

Court File No.: BK-24-03101800-0031

Estate File No.: 31-3101800

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**(COMMERCIAL LIST)**  
**IN BANKRUPTCY & INSOLVENCY**

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF**  
**125 FERRIS INC.**

**IN THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO**

**FACTUM OF THE MOVING PARTY, 125 FERRIS INC.**  
**(returnable July 31, 2024)**

July 29, 2024

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## PART I - OVERVIEW

1. On July 8, 2024, 125 Ferris Inc. (“**Ferris**” or the “**Company**”), filed a Notice of Intention to Make a Proposal (the “**NOI**”) pursuant to section [50.4](#) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the “**BIA**”). Ferris now brings this motion seeking certain relief with respect to these Notice of Intention to Make a Proposal proceedings (the “**Proposal Proceedings**”), for Orders, among other things:

- (a) abridging the time for service of this motion and motion record and dispensing with service on any person other than those served;
- (b) approving an interim financing facility (the “**Interim Financing Facility**”) in the maximum principal amount of \$235,000 to be made available to Ferris by the Interim Lender (as defined below);
- (c) granting the following charges (the “**Charges**”) over the assets, property, and undertakings of Ferris (collectively, the “**Property**”), in priority to all other creditors of Ferris, and which shall have the relative priority as set out below:
  - (i) firstly, the Interim Lender shall be entitled to the benefit of a charge on the Property (the “**Interim Lender’s Charge**”), which shall not exceed an aggregate amount of \$235,000, plus interest, fees and costs, as security for the Interim Financing Facility; and
  - (ii) secondly, legal counsel to Ferris, legal counsel to the Proposal Trustee (as defined below) and the Proposal Trustee (the “**Professionals**”), shall be entitled to the benefit of a charge on the Property (the “**Administration**”).



**Charge**”), which charge shall not exceed an aggregate amount of \$500,000 as security for their respective fees and disbursements incurred;

- (d) authorize Ferris’ execution of the JLL Listing Agreement and ability to perform its obligations under and in connection with the JLL Listing Agreement and the related sale process;
- (e) extending the time for the Company to file a proposal pursuant to section [50.4\(9\)](#) of the BIA from August 7, 2024, to 11:59 p.m. on September 21, 2024;
- (f) extending the stay of proceedings from August 7, 2024 to 11:59 p.m. on September 21, 2024; and
- (g) such further and other relief as this Honourable Court may deem just.

## **PART II – THE FACTS**

### **Background**

2. The facts are set out in greater detail in the Affidavit of Michael Di Iorio dated July 22, 2024.<sup>1</sup> A summary is set out below.

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<sup>1</sup> Capitalized terms used and not otherwise defined herein have the meanings ascribed to them in the Affidavit of Michael Di Iorio sworn on July 22, 2024 (the “**Di Iorio Affidavit**”).

***The Company and the Commercial Property***

3. Ferris was formed primarily to hold legal title to lands, together with a commercial building, located at 125 Ferris Drive, North Bay, ON P1B 8Z4 and legally described in PIN 49177-0022 (LT) (the “**Commercial Property**”).<sup>2</sup>

4. On July 8, 2024, Ferris filed its NOI with the Official Receiver pursuant to section [50.4\(1\)](#) of the BIA. KSV Restructuring Inc. was appointed as the proposal trustee under the NOI (in such capacity, the “**Proposal Trustee**”).<sup>3</sup>

5. Ferris does not have any business operations or any assets other than the Commercial Property and the personal property arising from or used in connection with the Commercial Property (all of which is held for the benefit of the Co-Tenants pursuant to the Co-Tenancy Agreement).

***The Loan Agreement and Related Security***

6. Laurentian Bank of Canada (“**Laurentian**” or the “**Bank**”), as lender, and Ferris, as borrower, executed a loan agreement dated October 10, 2013, pursuant to which the Bank extended a term loan facility to Ferris in the maximum principal amount of \$7,700,000 (as amended from time to time, the “**Loan Agreement**”).

7. As security for its indebtedness, liabilities, and obligations to the Bank pursuant to the Loan Agreement, Ferris executed and delivered to the Bank various security (collectively, the “**Security**”), including without limitation: a general security agreement (the “**GSA**”); a

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<sup>2</sup> Di Iorio Affidavit at para 6.

<sup>3</sup> Di Iorio Affidavit at para 2.

charge/mortgage of land in the amount of \$7,700,000.00 (the “**Charge**”); and two notice of assignment of rents over the Commercial Property dated October 31, 2013;<sup>4</sup>

8. The Charge was registered on October 31, 2013 as instrument number BC11991, in the principal amount of \$7,700,000.000 over the Commercial Property..

9. The Bank is Ferris’ only secured creditor according to a recent *Personal Property Security Act* (Ontario) search conducted on July 17, 2024.<sup>5</sup>

10. According to Ferris’ books and records, there is approximately \$170,000 owing to its unsecured creditors at the July 8<sup>th</sup>, 2024 NOI filing date. This primarily consists of amounts owing to utility providers and other suppliers.<sup>6</sup>

### ***The Company’s Financial Challenges and Current Financial Position***

11. Since October 2023, Ferris has been unable to generate enough funds to preserve and maintain the Commercial Property for a number of reasons, including: Ferris’ sole shareholder having filed an assignment in bankruptcy under the BIA; the long-term tenant of the Commercial Property having opted not to extend its lease for the Commercial Property; and issues in securing a suitable replacement tenant.<sup>7</sup>

12. Further, Ferris’ efforts to seek alternative secured financing in June and July 2023, were unsuccessful. Ferris secured a new tenant for the Commercial Property but lenders felt that tenant, a new business, lacked a sufficient track record and credit history to support new financing for

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<sup>4</sup> Di Iorio Affidavit at para 20.

<sup>5</sup> Di Iorio Affidavit at Exhibit “N”.

<sup>6</sup> First Report to Court of KSV Restructuring Inc. as Proposal Trustee of 125 Ferris Inc. dated July 25, 2024 at section 2.1.2 (the “**First Report**”).

<sup>7</sup> Di Iorio Affidavit at para 7.

Ferris. This occurred in conjunction with the tightened risk controls by banking and financial institutions at the time Ferris was seeking to renegotiate its secured lending facilities.<sup>8</sup>

13. On October 31, 2023, the Bank's legal counsel, Thornton Grout Finnigan LLP, issued a demand letter to Ferris for payment of all amounts outstanding to the Bank (the "**Demand Letter**"), accompanied by a Notice of Intention to Enforce Security pursuant to subsection [244\(1\)](#) of the BIA, also dated October 31, 2023 (the "**NITES**").<sup>9</sup>

14. Based on the cash flow projection, the Company requires approximately \$30,000 a month in financing to pay critical expenses, including property taxes, security, property management and insurance for the Commercial Property.<sup>10</sup>

#### ***Engagement and Approval of JLL Listing***

15. As part of the Ferris restructuring strategy, Ferris intends to implement a sale process to solicit interest in and opportunities for the sale of the Commercial Property. In this regard, Ferris has entered into a listing agreement with JLL (the "**JLL Listing Agreement**").<sup>11</sup>

#### ***Interim Financing Facility***

16. Due to its financial difficulties, Ferris requires interim financing to provide stability and to preserve and market the Commercial Property while it engages in its restructuring efforts in these Proposal Proceedings.<sup>12</sup>

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<sup>8</sup> Di Iorio Affidavit at para 22.

<sup>9</sup> Di Iorio Affidavit at para 23.

<sup>10</sup> Di Iorio Affidavit at para 28.

<sup>11</sup> Di Iorio Affidavit at para 29.

<sup>12</sup> Di Iorio Affidavit at para 34.

17. In consultation with the Proposal Trustee, Ferris has negotiated the Interim Financing Facility in the maximum principal amount of \$235,000 with Laurentian, as lender (the “**Interim Lender**”) pursuant to a term sheet (the “**Interim Financing Term Sheet**”) dated June 25, 2024.<sup>13</sup> The Interim Financing Term Sheet provides approximately six months of liquidity to run a sale process and close a sale for the Commercial Property.<sup>14</sup>

### ***Interim Lender’s Charge***

18. The Interim Financing Term Sheet provides, among other things, that the Interim Financing Facility is contingent on the granting of a Court-ordered Interim Lender’s Charge. The Interim Lender’s Charge is proposed to rank in priority to all existing security interests and charges.<sup>15</sup>

19. The amount to be funded under the Interim Financing Facility and the corresponding Interim Lender’s Charge was calculated with the assistance of the Proposal Trustee and based on the Company’s liquidity needs as set out in the Cash Flow Forecast.<sup>16</sup>

### ***Administration Charge***

20. Ferris requests an Order approving a Court-ordered Administration Charge over the Property in favour of the Professionals, to secure the payment of their respective fees and disbursements incurred in connection with the services rendered in respect of Ferris in the amount

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<sup>13</sup> Di Iorio Affidavit at para 35.

<sup>14</sup> Di Iorio Affidavit at para 28.

<sup>15</sup> Di Iorio Affidavit at para 41.

<sup>16</sup> Di Iorio Affidavit at para 43.

of \$500,000 in accordance with section [64.2](#) of the BIA, in, ranking ahead of all other creditors, save for the Interim Lender in respect of the Interim Lender's Charge.<sup>17</sup>

***Extension of Time to Make a Proposal***

21. Ferris' restructuring efforts are on-going.<sup>18</sup>

22. The extension relief requested by Ferris is necessary in order to allow Ferris and JLL to successfully carry out the solicitation contemplated by the JLL Listing Agreement. Ferris requests a 45-day extension of the time for filing such proposal from August 7, 2024 to 11:59 p.m. on September 21, 2024, in accordance with section [50.4\(9\)](#) of the BIA.<sup>19</sup> Ferris also requests an extension of the stay of proceedings in this matter until September 21, 2024.<sup>20</sup>

**PART III – THE ISSUES**

23. The principal issues before this Court are whether this Court should:

- (a) approve an the Interim Financing Facility in the maximum principal amount of \$500,000 to be made available to Ferris by the Interim Lender;
- (b) grant the Interim Lender's Charge;
- (c) grant the Administration Charge;

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<sup>17</sup> Di Iorio Affidavit at para 44.

<sup>18</sup> Di Iorio Affidavit at para 49.

<sup>19</sup> Di Iorio Affidavit at para 53.

<sup>20</sup> Di Iorio Affidavit at para 54.

- (d) authorize Ferris' execution of the JLL Listing Agreement and ability to perform its obligations under and in connection with the JLL Listing Agreement and the related sale process; and
- (e) extend the time for the Company to file a proposal and extend the stay of proceedings.

## **PART IV – LAW & ARGUMENT**

### **A. The Interim Financing Facility and the Interim Lender's Charge Should be Approved**

24. Ferris seeks an Interim Financing Facility in the principal amount of \$235,000.<sup>21</sup>

25. The proposed Interim Lender's Charge will secure all of the debts, liabilities and obligations of Ferris under or in connection with the Interim Financing Facility. The Interim Lender's Charge will not secure obligations incurred prior to the issuance of the Order approving the Interim Lender's Charge.<sup>22</sup>

26. When determining whether to grant an interim financing charge, the BIA lists factors a court is to consider as part of the assessment in NOI proceedings:<sup>23</sup>

- (a) the time frame within which the debtor is anticipated to be subject to BIA proceedings;
- (b) how the debtor's business and finances will be handled during the proceedings;

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<sup>21</sup> Di Iorio Affidavit at para 35.

<sup>22</sup> Di Iorio Affidavit at para 26.

<sup>23</sup> *Bankruptcy and Insolvency Act*, [R.S.C., 1985](#), c. B-3 [*BIA*], s. [50.6\(5\)](#).

- (c) if the debtor's major creditors have confidence in the debtor's management;
- (d) if the loan would improve the potential of a viable proposal being advanced in respect of the debtor;
- (e) the nature and worth of the debtor's property;
- (f) if any creditor would experience material prejudice due to the security or charge;  
and
- (g) the trustee's report.

27. Having regard to the foregoing factors and the requirements of the BIA, the following supports the approval of the Interim Financing Facility and the granting of the Interim Lender's Charge:

- (a) Ferris is unable to generate sufficient cash to meet critical preservation costs for the Commercial Property. The cash flow forecast indicates that Ferris urgently requires the Interim Financing Facility to provide the liquidity required to meet critical payable obligations during these Proposal Proceedings;<sup>24</sup>
- (b) the secured creditor of Ferris, Laurentian, supports the Interim Financing Facility;
- (c) the Interim Financing Facility would enhance the prospects of a viable proposal;
- (d) no creditor will be prejudiced as a result of the Interim Financing Facility; and

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<sup>24</sup> Di Iorio Affidavit at para 40.



- (e) the Proposal Trustee supports and was consulted in the process of determining the Interim Financing Facility.

28. Most critically in this case, without the Interim Financing Facility, Ferris will be “unable to fund its ongoing business operations and restructuring efforts during the NOI proceedings.”<sup>25</sup>

29. The Interim Financing Facility, provides “at least the prospect of increased value and a successful proposal”, whereas any alternative “would have dire effects”.<sup>26</sup>

### **B. The Administration Charge Should be Approved**

30. The Company requests that the Professionals, shall be entitled to the benefit of the Administration Charge, which charge shall not exceed an aggregate amount of \$500,000 as security for their respective fees and disbursements.<sup>27</sup>

31. Section [64.2](#) of the BIA confers on this Court the authority to grant a charge in favour of financial, legal or other professionals involved in proposal proceedings under the BIA. Section [64.2](#) provides in part as follows:

#### **Court may order security or charge to cover certain costs**

64.2 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of

(a) the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee’s duties;

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<sup>25</sup> *Re P.J. Wallbank Manufacturing Co. Limited*, 2011 ONSC 7641 at paras [16–18](#) [*Wallbank*].

<sup>26</sup> *Eureka 93 Inc. et. al. (Re)*, 2020 ONSC 1482 at para [24](#); See also *Wallbank* at para [24](#).

<sup>27</sup> Di Iorio Affidavit at para 4(c)(iii).

(b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for the effective participation of that person in proceedings under this Division.

**Priority**

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.<sup>28</sup>

32. Administration charges have been previously approved in proposal proceedings, where, as in the present case, the participation of the parties whose fees are secured by the charge is necessary to ensure a successful proceeding under the BIA.<sup>29</sup>

33. The quantum of the proposed Administration Charge was calculated in consultation with the Proposal Trustee, which takes into account that the Professionals will be deferring the payment of fees and disbursements until a transaction has successfully closed in respect of the Commercial Property.<sup>30</sup>

34. The Proposal Trustee is of the view that the amount is reasonable and appropriate in the circumstances.<sup>31</sup>

**C. The JLL Listing Agreement Should be Authorized**

35. Ferris executed the JLL Listing Agreement in order to implement a sale process to solicit interest in and opportunities for the sale of the Commercial Property.<sup>32</sup>

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<sup>28</sup> BIA, s. 64.2(1)-(2).

<sup>29</sup> *Mustang GP Ltd. (Re)*, 2015 ONSC 6562 at para 33 [*Mustang*].

<sup>30</sup> Di Iorio Affidavit at para 46.

<sup>31</sup> Di Iorio Affidavit at para 46.

<sup>32</sup> Di Iorio Affidavit at para 29.

36. The Court's power to approve a sale of assets in the context of a proposal is set out in section [65.13](#) of the BIA. However, this section does not speak to the approval of a sale process.<sup>33</sup>

37. In the context of CCAA filings, courts have approved a stalking horse sale process and set out four factors (the "Nortel Criteria") that a court should consider in the exercise of its general statutory discretion to determine whether to authorize a sale process. The Court in *Mustang GP Ltd. (Re)*, 2015 ONSC 6562 held that, "The Nortel Criteria are of assistance in circumstances such as this — namely on a motion to approve a sale process in proposal proceedings under the BIA."<sup>34</sup>

The Nortel Criteria are as follows:

- (a) Is a sale transaction warranted at this time?;
- (b) Will the sale benefit the whole "economic community"?
- (c) Do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?; and
- (d) Is there a better viable alternative?<sup>35</sup>

38. Having regard to the foregoing criteria and the requirements of the BIA, the following supports the approval of the JLL Listing Agreement:

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<sup>33</sup> *Mustang* at para [36-37](#).

<sup>34</sup> *Mustang* at para [38](#).

<sup>35</sup> *Mustang* at para [37](#)

- (a) selling the Commercial Property pursuant to a process overseen by the Proposal Trustee is necessary at this time to realize the best possible price for Ferris' primary asset of value;<sup>36</sup>
- (b) the implementation of a sale process and sale of the Commercial Property aims to maximize the value of Ferris' assets for the benefit of all of Ferris' stakeholders;<sup>37</sup>
- (c) the JLL Listing Agreement was negotiated and prepared in consultation with the Proposal Trustee and is supported by the Interim Lender and Laurentian; and<sup>38</sup>
- (d) the JLL Listing Agreement represents a fair and commercially efficient process that allows a sufficient opportunity for Ferris to optimize its chances of securing the best possible price for the Commercial Property.<sup>39</sup>

#### **D. The Time to make a Proposal Should be Extended**

39. Pursuant to section [50.4\(8\)](#) of the BIA, the Company must file its proposal within thirty (30) days of filing a notice of intention, unless it otherwise obtains an extension of time from the Court. The Company seeks a forty-five (45) day extension of the time to file a proposal, moving the deadline from August 7, 2024 to September 21, 2024.

40. Section [50.4\(9\)](#) of the BIA allows a debtor in a proposal proceeding to apply to the court for an order extending the time to file a proposal by a maximum of forty-five (45) days. This Court may grant an extension if satisfied that:

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<sup>36</sup> Di Iorio Affidavit at para 29.

<sup>37</sup> Di Iorio Affidavit at para 29.

<sup>38</sup> Di Iorio Affidavit at para 30.

<sup>39</sup> Di Iorio Affidavit at para 30.

- (a) the insolvent person has acted, and is acting, in good faith and with due diligence;
- (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
- (c) no creditor would be materially prejudiced if the extension being applied for were granted.<sup>40</sup>

41. The section [50.4\(9\)](#) factors are assessed using an objective standard, considering what is reasonable in the circumstances.<sup>41</sup>

42. A court should consider the intent of the BIA, specifically the rehabilitative purpose of a proposal. Further, a court should take a broad approach and consider the impact on all stakeholders, including employees, secured creditors, unsecured creditors and other impacted parties.<sup>42</sup>

43. To find good faith and due diligence, a court must be satisfied that the insolvent company is not acting in bad faith and making initial steps towards forming a proposal. A court need only look for “some diligence”.<sup>43</sup>

### ***Good Faith***

44. Ferris has acted and continues to act in good faith and with due diligence in the NOI proceedings by:

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<sup>40</sup> *BIA* at s. [50.4\(9\)](#).

<sup>41</sup> *In the Matter of the Proposal of Cantrail Coach Lines Ltd.*, 2005 BCSC 351 at para. [11](#) [*Cantrail*]. *Andover Mining Corp. (Re)*, 2013 BCSC 1833 at paras. [50](#), [58](#) [*Andover*].

<sup>42</sup> *Cantrail* at paras. [11–12](#).

<sup>43</sup> *Andover* at paras. [64–65](#).

- (a) addressing its urgent cashflow needs by seeking the Interim Financing Facility and related court approval;
- (b) negotiating and entering into the Interim Financing Term Sheet;
- (c) ensuring the continued participation of the Professionals and legal counsel to the Lender, by obtaining court approval of the Administration Charge;
- (d) working to stabilize and reduce its operational costs;
- (e) working diligently to execute the JLL Listing Agreement to implement a sale process to solicit interest in and opportunities for the sale of the Commercial Property; and
- (f) working with the Proposal Trustee in the Proposal Proceedings.

45. Further, the Proposal Trustee is of the opinion that Ferris has acted, and is acting, in good faith and with due diligence.<sup>44</sup>

### ***Viable Proposal***

46. To find the insolvent company would likely be able to make a viable proposal, a court must be satisfied that the insolvent company “would likely be able to make a viable proposal, a proposal that is at least feasible, a proposal that would be practicable from an economic standpoint, if the extension being applied for were granted.”<sup>45</sup>

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<sup>44</sup> First Report at section 6.

<sup>45</sup> *Cantrail* at paras. [19–20](#).

47. Evidence of a viable proposal need not be certain, but rather, an insolvent company must show that a viable proposal “might well happen.”<sup>46</sup>

48. The extension will provide Ferris the necessary time to implement a sale process, based on the executed JLL Listing Agreement, and solicit interest in and opportunities for the sale of the Commercial Property.

### ***Prejudice***

49. To find that no creditor will be materially prejudiced by the extension, a court must be satisfied that none of the insolvent company’s creditors will face “substantial” or “considerable” prejudice above and beyond the normal prejudice imposed on all creditors by the BIA during the proposal period.<sup>47</sup>

50. In the case at bar, granting the extension to Ferris will not materially prejudice its primary secured creditor, Laurentian, as Laurentian will likely receive a greater benefit from the proposed sale process.

### ***Conclusion on Extension***

51. Considering the rehabilitative purposes of a proposal and all stakeholders involved, Ferris submits that Ferris has met the test set out in section [50.4\(9\)](#) of the BIA..

52. Accordingly, Ferris submits that it is appropriate to grant the order extending the time for filing a proposal and the order extending the stay of proceedings.

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<sup>46</sup> *Andover* at para. [66](#).

<sup>47</sup> *Cantrail* at paras. [21–22](#).

**PART V – ORDER SOUGHT**

53. For all of the foregoing reasons, the Company requests that this Court grant the proposed relief by making an order substantially in the form of the proposed Order.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 29<sup>th</sup> day of July, 2024.



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**DENTONS CANADA LLP**  
*Lawyers for 125 Ferris Inc.*



**SCHEDULE “A”**

**LIST OF AUTHORITIES**

1. *P.J. Wallbank Manufacturing Co. Limited (Re)*, [2011 ONSC 7641](#)
2. *Eureka 93 Inc. et. al. (Re)*, [2020 ONSC 1482](#)
3. *Mustang GP Ltd. (Re)*, [2015 ONSC 6562](#)
4. *In the Matter of the Proposal of Cantrail Coach Lines Ltd.*, [2005 BCSC 351](#)
5. *Andover Mining Corp. (Re)*, [2013 BCSC 1833](#)

**SCHEDULE “B”****STATUTES AND REGULATIONS****Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3**

**50.4 (1)** Before filing a copy of a proposal with a licensed trustee, an insolvent person may file a notice of intention, in the prescribed form, with the official receiver in the insolvent person’s locality, stating

- (a) the insolvent person’s intention to make a proposal,
  - (b) the name and address of the licensed trustee who has consented, in writing, to act as the trustee under the proposal, and
  - (c) the names of the creditors with claims amounting to two hundred and fifty dollars or more and the amounts of their claims as known or shown by the debtor’s books,
- and attaching thereto a copy of the consent referred to in paragraph (b).

**Certain things to be filed**

(2) Within ten days after filing a notice of intention under subsection (1), the insolvent person shall file with the official receiver

- (a) a statement (in this section referred to as a “cash-flow statement”) indicating the projected cash-flow of the insolvent person on at least a monthly basis, prepared by the insolvent person, reviewed for its reasonableness by the trustee under the notice of intention and signed by the trustee and the insolvent person;
- (b) a report on the reasonableness of the cash-flow statement, in the prescribed form, prepared and signed by the trustee; and
- (c) a report containing prescribed representations by the insolvent person regarding the preparation of the cash-flow statement, in the prescribed form, prepared and signed by the insolvent person.

**Creditors may obtain statement**

(3) Subject to subsection (4), any creditor may obtain a copy of the cash-flow statement on request made to the trustee.

**Exception**

(4) The court may order that a cash-flow statement or any part thereof not be released to some or all of the creditors pursuant to subsection (3) where it is satisfied that

- (a) such release would unduly prejudice the insolvent person; and
- (b) non-release would not unduly prejudice the creditor or creditors in question.

### **Trustee protected**

(5) If the trustee acts in good faith and takes reasonable care in reviewing the cash-flow statement, the trustee is not liable for loss or damage to any person resulting from that person's reliance on the cash-flow statement.

### **Trustee to notify creditors**

(6) Within five days after the filing of a notice of intention under subsection (1), the trustee named in the notice shall send to every known creditor, in the prescribed manner, a copy of the notice including all of the information referred to in paragraphs (1)(a) to (c).

### **Trustee to monitor and report**

(7) Subject to any direction of the court under paragraph 47.1(2)(a), the trustee under a notice of intention in respect of an insolvent person

(a) shall, for the purpose of monitoring the insolvent person's business and financial affairs, have access to and examine the insolvent person's property, including his premises, books, records and other financial documents, to the extent necessary to adequately assess the insolvent person's business and financial affairs, from the filing of the notice of intention until a proposal is filed or the insolvent person becomes bankrupt;

(b) shall file a report on the state of the insolvent person's business and financial affairs — containing the prescribed information, if any —

(i) with the official receiver without delay after ascertaining a material adverse change in the insolvent person's projected cash-flow or financial circumstances, and

(ii) with the court at or before the hearing by the court of any application under subsection (9) and at any other time that the court may order; and

(c) shall send a report about the material adverse change to the creditors without delay after ascertaining the change.

### **Where assignment deemed to have been made**

(8) Where an insolvent person fails to comply with subsection (2), or where the trustee fails to file a proposal with the official receiver under subsection 62(1) within a period of thirty days after the day the notice of intention was filed under subsection (1), or within any extension of that period granted under subsection (9),

- (a) the insolvent person is, on the expiration of that period or that extension, as the case may be, deemed to have thereupon made an assignment;
- (b) the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;
- (b.1) the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and
- (c) the trustee shall, within five days after the day the certificate mentioned in paragraph (b.1) is issued, send notice of the meeting of creditors under section 102, at which meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.

### **Extension of time for filing proposal**

(9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

- (a) the insolvent person has acted, and is acting, in good faith and with due diligence;
- (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
- (c) no creditor would be materially prejudiced if the extension being applied for were granted.

### **Court may not extend time**

(10) Subsection 187(11) does not apply in respect of time limitations imposed by subsection (9).

### **Court may terminate period for making proposal**

(11) The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that

- (a) the insolvent person has not acted, or is not acting, in good faith and with due diligence,
- (b) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,

(c) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or

(d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected, and where the court declares the period in question terminated, paragraphs (8)(a) to (c) thereupon apply as if that period had expired.

### **Factors to be considered**

[50.6\(5\)](#) In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the debtor is expected to be subject to proceedings under this Act;

(b) how the debtor's business and financial affairs are to be managed during the proceedings;

(c) whether the debtor's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;

(e) the nature and value of the debtor's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

### **Court may order security or charge to cover certain costs**

[64.2](#) (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of

(a) the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;

(b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for the effective participation of that person in proceedings under this Division.

### **Priority**

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

### **Individual**

(3) In the case of an individual

(a) the court may not make the order unless the individual is carrying on a business; and

(b) only property acquired for or used in relation to the business may be subject to a security or charge.

### **Restriction on disposition of assets**

[65.13](#) (1) An insolvent person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

### **Individuals**

(2) In the case of an individual who is carrying on a business, the court may authorize the sale or disposition only if the assets were acquired for or used in relation to the business.

### **Notice to secured creditors**

(3) An insolvent person who applies to the court for an authorization shall give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

### **Factors to be considered**

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

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

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

- (c) whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

### **Additional factors — related persons**

(5) If the proposed sale or disposition is to a person who is related to the insolvent person, the court may, after considering the factors referred to in subsection (4), grant the authorization only if it is satisfied that

- (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the insolvent person; and
- (b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

### **Related persons**

(6) For the purpose of subsection (5), a person who is related to the insolvent person includes

- (a) a director or officer of the insolvent person;
- (b) a person who has or has had, directly or indirectly, control in fact of the insolvent person; and
- (c) a person who is related to a person described in paragraph (a) or (b).

### **Assets may be disposed of free and clear**

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

### **Restriction — employers**

(8) The court may grant the authorization only if the court is satisfied that the insolvent person can and will make the payments that would have been required under paragraphs 60(1.3)(a) and (1.5)(a) if the court had approved the proposal.

**Restriction — intellectual property**

(9) If, on the day on which a notice of intention is filed under section 50.4 or a copy of the proposal is filed under subsection 62(1), the insolvent person is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (7), that sale or disposition does not affect the other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

**Advance notice**

244 (1) A secured creditor who intends to enforce a security on all or substantially all of

- (a) the inventory,
- (b) the accounts receivable, or
- (c) the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.



**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF 125 FERRIS INC.  
IN THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO**

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**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)  
IN BANKRUPTCY & INSOLVENCY**

PROCEEDING COMMENCED AT TORONTO

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