment by RB.

Sealing the Confidential Affidavit is Appropriate

32. Mantle requests a sealing order with respect to the Confidential Affidavit, until the administration of the conclusion of the Proposal Proceedings or further order of the court.
33. Part 6 Division 4 of the Alberta *Rules of Court*²³ provides that the Court may order that a document filed in a civil proceeding is confidential, may sealed and not form part of the public record of the proceedings.
34. The test to obtain a sealing order was set out by the Supreme Court of Canada in *Sierra Club of Canada v Canada (Minister of Finance)*²⁴ and revised by the Supreme Court in *Sherman Estate v Donovan*:

“The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:

- (1) court openness poses a serious risk to an important public interest;
- (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,

²³ *Rules of Court*, Alta Reg 124/2010, Part 6 Division 4 [Tab 8].

²⁴ *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41, at para 53 [Tab 14].

- (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

Only where all three of these prerequisites have been met can a discretionary limit on openness — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments.”²⁵

35. In this case, the Confidential Affidavit attaches a bid summary, that sets out the offer price and other economic terms that RB and the other bidders were prepared to offer. It further contains an unredacted version of the Auction Agreement.
36. Mantle is of the opinion that the specific information pertaining to all the offers/proposals received through the SSP process is sensitive in nature. If RB does not carry out the auction or otherwise breaches its obligations under the Auction Agreement, and it is necessary for Mantle to seek new proposals from auctioneers and equipment dealers, that information could prejudice its ability to do so.²⁶ This would have a potentially material and negative effect on Mantle’s ability to maximize the proceeds of sale of the Equipment, which would prejudice the stakeholders of Mantle.
37. Mantle therefore submits that the salutary effects of a sealing order until the conclusion of Proposal Proceedings outweighs any negative effects to the open court principle.

Disclosure of the Shareholder Information is Appropriate

Business Corporations Act (Alberta) Considerations

38. The *Business Corporations Act* of Alberta²⁷ (the “*ABCA*”) sets out the following sections which require Atlas to provide Mantle with the Shareholder Information:
- (a) Section 21(1)(d): A corporation shall prepare and maintain at its records office records containing a securities register complying with Section 49 of the *ABCA*.²⁸

²⁵ *Sherman Estate v Donovan*, 2021 SCC 25, at para 35 [Tab 15].

²⁶ November 2 Affidavit, para 35.

²⁷ *Business Corporations Act*, RSA 2000, c B-9 (“*ABCA*”) [Tab 3]

²⁸ *ABCA*, section 21(1)(d) [Tab 3]

- (b) Section 49: A corporation shall maintain a securities register in which it records the securities issued by it in registered form, showing with respect to each class or series of securities:
- (i) the name and current contact information of each person who is or has been a security holder,
 - (ii) the number of securities held by each security holder, and
 - (iii) the date and particulars of the issue and transfer of each security.²⁹
- (c) Section 23(1): The directors and shareholders of a corporation, their agents and legal representatives may examine the records referred to in section 21(1) during the usual business hours of the corporation free of charge.³⁰
- (d) Section 23(11): A list of shareholders obtained under this section must not be used by any person except in connection with:
- (i) an effort to influence the voting shareholders of the corporation,
 - (ii) an offer to acquire shares of the corporation, or
 - (iii) any other matter relating to the affairs of the corporation.³¹

(Emphasis added)

39. Mantle submits that the purpose of its request for the Shareholder Information is to contact Atlas' current shareholders in an attempt to market Mantle's shares in Atlas in a commercially reasonable manner. It's use of the Shareholder Information thus falls under "offer to acquire shares of the corporation" pursuant to section 23(11)(b) of the *ABCA*. Mantle's efforts further relate to matters relating to the affairs of Atlas as provided under section 23(11)(c) of the *ABCA*.

²⁹ *ABCA*, section 49 [Tab 3]

³⁰ *ABCA*, section 23(1) [Tab 3].

³¹ *ABCA*, section 23(11) [Tab 3].

40. The meaning of affairs under the *ABCA* means the relationships among a corporation, its affiliates and the shareholders, directors and officers of those bodies corporate, but does not include the business carried on by those bodies corporate. “Affairs” addresses the internal relationships within a corporation.³²
41. The Alberta Court of Appeal has held that the provision of the Shareholder Information to a shareholder of a corporation under the *ABCA* is mandatory, and not subject to discretion, once the technical provisions for disclosure under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 have been met.³³ In this regard, Mantle’s counsel sent a letter to Atlas’ registered office on October 25, 2023 by email and personal delivery requiring that this information be provided.³⁴
42. Other cases have found that the disclosure of a corporation under business corporations statutes is mandatory and not discretionary as per Atlas’ position:
- (a) in *Jot it! Software Corp v Plant Software Inc.*³⁵, the Supreme Court of British Columbia referenced the *Company Act* (British Columbia), the predecessor legislation to the current *Business Corporation Act* (British Columbia), which provided that any person may examine and take extracts from the records (including register of members) of a non-reporting corporation. Under the *Company Act*, a corporation must furnish a list of members to any person who has delivered a required affidavit. The *Business Corporation Act* (British Columbia) provides has the same or more comprehensive legislation than the *Company Act*; and
 - (b) in *Mathieu v J. R. Stephenson MFG Ltd.*³⁶, shareholders entered into a unanimous shareholder agreement with the corporation, and eventually the relationship between parties deteriorated. The shareholders’ principals requested financial information from the corporation, but did not receive it. The Manitoba Court of

³² *ABCA*, section 1(a) [Tab 3], and *Allard v Shaw Communications Inc.*, 2009 ABQB 748 at para 10 [Tab 16]

³³ *EnCana Corporation v Douglas*, 2005 ABCA 439 [Encana], at paras 23 and 27 [Tab 17]; *Canada Business Corporations Act*, RSC 1985, c C-44, ss. 20(1), 21(1), 21(9) and 50(1), [Tab 30tab 28]

³⁴ November 2 Affidavit, para 39.

³⁵ *Jot it! Software Corp v Plant Software Inc.*, 1998 CarswellBC 471 at paras 9 and 10 [Tab 18].

³⁶ *Mathieu v J. R. Stephenson MFG Ltd.*, 2013 MBQB 64 [Matieu] at paras 77 and 79 [Tab 19].

King’s Bench determined that the shareholders were entitled to financial statements on demand and held that absent clear proof that the director intends to abuse the confidence and materially hurt the corporation, it can be assumed that the shareholder will be exercising its use of the information for a proper purpose. The Court stated:

“A shareholder does not require a special interest to obtain corporate information where a statutory right exists. All that is required is that the shareholder’s request technically complies with the statute’s requirements.”³⁷

43. British Columbia and Manitoba corporations act legislation have analogous sections to the *ABCA* sections listed above.³⁸

Privacy Law is not Applicable to Disclosure of the Shareholder Information

44. Atlas’ argument that it cannot provide the Shareholder Information to Mantle based on privacy concerns is without merit.
45. The purpose of the *Personal Information Protection Act* (“*PIPA*”) is to govern the collection, use and disclosure of “personal information” by organizations in a manner that recognizes both the right of an individual to have his or her personal information protected and the need of organizations to collect, use or disclose personal information for purposes that are reasonable.³⁹
46. Personal information under the *PIPA* means “means information about an identifiable individual”.⁴⁰ Accordingly, the Shareholder Information relating to corporate shareholders of Atlas does not fall within the purview of the *PIPA*.
47. Under the *PIPA*, as it concerns individuals, an organization may disclose personal information about an individual without the consent of the individual if:

³⁷ *Mathieu*, at para 67 [Tab 17]

³⁸ *Business Corporations Act*, SBC 2002, c 57 at ss. 42(1)(d), 46(1), 49(3) and 111(1) [Tab 4]; *The Corporations Act*, CCSM, c C225 at ss. 20(1)(d), 46, 21(1) and 21(9) [Tab 6].

³⁹ *Personal Information Protection Act*, SA 2003, c P-6.5 [PIPA], s. 3 [Tab 7].

⁴⁰ *PIPA*, section 1(1)(k) – Definition of “personal information” [Tab 7].

- (a) the disclosure of the information is authorized by a statute of Alberta;⁴¹ and
- (b) the disclosure of the information is for a purpose for which the information was collected pursuant to a form that is approved or otherwise provided for under a statute of Alberta or a regulation of Alberta.⁴²

48. The *ABCA*, and in particular sections 23(1), 21(1) and 49(1), is a statute of Alberta which authorizes the disclosure of personal information provided by shareholders of a corporation. The disclosure of the Shareholder Information of any individual shareholders of Atlas to Mantle is for the purpose of Mantle reviewing the Shareholder Information as provided for as its right under the *ABCA* as a shareholder of Atlas.

49. Mantle’s position is supported by relevant case law. In *EnCana Corporation v Douglas*⁴³, the respondent requested the security register from the appellant corporation. The Alberta Court of Appeal acknowledged that the use of the information does not need to be stated when requesting information, but a person may not use it in an improper manner. The Court stated that both the *PIPA* and the *Personal Information Protection and Electronic Documents Act* allow the disclosure of personal information without consent if authorized by law. The Court specifically held that:

“A corporation cannot hide behind general privacy law to deprive shareholders access to the securities register, nor can it use such concerns to fish for information”⁴⁴

Inherent Jurisdiction under the BIA

50. Section 183(1) of the *BIA* provides that the Court of King’s Bench of Alberta has invested in it such jurisdiction at law and in equity as will enable it to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act

⁴¹ *PIPA*, section 20(b)(i) [Tab 7]

⁴² *PIPA*, section 20(b.1) [Tab 7]

⁴³ *Encana*, at para 25 [Tab 17].

⁴⁴ *Encana* at para 26 [Tab 17]

during their respective terms.⁴⁵ This section confers this Honourable Court with the authority to make certain orders based on its inherent jurisdiction.⁴⁶

51. There should not be frequent resort to the Court's inherent jurisdiction and it should only be used sparingly and in a clear case. However, the power can be used where it is necessary to promote the objects of the *BIA*.⁴⁷
52. Court's in *BIA* proposal proceedings have relied upon their inherent jurisdiction to grant orders where it was just and equitable to do so.⁴⁸
53. In this case, Mantle has and continues to act in good faith to convey its assets as part of the Proposal Proceedings. The potential sale of its shares in Atlas is another step in this effort; however, it requires the Shareholder Information in order to properly market its shares in a commercially reasonable effort. Mantle submits that the current shareholders of Atlas will be the most likely parties to consider purchasing Mantle's shares.⁴⁹ Accordingly, it is just and equitable that an order be granted that Atlas provide Mantle with the Shareholder Information.
54. It is also not appropriate that Atlas has taken the position that it will not provide the Shareholder Information to Mantle until it has had an opportunity to not purchase the shares itself. Mantle submits that Atlas' actions in this regard is a veiled attempt by Atlas to extract a corporate opportunity for itself at the expense of Mantle, Mantle's stakeholders and the other shareholders of Atlas.

⁴⁵ *BIA* s. 183(1) [Tab 1].

⁴⁶ *Residential Warranty Co. of Canada Inc., Re*, 2006 ABCA 293 ("*Residential Warranty*"), para 19 [Tab 20].

⁴⁷ *Residential Warranty*, paras 20 and 21 [Tab 20]

⁴⁸ Bankruptcy and Insolvency Law of Canada, 4th Edition § 8:4 - Statutory Interpretation, Gap-Filling and Inherent Jurisdiction of the Court [Tab 2]; see for example *Bearcat Explorations Ltd., Re*, 2004 CarswellAlta 1183 at paras 6, 7 and 9 [Tab 21]

⁴⁹ November 2 Affidavit, para 37.

Extending the Stay Period is Appropriate

55. The Stay Period expires on November 13, 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.
56. 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.⁵⁰
57. 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,⁵¹ although the evidentiary threshold to meet the onus that it has satisfied the section 50.4(9) factors is low.⁵²
58. 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 what a specific creditor would do, and in particular a creditor opposing the request for an extension.⁵³
59. 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

⁵⁰ *BIA*, s 50.4(9) [Tab 1]

⁵¹ *Re Heritage Flooring Ltd.* (2004), 46 CBR (3d) 280 at paras 31,32 and 37 [Tab 22]

⁵² *Re Scotian Distribution Services Limited*, 2020 NSSC 131 at para 24 [Tab 23]; *Re T & C Steel Ltd*, 2022 SKKB 236 at para 20 [Tab 24]

⁵³ *Nautican v Dumont*, 2020 PESC 15 at paras 16-18 [*Nautican*] [Tab 25]

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] ⁵⁴

60. 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.⁵⁵ The test requires a dispassionate evaluation, not the position of an advocate of a specific creditor⁵⁶ and requires the Court to consider what a reasonable creditor might expect to happen or what might reasonably be expected to occur.⁵⁷
61. 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 Reclamation Liabilities have either been fully performed or satisfactorily provided for.⁵⁸ Mantle is the only party in these proceedings that has a viable plan for addressing the Reclamation Liabilities. Mantle has in place the Interim Financing, which will permit it to fund the performance of the Reclamation Work;

⁵⁴ *Baldwin Valley Investors Inc., Re*, 1994 CarswellOnt 253 [*Baldwin*] [Tab 26]

⁵⁵ *Nautican* at paras 16 and 17 [Tab 25].

⁵⁶ *Ibid* at para 18 [Tab 25].

⁵⁷ *Baldwin* at para 4 [Tab 26].

⁵⁸ 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 27], 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 28], where he confirmed that this priority applied to all assets of the debtor.

- (b) Mantle has made significant efforts towards a sale of the Active Pits pursuant to the SSP;
 - (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 the SSP in respect of the Active Aggregate Pits (which will provide for the Reclamation Liabilities relating thereto to be assumed by purchasers acceptable to the AEPA), seeking proposals for the sale of the Equipment and entering into the Auction Agreement. Seeking the sale of assets has been found by courts to be evidence of good faith.⁵⁹ By taking the forgoing steps with respect to the Reclamation Liabilities, it will also be able to recover the security previously provided to the AEPA for the benefit of the creditors; and
62. Mantle has been proceeding in good faith and with due diligence it requires the additional time provided for by an extension of the Stay Period in order to:
- (a) continue developing a plan of compromise and arrangement, which will require a conversion of these Proposal Proceedings to proceedings under the CCAA;
 - (b) complete the Reclamation Work, a substantial portion of which has been accomplished;
 - (c) complete its sales of Aggregate inventory pursuant to sale and supply contracts;
 - (d) collect its accounts receivable; and
 - (e) sell its Equipment and the Active Aggregate Pits.⁶⁰
63. 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. The forgoing demonstrate that Mantle has been acting

⁵⁹ *Re Colossus Minerals*, 2014 ONSC 514 at para 39 [Tab 29]

⁶⁰ November 2 Affidavit, para 27.

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.


64. Based on the updated cash flow projections attached to the third 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.⁶¹

E. CONCLUSION AND RELIEF SOUGHT

65. For the reasons above, Mantle requests the Orders sought be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of November, 2023.

GOWLING WLG (CANADA) LLP

Per: 

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

⁶¹ November 2 Affidavit, para 29.

TABLE OF AUTHORITIES

Tab	Authority
1.	<i>Bankruptcy and Insolvency Act</i> , RSC 1985, c B-3
2.	Bankruptcy and Insolvency Law of Canada, 4th Edition § 8:4 - Statutory Interpretation, Gap-Filling and Inherent Jurisdiction of the Court
3.	<i>Business Corporations Act</i> , RSA 2000, c B-9
4.	<i>Business Corporations Act</i> , SBC 2002, c 57
5.	<i>Companies' Creditors Arrangement Act</i> , RSC 1985, c C-36
6.	<i>The Corporations Act</i> , CCSM, c C225
7.	<i>Personal Information Protection Act</i> , SA 2003, c P-6.5
8.	<i>Rules of Court</i> , Alta Reg 124/2010
9.	<i>Royal Bank v Soundair Corp. (1991)</i> , 1991 CarswellOnt 205, 7 CBR (3d) 1, 83 OLR (41) 76
10.	<i>PaySlate Inc. (Re)</i> , 2023 BCSC 608
11.	<i>Re White Birch Paper Holding Co.</i> , 2010 QCCS 4915
12.	<i>Re Feronia Inc.</i> , 2020 BCSC 1372
13.	<i>Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.</i> , 2019 ONCA 508
14.	<i>Sierra Club of Canada v Canada (Minister of Finance)</i> , 2002 SCC 41
15.	<i>Sherman Estate v Donovan</i> , 2021 SCC 25
16.	<i>Allard v Shaw Communications Inc.</i> , 2009 ABQB 748
17.	<i>EnCana Corporation v Douglas</i> , 2005 ABCA 439
18.	<i>Jot it! Software Corp v Plant Software Inc.</i> , 1998 CarswellBC
19.	<i>Mathieu v J. R. Stephenson MFG Ltd.</i> , 2013 MBQB 64
20.	<i>Residential Warranty Co. of Canada Inc., Re</i> , 2006 ABCA 293
21.	<i>Bearcat Explorations Ltd., Re</i> , 2004 CarswellAlta 1183

22. *Re Heritage Flooring Ltd.* (2004), 46 CBR (3d) 280
23. *Re Scotian Distribution Services Limited*, 2020 NSSC 131
24. *Re T & C Steel Ltd*, 2022 SKKB 236
25. *Nautican v Dumont*, 2020 PESC 15
26. *Baldwin Valley Investors Inc., Re*, 1994 CarswellOnt 253
27. *Orphan Well Association v Grant Thornton Ltd.*, 2019 SCC 5
28. *Orphan Well Association v Trident Exploration Corp.*, 2022 ABKB 839
29. *Re Colossus Minerals*, 2014 ONSC 514
30. *Canada Business Corporations Act*, RSC 1985, c C-44