Court File No: _____

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

TRAVELERS CAPITAL CORP.

Applicant
(Appellant)

-and-

MANTLE MATERIALS GROUP, LTD.

Respondent
(Respondent)

APPLICATION FOR LEAVE TO APPEAL
Filed by the Applicant, Travelers Capital Corp.
Pursuant to Rule 40 of the *Supreme Court Act,*
Section 183(3) of the *Bankruptcy and Insolvency Act*, and
Rule 25 of the *Rules of the Supreme Court of Canada*

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Solicitors for the Respondent, Mantle Materials Group, Ltd.

Notice pursuant to Rule 26(2)(b)

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Solicitor for Alberta Environment and Protected Areas

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IN THE SUPREME COURT OF CANADA
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BETWEEN:

TRAVELERS CAPITAL CORP.

Applicant
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-and-

MANTLE MATERIALS GROUP LTD.

Respondent
(Respondent)

NOTICE OF APPLICATION FOR LEAVE TO APPEAL
Filed by the Applicant
Pursuant to Rule 40(1) of the *Supreme Court Act*
Section 183(3) of the *Bankruptcy and Insolvency Act*
Rule 25 of the *Rules of the Supreme Court of Canada*

TAKE NOTICE that the Applicant, Travelers Capital Corp., applies for leave to appeal to the Supreme Court of Canada, under section 40(1) of the *Supreme Court Act,* RSC 1985, c S-26, and section 183(3) of the the *Bankruptcy and Insolvency Act,* RSC 1985, c B-3 ("***BIA***") from the judgment and orders of the Court of Appeal of Alberta, Court File No. 2301-0216AC pronounced on October 23, 2023 and November 27, 2023, and for any further or other order that the Court may deem appropriate;

AND FURTHER TAKE NOTICE that this application for leave to appeal is made on the grounds that this case raises the following issues of national or public importance:

A. What are "assets unrelated to the environmental condition or damage", as referenced in paragraph 159 of *Orphan Well Association v Grant Thornton Ltd,* 2019 SCC 5, and are

those assets available to satisfy end-of-life environmental obligations ahead of a distribution to creditors?; and

B. Whether the various formulations of the test for declaring that a litigant has an appeal as of right pursuant to section 193(c) of the *BIA* should be reconciled into a single constituent test?

DATED AT CALGARY, ALBERTA THIS 20th DAY OF DECEMBER, 2023.

Ryan Zahara and Molly McIntosh
Solicitors for the Applicant,
Travelers Capital Corp.

NOTICE TO THE RESPONDENT OR INTERVENER: A respondent or intervener may serve and file a memorandum in response to this application for leave to appeal within 30 days after the day on which a file is opened by the Court following the filing of this application for leave to appeal or, if a file has already been opened, within 30 days after the service of this application for leave to appeal. If no response is filed within that time, the Registrar will submit this application for leave to appeal to the Court for consideration under section 43 of the *Supreme Court Act*.

Reasons for Judgment:

- Reasons of the Court of King's Bench of Alberta, 2023 ABKB 488
- Reasons of the Court of Appeal of Alberta, 2023 ABCA 302
- Reasons of the Court of Appeal of Alberta, 2023 ABCA 339

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Solicitor for Alberta Environment and Protected Areas

Court of King's Bench of Alberta

Citation: Re Mantle Materials Group, Ltd, 2023 ABKB 488

Date: 20230828
Docket: 2301 10358
Registry: 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.

Reasons for Decision
of the
Honourable Justice Colin C.J. Feasby

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 B-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 pre-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 end-of-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 ("*Redwater*") 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 end-of-life environmental obligation need only be satisfied using assets encumbered by or related to the end-of-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 gravel-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 gravel-producing properties.

[7] EPOs are issued pursuant to AEPA's authority under the *Environmental Protection and Enhancement Act*, RSA 2000, c E-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 end-of-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 end-of-life reclamation steps to be taken at various gravel-producing or formerly gravel-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

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[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.

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 gravel-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 purchase-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 gravel-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 end-of-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 end-of-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 end-of-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 66-67 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 end-of-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 end-of-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 end-of-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 non-monetary end-of-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 "non-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.

Heard on the 15th day of August, 2023.
Dated at the City of Calgary, Alberta this 28th day of August, 2023.

Colin C.J. Feasby
J.C.K.B.A.

Appearances:

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for Mantle Materials Group, Ltd.

Alexis Teasdale & Joel Schachter, Lawson Lundell LLP
for Travelers Capital Corp

Pantelis Kyriakakis, McCarthy Tétrault LLP
for the Proposal Trustee, FTI Consulting Canada Inc.

Doug Nishimura, Field LLP,
for Alberta Environment and Protected Areas

Darren Bieganek, Duncan Craig LLP
for 945441 Alberta Ltd

COURT FILE NO.	25-2965622
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANTS	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	**ORDER (Stay Extension, Administration Charge, Interim Financing, Interim Financing Charge, D&O Charge and Other Relief)**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Gowling WLG (Canada) LLP** 1600, 421 – 7th Avenue SW Calgary, AB T2P 4K9 Attn: **Tom Cumming / Sam Gabor / Stephen Kroeger** Phone: 403.298.1938 / 403.298.1018 Fax: 403.263.9193 Email: tom.cumming@gowlingwlg.com / sam.gabor@gowlingwlg.com / stephen.kroeger@gowlingwlg.com File No.: A1171561

DATE ON WHICH ORDER WAS PRONOUNCED: August 15, 2023

LOCATION WHERE ORDER WAS PRONOUNCED: Calgary, Alberta

JUSTICE WHO MADE THIS ORDER: The Honourable Justice Feasby in Commercial Chambers

UPON THE APPLICATION of Mantle Materials Group, Ltd. ("**Mantle**" or, the "**Applicant**") filed August 8, 2023; **AND UPON** reading the Affidavit of Byron Levkulich, sworn August 7, 2023, the Supplemental Affidavit of Byron Levkulich, sworn August 11, 2023 (the "**August 11 Affidavit**"), the Second Supplemental Affidavit of Byron Levkulich sworn, August 14, 2023, the Affidavit of Cory Pichota, sworn August 8, 2023, the Affidavit of Warren Miller of Travelers Capital Corp. ("**Travelers**"), sworn August 4, 2023, the Affidavit of Heather Dent, sworn August 11, 2023, and the Affidavits of Service of Samah Zeineddine, sworn August 8 and 15, 2023; **AND UPON** reading the Report of FTI Consulting Canada Inc. in its capacity as proposal trustee of the Applicant (in such capacity, the "**Proposal Trustee**"), dated August 4, 2023, and the Supplemental Report of the Proposal

Trustee, dated August 11, 2023; **AND UPON** hearing submissions by counsel for the Applicant, the Proposal Trustee, Travelers, the Minister of Environment and Protected Areas any other counsel or other interested parties present,

IT IS HEREBY ORDERED THAT:

SERVICE

1. The time for service of the notice of application for this order (the "**Order**") is hereby abridged and deemed good and sufficient and this application is properly returnable today, and no other than those persons served is entitled to service of the notice of application.

EXTENSION OF TIME TO FILE A PROPOSAL

2. The time within which Mantle is required to file a proposal to its creditors with the Official Receiver, under section 50.4 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "***BIA***") is hereby extended to September 27, 2023 (as extended from time to time, the "**Stay Period**").

ADMINISTRATION CHARGE

3. Legal counsel to Mantle, the Proposal Trustee and McCarthy Tétrault, legal counsel to the Proposal Trustee, as security for their respective professional fees and disbursements incurred in preparing for and during these proposal proceedings, and both before and after the granting of this Order, shall be entitled to the benefit of, and are hereby granted, a security and charge (the "**Administration Charge**") on all of Mantle's present and after-acquired assets, property and undertakings (the "**Property**"), which charge shall not exceed $425,000.

INTERIM FINANCING

4. Mantle is hereby authorized and empowered to obtain and borrow under an interim financing facility (the "**Interim Financing Facility**") pursuant to the interim financing facility commitment letter dated August 10, 2023 (the "**Interim Financing Commitment Letter**") between Mantle as borrower and RLF Canada Lender Limited (the "**Interim Lender**") as lender, provided that borrowings under the Interim Financing Facility shall not exceed the principal amount of $2,200,000 unless permitted by further order of this Court and agreed to by the Interim Lender.

5. The Interim Financing Facility shall be on the terms and subject to the conditions set forth in the Interim Financing Commitment Letter attached as Exhibit "H" to the August 11 Affidavit, as such Interim Financing Commitment Letter may be amended in accordance with its terms.

6. The Interim Lender shall be entitled to the benefit of and are hereby granted a security and charge on the Property (the "**Interim Lender's Charge**") as security for the payment and performance of the indebtedness, liabilities and obligations of Mantle to the Interim Lender under the Interim Financing Commitment Letter and the Interim Financing Facility created thereby in the principal amount of $2,200,000 together with any interest accrued thereon or costs and expenses incurred thereunder.

D&O INDEMNIFICATION AND CHARGE

7. Mantle shall indemnify its directors and officers against obligations and liabilities that they may incur as directors or officers after the Filing Date, except to the extent that, with respect to any director or officer, the obligation or liability was incurred as a result of the director or officer's gross negligence or wilful misconduct.

8. Each of the directors and officers of Mantle shall be entitled to the benefit of and are hereby granted a charge (the "**D&O Charge**") on all of the Property, which shall not exceed an aggregate amount of $150,000, as security for the indemnity provided in this Order.

PRIORITY OF CHARGES

9. The filing, registration or perfection of the Administration Charge, the Interim Lender's Charge and the Directors Charge (collectively, the "**Charges**"**)** shall not be required, and the Charges shall be enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

10. 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 the

Charges and the Travelers' Security Interests is subject to further order of the Court. The ranking as between the Charges shall be as follows:

(a) first, the Administration Charge;

(b) second, the Interim Lender's Charge; and

(c) third, the D&O Charge.

11. Except as otherwise provided herein, or as may be approved by this Honourable Court, Mantle shall not grant any Encumbrances over the Property that rank in priority to, or *pari passu* with, any of the Charges, unless Mantle obtains the prior written consent of the beneficiaries of the Charges (the "**Chargees**") or further order of this Court.

12. The Charges shall not be rendered invalid or unenforceable and the rights and remedies of the Chargees thereunder shall not otherwise be limited or impaired in any way by:

(a) the pendency of these proceedings and the declarations of insolvency made in this Order;

(b) any application(s) for bankruptcy order(s) issued pursuant to the *BIA***,** or any bankruptcy order made pursuant to such applications;

(c) the filing of any assignments for the general benefit of creditors made pursuant to the *BIA*;

(d) the provisions of any federal or provincial statutes; or

(e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") that binds Mantle, and notwithstanding any provision to the contrary in any Agreement:

(i) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of any documents in respect thereof, shall create or be deemed to constitute a new breach by Mantle of any Agreement to which they, or any one of them, is a party;

(ii) none of the Chargees shall have any liability to any person whatsoever as a result of any breach of any Agreement caused by or resulting from the

creation of the Charges, or the execution, delivery or performance of the Interim Financing Facility; and

(iii) the payments made by Mantle pursuant to this Order and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct or other challengeable or voidable transactions under any applicable law.

RESTATEMENT OF STAY AND CONTINUATION OF SERVICES

13. In accordance with section 69(1) of the *BIA*, during the period between July 14, 2023 (the "**Filing Date**") and the date on which the Stay Period expires:

(i) no creditor has any remedy against Mantle or against any of the Property or shall commence or continue any action, execution or other proceedings for the recovery of a claim provable in bankruptcy; and

(ii) no provision of a security agreement between Mantle and a secured creditor that provides, in substance, that on Mantle's insolvency, the default by Mantle of an obligation under the security agreement, or the filing by Mantle of the NOI, Mantle ceases to have rights to use or deal with Property secured under the security agreement as it would otherwise have, has any force or effect.

14. In accordance with section 65.1(1) of the *BIA* but subject to section 65.1(4) of the *BIA*, no person may terminate or amend any agreement with Mantle or claim an accelerated payment, or a forfeiture of the term, under any agreement with Mantle by reason only that Mantle is insolvent or a NOI has been filed with respect to Mantle.

15. During the Stay Period, all persons having oral or written agreements with Mantle or statutory or regulatory mandates for the supply of goods and/or services are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by Mantle, provided in each case that the normal prices or charges for such goods or services received after the date of this Order are paid by Mantle in accordance with normal payment practices of Mantle or other practices as may be agreed upon by the supplier or service provider and each of Mantle and the Proposal Trustee, or as may be ordered by this Honourable Court.

16. Mantle shall be entitled, but not required, to pay amounts owing to any supplier for goods or services actually supplied to Mantle prior to July 14, 2023 if, in the opinion of Mantle, any such payment is necessary to maintain the uninterrupted operations of the business (such payments being "**Emergency Payments**"), provided that the Proposal Trustee approves such payment and such payment is contemplated by the cash flow projections filed by the Proposal Trustee in these proceedings under section 50(6) of the *BIA*.

17. In the event that the payment of an Emergency Payment which was made prior to the date of this Order has been funded by an advance under the Interim Financing Facility, Mantle shall be entitled to repay such advance(s) to the Interim Lender from any amounts received by Mantle subsequent to the Filing Date.

18. Any Person (as such term is defined in the *BIA*) that has collected, realized, seized or taken possession of any money or other Property subsequent to the Filing Date without the consent of the Proposal Trustee or leave of this Honourable Court shall promptly deliver or surrender to Mantle such money or other Property.

ALLOCATION

19. Any interested Person may apply to this Court on notice to any other party likely to be affected for an order to allocate the Administration Charge, the Interim Lender's Charge, and the D&O Charge amongst the various assets comprising the Property.

GENERAL

20. Service of this Order may be effected by facsimile, electronic mail, personal delivery or courier. Service is deemed to be effected the next business day following transmission or delivery of this Order.

21. The approval as to form and content of the parties to this Order may be signed in counterpart and by facsimile or other electronic means.

J.C.K.B.A.

Approved as to form and content this 17th day of August, 2023 by Legal Counsel for FTI Consulting Canada Inc., in its capacity as Proposal Trustee for the Applicant

Pantelis Kyriakakis
McCarthy Tétrault LLP

Approved as to form and content this ____ day of August, 2023 by Legal Counsel for the Applicant

Tom Cumming
Gowling WLG (Canada) LLP

Approved as to form and content this ____ day of August, 2023 by Legal Counsel for Alberta Environment and Protected Areas (AEP)

Doug Nishimura
Field Law

Approved as to form and content this ____ day of August, 2023 by Legal Counsel for Travelers Capital Corp.

Alexis Teasdale
Lawson Lundell LLP

Approved as to form and content this ____ day of August, 2023 by Legal Counsel for FTI Consulting Canada Inc., in its capacity as Proposal Trustee for the Applicant

Pantelis Kyriakakis
McCarthy Tétrault LLP

Approved as to form and content this 17th day of August, 2023 by Legal Counsel for the Applicant

DocuSigned by:
Thomas Cumming
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Tom Cumming
Gowling WLG (Canada) LLP

Approved as to form and content this 17th day of August, 2023 by Legal Counsel for Alberta Environment and Protected Areas (AEP)

Doug Nishimura
Field Law

Approved as to form and content this ____ day of August, 2023 by Legal Counsel for Travelers Capital Corp.

Alexis Teasdale
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Approved as to form and content this ____ day of August, 2023 by Legal Counsel for FTI Consulting Canada Inc., in its capacity as Proposal Trustee for the Applicant

Pantelis Kyriakakis
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Tom Cumming
Gowling WLG (Canada) LLP

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Doug Nishimura
Field Law

Approved as to form and content this 17th day of August, 2023 by Legal Counsel for Travelers Capital Corp.

Alexis Teasdale
Lawson Lundell LLP

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COURT FILE NO.	25-2965622
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANTS	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	**ORDER (Amending Order of Justice Feasby dated August 15, 2023)**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Gowling WLG (Canada) LLP** 1600, 421 – 7th Avenue SW Calgary, AB T2P 4K9 Attn: **Tom Cumming / Sam Gabor / Stephen Kroeger** Phone: 403.298.1938 / 403.298.1018 Fax: 403.263.9193 Email: tom.cumming@gowlingwlg.com / sam.gabor@gowlingwlg.com / stephen.kroeger@gowlingwlg.com File No.: A1171561

DATE ON WHICH ORDER WAS PRONOUNCED: August 28, 2023

LOCATION WHERE ORDER WAS PRONOUNCED: Calgary, Alberta

JUSTICE WHO MADE THIS ORDER: The Honourable Justice Feasby in Commercial Chambers

UPON THE APPLICATION of Mantle Materials Group, Ltd. filed August 8, 2023; **AND UPON** referring to the reasons for decision of the Honourable Justice Feasby dated August 28, 2023 having the citation *Re Mantle Materials Group, Ltd*, 2023 ABKB 488; **AND UPON** reading the Order of the Honourable Justice Feasby dated August 15, 2023 in these proceedings (the "**August 15 Order**");

IT IS HEREBY ORDERED THAT:

AMENDMENT

1. Paragraph 10 of the August 15 Order shall be amended to read as follows:

> "The Charges shall constitute a security and charge on the Property and 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**"), The ranking as between the Charges shall be as follows: (a) first, the Administration Charge; (b) second, the Interim Lender's Charge; and (c) third, the D&O Charge."

GENERAL

2. Service of this Order may be effected by facsimile, electronic mail, personal delivery or courier. Service is deemed to be effected the next business day following transmission or delivery of this Order.

J.C.K.B.A.

In the Court of Appeal of Alberta

Citation: Mantle Materials Group, Ltd v Travelers Capital Corp, 2023 ABCA 302

Date: 20231023
Docket: 2301-0216AC
Registry: Calgary

Between:

Mantle Materials Group, Ltd

Respondent

- and -

Travelers Capital Corp

Applicant

Corrected judgment: A corrigendum was issued on October 24, 2023; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Decision of
The Honourable Justice William T. de Wit

Application for Permission to Appeal

Reasons for Decision of
The Honourable Justice William T. de Wit

Introduction

[1] Travelers Capital Corp (Travelers) applies for a declaration that leave is not required to appeal the August 28, 2023 decision of Feasby J or alternatively, applies for permission to appeal that same order.

[2] The respondent, Mantle Materials Group, Ltd. (Mantle), opposes the application and cross applies for a lifting of a stay in the event that leave is granted.

[3] Alberta Environment and Protected Areas (AEPA), the provincial ministry responsible for environmental issues, supports Mantle in opposing the application.

Facts

[4] This application arises in the context of Mantle's insolvency proceedings under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (*BIA*). Mantle operates gravel pits on lands both public and private, some of which are subject to Environment Protection Orders (EPO) issued by the AEPA.

[5] After conducting due diligence, Travelers financed Mantle's purchase of equipment for use in its operations and Mantle granted Travelers a purchase-money security interest over the equipment, and pursuant to an agreement, Travelers' security interest in the equipment was designated to have first priority. As of the date of this application, Mantle owes Travelers over $1 million.

[6] Financial difficulties led Mantle to file a notice of intention to make a proposal under section 50.4 of the *BIA*. On August 15, 2023, Mantle was granted an order extending time to make a proposal. In addition, the order approved various charges on the bankrupt estate including the priority of those charges, and approval of the payment of certain pre-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 without prejudice with respect to the priority of the charges that Travelers holds over the equipment until the chambers judge released his reasons regarding Travelers' priority claim.

[7] Mantle's intended proposal will not allow payment to any creditors before Mantle has satisfied its end-of-life obligations stemming from EPOs. Mantle submits this is required by the Supreme Court of Canada decision known as *Redwater* or *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5, which held the environmental remediation obligations must be satisfied prior to distributions to creditors.

[8] Travelers submitted that it has priority with respect to security in certain equipment and its ability to realize on its security should not be postponed until after the remediation work has been completed. Travelers takes the position that *Redwater* held that an end-of-life environmental obligation need only be satisfied using assets encumbered by or related to the end-of-life obligation. A creditor with security over assets unrelated to assets burdened with the environmental remediation obligation may realize on such security without delay.

[9] The chambers judge disagreed with Travelers and amended his August 15, 2023 order to provide that the various approved charges on the bankrupt's estate have priority over Travelers' security interest in the equipment. The reasons of the chambers judge can be found at *Re Mantle Materials Group, Ltd*, 2023 ABKB 488.

Is Leave Required?

[10] Travelers submits that leave to appeal is not required because section 193(c) of the *BIA* provides "an appeal lies to the Court of Appeal from any order or decision of a judge of the court . . . if the property involved in the appeal exceeds in value ten thousand dollars". As it is owed over $1 million, Travelers submits it is entitled to appeal as of right.

[11] Travelers is required to obtain leave. Case authorities have held that section 193(c) is not satisfied simply where the value of the property exceeds $10,000. In *Manitok Energy Inc (Re)*, 2022 ABCA 260 (*Manitok leave decision*), this court held that an appeal is not available under section 193(c) in situations where the order is procedural in nature (para 27). Where the order does not result in a gain or loss to an interested party, the order is procedural in nature: *Athabasca Workforce Solutions Inc v Greenfire Oil & Gas Ltd*, 2021 ABCA 66 at para 15; *Manitok leave decision* at para 30.

[12] Travelers has not filed evidence showing the value of the equipment at issue and has not shown that its recovery is in jeopardy. The order it seeks to appeal is an order extending time to make a proposal, approved various charges on the bankrupt estate, and approved payment of certain pre-filing debts. The order is procedural in nature and section 193(c) does not apply to give Travelers a right to appeal.

Test for Leave to Appeal

[13] As set out in *Athabasca* at paras 17-18, the following factors are considered on an application for leave to appeal under section 193(e) of the *BIA*:

a) whether the point on appeal is of significance to the practice;

b) whether the point raised is of significance to the action itself;

c) whether the appeal is *prima facie* meritorious or frivolous; and

d) whether the appeal will unduly hinder the progress of the action.

In addition, leave should only be granted if the judgment appears to be contrary to law, amounts to an abuse of judicial power or involves an obvious error, causing prejudice for which there is no remedy.

[14] The test essentially requires that the proposed appeal must be on a point of significance for which there is at least an arguable case. I find that is where the application fails.

[15] Travelers points to paragraph 159 in *Redwater*, where Wagner CJC for the majority stated that the Alberta Energy Regulator's orders and assessment of liability "did not seek to force Redwater to fulfill end-of-life obligations with assets unrelated to the environmental condition or damage".

[16] This court in *Manitok Energy Inc (Re)*, 2022 ABCA 117 (*Manitok*), viewed the situation in the appeal before it to be the same as in *Redwater* and at paragraph 31 explained *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.

[17] Whether in theory unrelated assets could not be called upon to satisfy environmental obligations did not have to be decided by this court given that all of Manitok's substantial assets were related to the environmental obligations. As this court stated at paragraph 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.

[18] Travelers argues that the unaddressed issue arises in its case because the equipment over which it has a secured interest was not affected by an environmental condition or damage and

therefore, it should not have to wait for Mantle to complete its environmental obligations before Travelers can realize upon its security.

[19] Travelers' proposed arguments on appeal ignore a basic principle arising from *Redwater* and reiterated in *Manitok* that abandonment and reclamation obligations are binding "on the bankrupt estate": *Redwater* at para 93, 98, *Manitok* at para 17. The obligation was not tied to the type of asset.

[20] In *Redwater* and *Manitok* all the assets were oil and gas assets and none were "assets unrelated" to the other oil and gas assets. Distinguishing oil and gas assets from non-oil and gas assets as "assets unrelated to the environmental condition or damage" was argued in *Manitok* and rejected by this court at paragraph 35:

> One could read para 159 of *Redwater* as excluding resort to "unrelated" non-oil and gas assets to cover abandonment and reclamation costs. However, as was pointed out by the Orphan Well Association, the reasons in *Redwater* refer repeatedly to the "assets of the estate", without drawing any such distinction: see for example *Redwater* at paras 76, 102, 107, 114. Further, there is no clear boundary between licensed assets and other assets. For example, the sale to Persist (like many similar sales) included not only licensed assets but oil and gas rights, royalty rights, intellectual property, seismic data, vehicles and other chattels. *Redwater* gives no support to the municipalities' argument.

[21] Travelers is in no different position in its proposed appeal. As the chambers judge found, the equipment in which Travelers has a security interest is part of Mantle's gravel production business: "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" (para 39 and see paras 40-41). These are "vehicles and other chattels" as referred to in *Manitok* quoted above. Moreover, the equipment is being used in the reclamation efforts. Mantle is not an oil and gas company but that distinction does not change the application of the reasons in *Redwater* or *Manitok*. Mantle's only business is gravel production. It has no assets unrelated to those operations. While the question of what are "assets unrelated to the environmental condition or damage" and the policy concerns related to financing businesses that have environmental obligations are significant matters, they are not arguable on the facts of this case.

[22] Additionally, Travelers cannot satisfy the factor that an appeal will not unduly hinder the progress of the action. Section 195 of the *BIA* automatically stays proceedings until an appeal is disposed of. Staying the proceedings would cause significant harm to Mantle as it is required to complete the EPOs by November 1, 2023, and it cannot continue once winter freeze sets in.

Conclusion

[23] The application for leave to appeal is dismissed. As leave has not been granted, there is no need for Mantle's cross-application.

Application heard on October 18, 2023

Reasons filed at Calgary, Alberta
this 23rd day of October, 2023

de Wit J.A.

Appearances:

T.S. Cumming
S.P. Kroeger
for the Respondent

A.E. Teasdale
for the Applicant

T.A. Batty
for Alberta Environment and Protected Areas

P. Kyriakakis
for the Proposal Trustee

Corrigendum of the Reasons for Decision

Page 6, counsel's name "S.J. Kroeger" has been corrected to "S.P. Kroeger".

In the Court of Appeal of Alberta

Citation: Mantle Materials Group, Ltd v Travelers Capital Corp, 2023 ABCA 339

Date: 20231127
Docket: 2301-0216AC
Registry: Calgary

Between:

Mantle Materials Group, Ltd.

Respondent

- and –

Travelers Capital Corp.

Applicant

Reasons for Decision of
The Honourable Justice William T. de Wit

Application for Permission to Appeal

Reasons for Decision of
The Honourable Justice William T. de Wit

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[1] On October 23, 2023, I held that the applicant, Travelers Capital Corp, required leave to appeal an order in an insolvency proceeding and dismissed its application for leave. The reasons are found at *Mantle Materials Group, Ltd v Travelers Capital Corp*, 2023 ABCA 302. The applicant now seeks permission to appeal the term of the order holding that the applicant did not have an appeal as of right pursuant to section 193(c) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (BIA).

[2] For the reasons that follow, permission to appeal is denied.

[3] Permission to appeal a decision of a single justice can be granted if the applicant establishes that there is "(a) a question of general importance; (b) a possible error of law; (c) an unreasonable exercise of discretion; or (d) a misapprehension of important facts": *Settlement Lenders Inc v Blicharz*, 2016 ABCA 109 at para 1. The fundamental hurdle is to show it is in the interests of justice to have a panel review of the single judge's decision: *Al-Ghamdi v Alberta*, 2016 ABCA 403 at paras 10-12. Permission to review a single judge's decision should be rare and permitted "only if there is a *compelling reason* to require the applicant and the respondent to reargue and three judges of the Court of Appeal to decide an issue": *Ouellette et al v Law Society of Alberta*, 2021 ABCA 283 at para 14 [emphasis in original].

[4] The background facts are set out in my earlier reasons and in the reasons of the chambers judge found at *Re Mantle Materials Group, Ltd*, 2023 ABKB 488 and will not be repeated here.

[5] The applicant submits that I erred in applying earlier decisions of this court which held that section 193(c) of the BIA is not simply satisfied where the value of the subject property exceeds $10,000; the section does not apply to procedural orders; and the section does not apply to orders where loss is speculative and not crystallized. More specifically, the applicant submits I erred in finding that the chambers judge's order was procedural in nature and misunderstood the evidence showing that it has suffered a loss or risk of loss of more than $10,000.

[6] I disagree. First, the chambers order was properly characterized as a procedural order. As the chambers judge explained, the matter before him involved an extension of time for the respondent, Mantle Materials Group, Ltd, to make a proposal pursuant to the BIA, approval of various charges on the bankrupt estate including the priority of those charges, and approval of the payment of certain pre-filing debts to creditors whose support is required to perform environmental reclamation work that will be integral to the pending proposal. The chambers order did not contain "some element of a final determination of the economic interests of a claimant in the debtor" as this court held was required for section 193(c) to apply: *Manitok Energy Inc (Re)*, 2022 ABCA 260 at para 30, citing *2403177 Ontario Inc v Bending Lake Iron Group Limited*, 2016 ONCA 225 at para 61; and see also, *Trimor Mortgage Investment Corporation v Fox*, 2015 ABCA 44. Unless

the respondent performs work on its gravel pits and performs restructuring work including collecting accounts receivable, negotiating with creditors, paying post filing trade debt and prepare a proposal or plan distributions, there is no element of final determination as there is no crystallization or determination of the value of loss.

[7] Second, the loss of more than $10,000 was speculative. The applicant asserts that it in the absence of the chambers order, it would likely recover all of its indebtedness. This is not evidence that the loss is crystallized, but merely speculation of a risk of loss. The mere possibility of a future loss does not satisfy section 193(c).

[8] Nor has the applicant shown evidence from which loss can be calculated. It submits that the risk of loss arises from the BIA charges securing amounts in priority to its own security. But the applicant did not file any valuation of the equipment its loan secures. The fact that other claims rank in priority is not evidence of a loss, but, again, is speculation.

[9] As many decisions have noted, section 193(c) of the BIA performs a gatekeeping function. Permitting appeals as of right based on speculative loss would undermine that function and the general purpose of the BIA "to ensure bankruptcy proceedings are administered efficiently and expeditiously": *Manitok* at para 26, quoting *Athabasca Workforce Solutions Inc v Greenfire Oil & Gas Ltd*, 2021 ABCA 66 at para 8.

[10] As the applicant has not persuaded me of a possible error of law or misapprehension of the facts, it cannot show an appeal would involve a question of general importance. Permission will not be granted where an applicant seeks "an opportunity to have a panel consider more fulsome arguments and re-weigh the evidence to come to a different conclusion": *Midland Resources Holding Limited v Shtaif*, 2022 ABCA 7 at para 30.

[11] Additionally, as I am not persuaded of a possible error of law or evidence, the applicant cannot show that the proposed appeal would have a reasonable chance of success, which may also be considered in whether to grant permission to appeal: *Ouellette* at para 19.

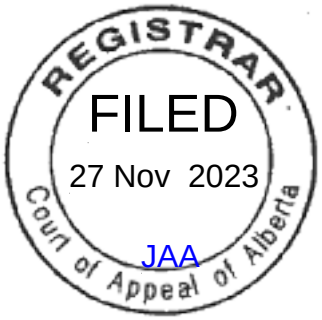
[12] The applicant submits there is precedential value to an interpretation of section 193(c) but in this case, the issues on any further appeal would remain a question of the evidence and the nature of the chambers order, not the proper interpretation of section 193(c). There would be no precedential value to have a panel determine if an order granting an interim financing charge in priority to other secured creditors is a procedural order or whether the evidence amounts to more than speculation.

[13] Finally, the applicant cannot show it is in the interests of justice to permit an appeal. An appeal would result in a stay of the chambers order, which would delay the respondent's reclamation work and risk not completing that work, which in turn would delay distribution to creditors. This would prejudice not only the respondent, but all its creditors.

[14] This application is dismissed.

Written submissions filed on November 2 and 17, 2023

Reasons filed at Calgary, Alberta
this 27th day of November, 2023



de Wit J.A.

Appearances:

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C.E. Hainert
A.J. Gray
for the Respondent

File No: _____

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

TRAVELERS CAPITAL CORP.

Applicant
(Appellant)

-and-

MANTLE MATERIALS GROUP, LTD.

Respondent
(Respondent)

MEMORANDUM OF ARGUMENT
Filed by the Applicant
Pursuant to Section 25(1)(c) of the *Supreme Court Act*

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(to Memorandum of Argument)

PART I – OVERVIEW AND STATEMENT OF FACTS

1. This is an application by Travelers Capital Corp. ("**Travelers**") for leave to appeal from two related decisions pronounced by the Honourable Mr. Justice W. T. de Wit ("**Justice de Wit**") of the Court of Appeal of Alberta in Court of Appeal File No. 2301-0216AC, as follows:

    A. the Reasons for Decision and Order of Justice de Wit, pronounced on October 23, 2023:

        i. dismissing Traveler's request for leave to appeal pursuant to section 193(e) of the *Bankruptcy and Insolvency Act*,[1] from the Order of the Court of King's Bench of Alberta, pronounced on August 15, 2023 and the Amending Order on August 28, 2023 and the Reasons for Decision, dated August 28, 2023;[2] and,

        ii. denying Traveler's request for a declaration that it had an appeal as of right pursuant to section 193(c) of the *BIA*; [3]

    and

    B. the Reasons for Decision and Order of Justice de Wit, pronounced on November 27, 2023 dismissing Traveler's request for leave to appeal the portion of the de Wit Decision denying that Travelers had an appeal as of right pursuant to section 193(c).[4]

2. The matters raised in the Requested Appeal raise questions of national and public importance that are critical to providing clarity to:

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[1] *Bankruptcy and Insolvency Act,* RSC 1985, c B-3 [***BIA***], s 193.
[2] *Re Mantle Materials Group, Ltd,* 2023 ABKB 488 [***Feasby Decision***]
[3] *Mantle Materials Group, Ltd. v Travelers Capital Corp*, 2023 ABCA 302 [***de Wit Decision***]. at para 23.
[4] *Mantle Materials Group, Ltd v Travelers Capital Corp*, 2023 ABCA 339 [***Second de Wit Decision***] at para 2.

A. the financial lending industry, particularly lenders who lend against equipment and other assets other than land, and in situations where a borrower is or may be subject to environmental remediation obligations; and

B. Canadian Courts and litigants in insolvency proceedings where appeals are sought pursuant to section 193 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "***BIA***").

3. In *Orphan Well Association v Grant Thornton Ltd.*, the Right Honourable Chief Justice R. Wagner ("**Wagner CJC**"), writing for the majority, stated:

> [I]t 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 end-of-life obligations with assets unrelated to the environmental condition or damage**. In other words, in 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].[5]

4. A determination on what is meant by "assets unrelated to the environmental condition or damage" and whether such assets are available to satisfy end-of-life obligations ahead of a distribution to secured and other creditors in an insolvency proceeding are issues of public importance to financial lenders and the insolvency practice. Without direction from the Court, financial lenders are left to guess as to what assets may or may not be available to satisfy end-of-life obligations, which has the potential to significantly chill financial lending against movable property, such as equipment, to debtors (in any number of industries) who are in any way exposed to, or may become exposed to, environmental remediation obligations.

5. Further, or in the alternative, there is a lack of clear and consistent case law across Canada in respect of the test for appeals as of right pursuant to section 193(c) of the *BIA*, which leads to significant uncertainty for litigants in insolvency proceedings.

[5] *Orphan Well Association v Grant Thornton Ltd,* 2019 SCC 5 [***Redwater***] at para 159.

6. Should the within Application for leave be granted, the Supreme Court will have an opportunity to give much needed clarity to the jurisprudence that has developed in this area.

A. The Insolvency Proceedings of Mantle Materials Group Ltd.

7. This application arises in the context of the insolvency proceedings of the Respondent, Mantle Materials Group, Ltd. ("**Mantle**"), pursuant to the *BIA*.

8. On July 14, 2023, Mantle filed a notice of intention to make a proposal pursuant to Division 1 of Part III of the *BIA* (the "**Proposal Proceedings**").[6]

9. Mantle operates gravel and aggregate pits on both public and private lands, some of which are subject to Environmental Protection Orders (the "**EPOs**") issued by Alberta Environment and Protected Areas ("**AEP**"), the provincial regulator responsible for environmental issues.[7]

10. The Court of King's Bench of Alberta has granted a series of extensions of the time for Mantle to file a proposal to its creditors pursuant to section 50.4 of the *BIA*, the latest of which expires on January 10, 2023.

11. On December 18, 2023, Mantle applied for an initial order pursuant to the *Companies' Creditor Arrangement Act*, RSC 1985, c C-36. The Honourable Justice D. B. Nixon of the Court of King's Bench of Alberta adjourned the application to January 10, 2024.

B. Travelers' Security

12. Travelers holds a first-ranking purchase-money security interest in respect of certain equipment owned by Mantle (the "**Equipment**") as security for funds advanced by Travelers to Mantle to fund the acquisition of the Equipment (the "**PMSI**").[8] Mantle owes Travelers approximately $1.1 million as of July 25, 2023.[9]

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[6] *Feasby Decision* at para 13.
[7] *Feasby Decision* at para 6; *de Wit Decision* at paras 3 and 4.
[8] *Feasby Decision* at para 12.
[9] *Feasby Decision* at para 12; *de Wit Decision* at para 10.

C. Decision of the Court of King's Bench of Alberta

13. On August 8, 2023, Mantle brought an application (the "**Mantle Application**") seeking, among other things, approval of various charges on the insolvent estate including approval of interim financing from a closely related company of Mantle to primarily be used by Mantle to fund the work underlying the EPOs (collectively, the "**Restructuring Charges**") and granting the interim financing lender, RLF Canada Lender Limited, a first-ranking priority position ahead of Mantle's existing creditors, including Travelers.[10]

14. In the Mantle Application, Mantle took the position that the requested priority in respect of the Restructuring Charges was appropriate as no payments can be made to any creditors before Mantle satisfies its environmental remediation obligations, in full, under the EPOs in accordance with *Redwater*.[11]

15. Travelers took the position that end-of-life environmental obligations need only be satisfied by assets encumbered by or related to the end-of-life obligations and a creditor with a security interest over assets unrelated to assets burdened with the environmental remediation obligation may realize on such security without delay.[12]

16. As stated by Justice Feasby, the issue before the Court in the Mantle Application was whether a binding decision exists on the issue of whether the "super priority" created in respect of end-of-life obligations applies to all assets in the insolvent's estate or whether, as Travelers' argued, the priority only exists with respect to those assets that are *related* to the environmental condition or damage.[13]

17. Justice Feasby reviewed the Supreme Court of Canada's decision in *Redwater* and the Court of Appeal of Alberta's decision in *Manitok Energy Inc (Re)*[14] and concluded that the issue of whether unrelated assets could be called upon to satisfy environmental obligations had not yet been decided by an appellate Court.[15]

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[10] *Feasby Decision* at para 1.
[11] *Feasby Decision* at para 2.
[12] *Feasby Decision* at para 3; *Redwater* at para 159.
[13] *Feasby Decision* at para 21.
[14] *Manitok Energy Inc (Re), ,* 2022 ABCA 117 [***Manitok***].
[15] *Feasby Decision* at para 34.

18. Justice Feasby concluded, however, that he was bound by the principle of horizontal *stare decisis* and, in particular, the Court of King's Bench of Alberta's decision in *Orphan Well Association v Trident Exploration Corp.*[16] In *Trident*, the Honourable Justice R. A. Neufeld ("**Justice Neufeld**") extended the principles in *Redwater* and *Manitok* to other assets used in an oil and gas business even though they were not directly involved in the oil and gas production that was the subject of the end-of-life obligations. This conclusion was reached by Justice Neufeld based on the determination that because Trident had only one business all of its assets were used in furtherance of that business.[17]

19. On that basis, Justice Feasby approved the priority ranking of the Restructuring Charges and declared that Travelers' PMSI can only be realized on after the end-of-life obligations under the EPOs are complete.[18] However, Justice Feasby noted that he was not addressing "how in theory a line should be drawn between related and unrelated assets or even if a line should be drawn" or "debating the wisdom of the policy of effectively subordinating secured creditors to environmental obligations."[19]

D. Decision of a Single Judge of the Court of Appeal of Alberta

20. On September 7, 2023, Travelers applied to a single judge of the Court of Appeal pursuant to Rule 14.37 of the Alberta *Rules of Court*[20] for:

    A. a declaration that Travelers had an appeal as of right to a full panel of the Court of Appeal in respect of the Feasby Decision pursuant to section 193(c) of the *BIA* (the "**193(c) Application**"); and

    B. further, or in the alternative, leave to appeal the Feasby Decision pursuant to section 193(e) of the *BIA* (the "**193(e) Application**").[21]

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[16] *Orphan Well Association v Trident Exploration Corp*, 2022 ABKB 839 [***Trident***].
[17] *Feasby Decision* at para 67.
[18] *Feasby Decision* at para 43.
[19] *Feasby Decision* at paras 40 and 42.
[20] Alberta *Rules of Court*, AR 124/2010 [***Rules of Court***], Rule 14.37.
[21] *de Wit Decision* at para 1 and 10.

E. de Wit Decision in respect of 193(e) of the *BIA*

21. The issue before Justice de Wit in the 193(e) Application was whether the proposed appeal was on a point of significance to the action and the practice and for which Travelers had at least an arguable case.[22]

22. Travelers took the position that leave to appeal was appropriate in the circumstances on the grounds that:

    A. the issue of whether assets unrelated to the environmental obligation or damage are available to satisfy environmental contamination in insolvency proceedings is an issue of significance to the insolvency practice and the lending industry; and

    B. given the lack of any binding case law on the Court of Appeal on the issue, Travelers had at least an arguable chance of success on appeal to a full panel of the Court of Appeal.

23. Justice de Wit dismissed the Leave Application on the basis that Travelers did not have an arguable case to appeal the Feasby Decision as Mantle's only business was gravel production and "it has no assets unrelated to those operations."[23] Justice de Wit concluded that the question of what are "assets unrelated to the environmental condition or damage" was, therefore, not an arguable issue on the facts of this case (the "**193(e) Dismissal**").[24]

F. de Wit Decision in Respect of Section 193(c) of the BIA

24. The issue before Justice de Wit in the 193(c) Application was whether the property involved in the appeal exceeded in value ten thousand dollars.

25. Justice de Wit dismissed the Leave Application on the basis that Travelers did not have an appeal as of right because the Feasby Decision was procedural in nature and, therefore, did not engage section 193(c) of the *BIA* (the "**193(c) Dismissal**").[25]

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[22] *de Wit Decision* at para 14.
[23] *de Wit Decision* at para 21.
[24] *de Wit Decision* at para 21.
[25] *de wit Decision* at paras 10 to 12.

G. Appeal of the 193(c) Dismissal to Justice de Wit

26. Rules 14.5(1)(a) and (2) of the *Rules of Court* require a party to seek leave to appeal a decision of a single appeal judge, that is not a decision on an application for leave to appeal, from the judge who made the decision that is to be appealed.[26] A decision of a single judge on an application for leave to appeal, by contrast, is final.[27]

27. Travelers was unable to locate any case law directing whether an application for a declaration for leave to appeal could be characterized as an "application for leave to appeal" for the purposes of Rule 14.5(3) or not.

28. On that basis and out of an abundance of caution to not prejudice Travelers' ability to appeal the 193(c) Dismissal, Travelers applied to Justice de Wit on November 2, 2023 for leave to appeal the portion of the de Wit Decision relating to the 193(c) Dismissal pursuant to Rules 14.5(1)(a) and (2) of the *Rules of Court* (the "**Second Leave Application**").

29. It was Traveler's position in the Second Leave Application that there was a "compelling reason" to grant leave to appeal the 193(c) Application on the grounds that Justice de Wit misunderstood or misapprehended the evidence that demonstrated that the Feasby Decision had the effect of increasing the quantum and number of Mantle's creditors who rank in priority to Travelers' PMSI in the equipment it financed in excess of $10,000 and thus putting at risk Traveler's recovery of the amounts outstanding to it.[28]

30. On November 27, 2023, Justice de Wit dismissed the Second Leave Application on the grounds that Travelers did not demonstrate a possible error of law or misapprehension of facts because: (i) the Feasby decision was procedural in nature and did not contain a final determination of the economic interests of a claimant in the debtor;[29] and (ii) Traveler's loss of more than $10,000 was speculative.[30]

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[26] *Rules of Court*, Rule 14.5(1)(a) and (2).
[27] *Rules of Court,* Rule 14.5(3).
[28] Second de Wit Decision at para 5.
[29] Second de Wit Decision at para 6.
[30] Second de Wit Decision at para 7.

PART II – QUESTION IN ISSUE

31. This leave application raises the following issues of national and public importance:

    A. What are "assets unrelated to the environmental condition or damage" and are those assets available to satisfy end-of-life environmental obligations ahead of a distribution to creditors?; and

    B. Whether the various formulations of the test for declaring that a litigant has an appeal as of right pursuant to section 193(c) of the *BIA* should be reconciled into a single constituent test?

PART III – LAW AND ARGUMENT

A. <u>The 193(e) Appeal Raises Issues of Public Importance</u>

32. The Supreme Court of Canada's decision in *Redwater* left open the question of whether assets *unrelated* to the environmental condition or damage are available to satisfy end-of-life environmental obligations ahead of a distribution to creditors.[31]

33. Since *Redwater*, the law on this issue remains unsettled.

Post-Redwater: The Law on "Unrelated Assets"

34. In the Court of Appeal of Alberta's decision in *Manitok*, the question of whether assets related to or unrelated to the environmental condition or damage are available to satisfy remediation costs was raised.

35. The assets at issue in *Manitok* were packages of oil and gas assets, and the proceeds arising therefrom, which the Court concluded were the same as the "substantial assets" in *Redwater*.[32] The Court held that the assets were "related assets" to the environmental condition and left the issue of whether there is a distinction to be made between related and unrelated assets for the purposes of satisfying end-of-life obligations "for another day."[33]

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[31] *Redwater* at para 159.
[32] *Manitok* at para 31.
[33] *Manitok* at para 36.

36. In *Trident*, the issue of whether there is a distinction between the availability of related and unrelated assets to satisfy end-of-life obligations was again raised in the oil and gas industry. Justice Neufeld concluded that "the AER super priority [is] not limited to licensed oil and gas wells, pipelines and production facilities" because Trident had "only one business: exploration and production of oil and gas."[34] In doing so, Justice Neufeld similarly left the question open as to whether "unrelated assets" are available to satisfy end-of-life obligations and how the line between "related" and "unrelated" assets is to be drawn.

37. Since *Redwater,* the delineation of "related" versus "unrelated" assets has not been considered outside of the oil and gas industry. Further, setting aside the Feasby Decision and the de Wit Decision, the issue has not been considered by a Court in the context of equipment financing.

38. In the Feasby Decision, Justice Feasby properly concluded that "there is no *ratio decidendi* in [*Redwater* and *Manitok*] that binds me in the present case."[35]

39. The timing of the decision in *Trident* is note-worthy to the Feasby Decision, as a significant emphasis was placed by Justice Feasby on Travelers' knowledge of the EPOs at the time the PMSI was granted. In particular, Justice Feasby stated "[p]rior 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."[36] However, the decision in *Trident* was released more than a year after any due diligence would have been conducted by Travelers, without the benefit of any binding case law to direct Travelers on whether the decision in *Redwater* would be extended to make the Equipment available to satisfy the EPOs.

40. In the 193(e) Application, Justice de Wit concluded that the Equipment could be characterized as a "related asset" and, therefore, any proceeds arising therefrom are available for distribution as Mantle's "only business is gravel production" and "it has no assets unrelated to those operations."[37] In doing so, Travelers respectfully submits:

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[34] *Trident* at para 67.
[35] *Manitok* at para 40; see also *Qualex-Landmark Towers Inc v 12-10 Capital Corp*, 2023 ABKB 109 [***Qualex***] at para 90.
[36] *Feasby Decision* at para 42.
[37] *Manitok* at para 21.

A. Justice de Wit failed to recognize the clear direction of importance Wagner CJC placed on the fact that the Abandonment Orders and Liability Management Rating in *Redwater* were not "assets unrelated" to the environmental condition or damage when rendering his decision for the majority; and

B. if the only requirement to establish a relationship between assets available for the satisfaction of end-of-life obligations is whether the debtor has only one type of business or not, as Justice de Wit posits, it is hard to imagine a scenario where a corporation's assets, no matter how far removed from the environmental condition or damage, would be "unrelated". This leads to an absurd result.

41. In conclusion, the Feasby Decision and the de Wit Decision, like their predecessors in *Manitok* and *Trident*, have similarly left the issue open as to whether "unrelated assets" are available to satisfy end-of-life obligations and what, if any, criteria parties advancing funds can use to properly delineate said assets.

42. In reaching his decision, Justice de Wit expressly acknowledged the importance of resolving the outstanding issue of what "unrelated assets" are and whether they are available to satisfy end-of-life obligations as follows:

> While the question of what are "assets unrelated to the environmental condition or damage" and the policy concerns related to financing businesses that have environmental obligations are significant matters, they are not arguable on the facts of this case.[38]

43. If the decision of a single judge of the Court of Appeal stands, the question of what assets may be characterized as related or unrelated to the environmental condition or damage and whether those assets are available to satisfy end-of-life obligations remains a live issue. This creates uncertainty in restructuring and insolvency proceedings and in the financial lending industry across any number of industries where debtors are, or may become, subject to environmental obligations.

44. An example of the nuisance created by uncertainty in the law, post-*Redwater*, can be found in the Court of King's Bench of Alberta's decision in *Qualex.* In that case, the plaintiff property

[38] *de Wit Decision* at para 21.

owner sought an attachment order against the defendant's property for environmental remediation costs it expects to incur as a result of contamination stemming from the defendant's neighbouring property.[39] The plaintiff argued, based on the principles in *Redwater,* a private landowner should be entitled to the same "super priority" as an environmental regulator in the amount of its environmental remediation costs in advance of secured creditors—in that case, mortgage lenders.

45. In rendering his decision, the Honourable Justice D.B. Nixon, reviewed the decisions in *Redwater*, *Manitok*, and *Trident* and concluded that, for the purposes of the test for an attachment order, the plaintiff had a "reasonable likelihood" of establishing its claim for environmental remediation would rank in priority to the mortgage lenders.[40]

46. Justice Nixon's decision in *Qualex* is currently under appeal to the Court of Appeal of Alberta. In the meantime, as is the case in these circumstances, there is a significant deal of uncertainty in the real estate industry as mortgage lenders are left to consider whether neighbouring land owners with potential environmental contamination may make future priority claims ahead of any secured lenders.

47. While Travelers does not intend to get into an analysis of the soundness of the decision of Justice Nixon in *Qualex* in these proceedings, Travelers notes that this decision serves as an example of the misguided attempts commercial litigants may attempt to argue to divert from the well-established priority regime in the face of uncertainty in the guiding jurisprudence.

48. As stated by Justice Feasby, clarity in the case law "is particularly important in the commercial arena where parties plan their affairs and make significant investment decisions based on the law that emerges from the Court."[41]

49. The de Wit Decision has thrown the well-established priority principles pertaining to purchase-money security interests created by the Legislature in the Alberta *Personal Property Security Act*[42] into disarray. Purchase-money security interests specifically designate certain assets of

[39] *Qualex* at para 6.
[40] *Qualex* at para 100.
[41] *Feasby Decision* at para 22.
[42] *Personal Property Security Act,* RSA 2000, c P-7, section 22.

the debtor as the primary source of repayment to the PMSI-holder and are not intended to underwrite the debtor's operations generally.

50. If the uncertainty following the de Wit Decision is allowed to remain, all types of lenders will be hesitant to undertake the risk to finance any asset-backed lending where the debtor is, or may become, the subject of environmental obligations, which could ultimately impact the ability of debtor's to meet their end-of-life obligations in the first place if such debtors cannot obtain financing in the first instance. Lenders will be forced to assume that all assets will be available to satisfy environmental obligations, no matter how distinct and disconnected the assets may be from any underlying end-of-life obligations of the debtor, which could have a significantly negative and chilling effect on the lending industry.[43]

51. This also places an unrealistic and almost impossible burden on lenders who finance equipment and other PMSI security to continually conduct due diligence or obtain reporting on operations from companies who may have tangential or future exposure to environmental obligations in order to determine when their equipment or security may become subject to or at risk of being used to satisfy any environmental obligations depending on the operations of any particular borrower, without an opportunity to mitigate the risk in the event that environmental obligations arise. For example, there could be no environmental obligations at the time the PMSI financing is advanced but on the next day, if an environmental condition or obligation arises, that PMSI financing may be subordinate to the full amount of the environmental obligation or condition.

52. It is Travelers' position that the uncertainty created by the de Wit Decision and the Second de Wit Decision is a matter of public and national importance, which requires a determination from the Supreme Court of Canada to provide much-needed clarity to the insolvency practice and the lending industry.

[43] Jassmine Girgis, "What are "Unrelated Assets" When It Comes to Environmental Reclamation Obligations? The Lending Industry Needs to Know" (The University of Calgary Faculty of Law Blog, 15 November 2023), online: ABlawg.

B. The 193(c) Appeal Raises Issues of Public Importance

53. Pursuant to section 193(c) of the *BIA*, an appeal lies to the Court of Appeal where "the property involved in the appeal exceeds in value ten thousand dollars".[44]

54. The case law interpreting section 193(c) that has developed in the provincial appellate courts across Canada demonstrates that diverging tests in the application of section 193(c) have emerged, resulting in the need for additional unnecessary litigation and injecting uncertainty into insolvency proceedings.

55. In Ontario, the Ontario Court of Appeal has adopted a "narrow" approach to interpreting section 193(c), as expressed in *2403177 Ontario Inc v Bending Lake Iron Group Ltd*. In that case, the Court of Appeal held that an appeal as of right will not exist where the order under appeal: (i) is procedural in nature; (ii) does not bring into play the value of the debtor's property; or (iii) does not result in a loss.[45]

56. The Honourable Mr. Justice D.M. Brown explained the rationale for his interpretation of section 193(c) in *Bending Lake* on the basis of two context factors.

57. First, the predecessor to section 193(c) was enacted in 1919 at a time when there was no right to seek leave to appeal (as there now is under section 193(e)) thereby prompting an initially wide and liberal interpretation of a litigant's right to appeal under section 193(c). In Justice Brown's view, the inclusion of section 193(e) in the *BIA* in 1949 removed the need for such a broad interpretation approach.[46]

58. Second, the *CCAA* contains an across-the-board requirement to obtain leave to appeal, which does not work harmoniously with a broad interpretation of the rights of appeal in sections 193(a) to (d) of the *BIA*.[47]

59. By contrast, in *MNP Ltd v Wilkes,* the Saskatchewan Court of Appeal criticized the strict nature of the *Bending Lake* approach and held that the primary issue to determine under section 193(c)

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[44] *BIA* at section 193.
[45] *2403177 Ontario Inc v Bending Lake Iron Group Ltd.,* 2016 ONCA 225 [***Bending Lake***] at para 53.
[46] *Bending Lake* at para 49.
[47] *Bending Lake* at para 50.

is whether there is at least $10,000 at stake, not whether the order is procedural. [48] Put another way, the Saskatchewan Court of Appeal held that a determination that an order is procedural in nature is not, in and of itself, determinative of whether an appeal as of right exists under section 193(c).[49]

60. In *Wilkes,* the Honourable Madam Justice Jackson questioned Justice Brown's reliance on the need for harmony in the appeals rights found in Canada's leading insolvency statutes, on the basis that Parliament's decision to create different appeal rights in these statutes must be taken to have been done for a reason.[50]

61. Similarly, in *Crowe MacKay & Company Ltd v 0731431 BC Ltd,* 2022 BCCA 158 ("***Crowe Mackay***"), the Honourable Madam Justice Newbury of the British Columbia Court of Appeal concluded that the three-part test described in *Bending Lake* overwhelmed the simplicity of the language in section 193(c) with irrelevant "contextual baggage". [51] Specifically, Justice Newbury was "not persuaded that the fact that amendments were made in 1949 to what is now s. 193 to allow appeals to be taken with leave, should be interpreted so as to narrow the interpretation of the *other* subparagraphs of s. 193."[52]

62. While there has been an attempt by some courts to alleviate the dichotomy in the jurisprudence,[53] Canadian appellate courts have acknowledged the persisting inconsistency in the application of section 193(c),[54] leaving uncertainty for litigants in insolvency matters.

63. As directed by the authors of *Bankruptcy and Insolvency Law of Canada*, the *BIA* should be interpreted uniformly across Canada given the federal application of the legislation.[55]

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[48] *MNP Ltd v Wilkes,* 2020 SKCA 66 [***Wilkes***] at para 63.
[49] *Wilkes* at para 62.
[50] *Wilkes* at para 54.
[51] *Crowe MacKay & Company Ltd v 0731431 BC Ltd,* 2022 BCCA 158 [***Crowe MacKay***] at para 54.
[52] *Crowe MacKay* at para 54.
[53] See for example in *Hillmount Capital Inc v Pizale,* 2021 ONCA 364.
[54] *Forjay Management Ltd v Peeverconn Properties Inc,* 2018 BCCA 188 at paras 33-34 and 46 to 48; *1905393 Alberta Ltd v Servus Credit Union Ltd*, 2019 ABCA 269 at para 25 to 26; *Davidson (Re)*, 2021 ONCA 135 at para 9; *Manitok Energy Inc (Re)*, 2021 ABCA 269 at paras 49 to 52.
[55] The Honourable Mr Justice Lloyd W Houlden et al, *Bankruptcy and Insolvency Law of Canada,*4th ed (Westlaw Edge Canada: 2022) at § 1:8.

Decisions rendered under the *BIA* should be harmonious and should be rendered based on the same criteria across all of Canada.

64. Given that the *BIA* is a federal statute, it is of national importance that there be a single, clear formulation of the test for appeals as of right pursuant to section 193(c) of the *BIA*. Having a standard test would provide both Courts and litigants with certainty as to the test to be met in order for an appeal as of right pursuant to section 193(c) of the *BIA* and would lead to greater consistency in the results of these matters. Furthermore, given that the various formulations of the test existing at the provincial appellate court level, the only Court that has the authority and ability to provide guidance and clarification across Canada is this Honourable Court.

C. Conclusion

65. Hearing this appeal would enable this Honourable Court to provide much-needed clarity as to: (i) how the rights and interests of various classes of secured creditors are to be reconciled with environmental end-of-life obligations in the context of asset-backed lending; and (ii) the appropriate test under section 193(c) of the *BIA*.

PART IV – SUBMISSIONS ON COSTS

66. Travelers does not ask for costs and requests that no costs be awarded against it.

PART V – ORDER SOUGHT

67. Travelers respectfully requests an Order granting Travelers leave to appeal the de Wit Decision and the Second de Wit Decision pursuant to section 40(1) of the *Supreme Court Act* and section 183(3) of the *BIA*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 20th DAY OF DECEMBER, 2023

Ryan Zahara and Molly McIntosh
Solicitors for the Applicant,
Travelers Capital Corp.

PART VI - TABLE OF AUTHORITIES

Case Law	**Para Ref.**
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Jassmine Girgis, "What are "Unrelated Assets" When It Comes to Environmental Reclamation Obligations? The Lending Industry Needs to Know" (The University of Calgary Faculty of Law Blog, 15 November 2023), online: ABlawg.	50
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