

Estate / Court File No.: _____

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

**IN THE MATTER OF *THE BANKRUPTCY AND INSOLVENCY*
ACT, R.S.C. 1985, c. B-3, AS AMENDED**

**IN THE MATTER OF THE NOTICE OF INTENTION TO
MAKE A PROPOSAL OF ALLIED TRACK SERVICES INC.,
A CORPORATION INCORPORATED UNDER THE LAWS
OF ONTARIO**

Applicant

**FACTUM OF THE APPLICANT
(Returnable January 22, 2021)**

January 21, 2021

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FACTUM OF THE APPLICANT

PART I: INTRODUCTION

1. Allied Track Services Inc. ("**Allied Track**" or the "**Applicant**") seeks an order (the "**Order**") pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**") to facilitate its restructuring, maintain its ordinary course business operations and implement a sale and investment solicitation process (the "**SISP**") for the benefit of its stakeholders.

2. Allied Track is a full service railroad maintenance and construction provider in Canada. It operates three business segments: (i) track production; (ii) signal maintenance, rehabilitation and construction; and (iii) industrial track maintenance and installation and bridge maintenance. While certain of Allied Track's business segments are profitable, its track production business segment has incurred unsustainable losses resulting in severe liquidity and cash flow issues.

3. In response to its liquidity and cash flow issues, Allied Track filed a notice of intention to make a proposal (the "**NOI**") on January 21, 2021 pursuant to section 50.4 of the BIA. KSV Restructuring Inc. is the proposal trustee under the NOI (in such capacity, the "**Proposal Trustee**"). With the support of its senior secured lender, Bridging Finance Inc. ("**Bridging**"), Allied Track now seeks additional relief in the NOI proceedings (the "**Proposal Proceedings**") to provide the stability, capital and time necessary to develop a viable proposal and ensure the continuation of its ordinary course business operations while the SISP is conducted.

PART II: FACTS

4. The facts underlying this Application are more fully set out in the affidavit of Andrew Stuart Jones, sworn January 21, 2021 (the "**Jones Affidavit**") and the First Report of the Proposal Trustee

dated January 21, 2021 (the "**First Report**").¹ All capitalized terms used but not defined herein have the meanings ascribed to them in the Jones Affidavit.

B. The Applicant

5. Allied Track is a privately held corporation that was incorporated under the *Business Corporations Act* (Ontario), R.S.O. 1990, c. B.16. Allied Track's registered head office is located in Grimsby, Ontario.²

6. Allied Track has two shareholders, 2409889 Ontario Inc. ("**240**") and Bridging Income Fund LP. Bridging Income Fund LP directly owns 80% of Allied Track's shares and indirectly owns a further 16% of Allied Track's shares through 240. 240's only other shareholder is Swift Railway Holdings U.S. LLC ("**Swift**").³

C. Business and Operations

7. With its sister company, Pittsburg Bottom Line LLC ("**Bottom Line**") and together with Allied Track, the "**Allied Group**", Allied Track provides railroad and rail-served clients with a full service offering of construction and maintenance needs for track, bridge, signals and communications. The Allied Group specializes in all types of track, rail bridge rehabilitation and maintenance, signals and construction projects.⁴

8. Due to the seasonal nature of Allied Track's operations, its employee base fluctuates throughout the year. Allied Track currently employs 27 employees on a salaried, full-time basis and

¹ Affidavit of Andrew Stuart Jones sworn January 21, 2021 [Jones Affidavit], Applicant's Motion Record at Tab 2 [Motion Record]; First Report of the Proposal Trustee dated January 21, 2021 [First Report].

² *Ibid* at para 10, Motion Record at Tab 2.

³ *Ibid* at para 12, Motion Record at Tab 2

⁴ *Ibid* at paras 4-5, Motion Record at Tab 2.

20 employees on an hourly, part-time basis. The part-time employees within Allied Track's production track and industrial maintenance and installation and bridge divisions located in Alberta, British Columbia, Manitoba, Ontario and Saskatchewan are unionized, as are the part-time employees within Allied Track's signals and communications division located in Ontario. All of Allied Track's remaining employees are non-unionized.⁵

9. Through its benefits provider, The Canada Life Assurance Company, Allied Track offers health, dental, life and disability benefits to all of its non-union employees. Additionally, Allied Track has established a group registered retirement savings plan and deferred profit sharing plan for its non-union employees, each issued by London Life Insurance Company. No relief sought herein purports to affect these benefits.⁶

D. Assets and Liabilities

10. As of the date of the Jones Affidavit, the Applicant had an immaterial amount of cash on hand.⁷

11. As at October 31, 2020, the Applicant had assets and liabilities with unaudited book values of approximately \$36,462,842 and \$132,526,658, respectively.⁸ The primary liabilities of the Applicant are discussed below.

⁵ *Ibid* at paras 16, 18, Motion Record at Tab 2.

⁶ *Ibid* at para 19, Motion Record at Tab 2.

⁷ *Ibid* at para 27, Motion Record at Tab 2.

⁸ *Ibid* at paras 29-30, Motion Record at Tab 2.

1. The Bridging Debt

12. The Applicant is a party to a credit agreement with Bridging, as administrative agent ("**Agent**") for certain lenders from time to time dated March 8, 2017, and amended and restated on November 15, 2017 (the "**Credit Agreement**"). The Applicant's obligations under the Credit Agreement are guaranteed by 240, Bottom Line and Swift (collectively, the "**Guarantors**").⁹

13. Among other things, the Credit Agreement provides for (i) a term non-revolving subordinated debt facility of up to \$18,500,000 (the "**Facility B Loan**") and (ii) a demand revolving loan of up to \$22,000,000 (the "**Facility A Loan**"). The Facility B Loan bears interest at 16% per annum calculated and payable on the daily outstanding balance of the Facility B Loan and compounded monthly. The Facility A Loan bears interest at Bank of Montreal's applicable prime rate of interest plus 11% per annum calculated and payable on the daily outstanding balance of the Facility A Loan and compounded monthly.¹⁰

14. As general and continued security for the obligations under the Credit Agreement, the Applicant and the Guarantors granted Bridging various first lien security.¹¹

15. As of the date of the Jones Affidavit, approximately \$88,700,000 (inclusive of accrued interest) is owing to Bridging pursuant to the Credit Agreement.¹²

⁹ *Ibid* at para 31, Motion Record at Tab 2.

¹⁰ *Ibid* at para 32, Motion Record at Tab 2.

¹¹ *Ibid* at paras 36-38, Motion Record at Tab 2.

¹² *Ibid* at para 35, Motion Record at Tab 2.

2. Progress Rail Equipment Leasing Corporation and 2700902 Ontario Inc.

16. On February 28, 2017, the Applicant entered into an Installment Sale Contract (the "**Sale Contract**") with Progress Rail Equipment Leasing Corporation ("**Progress**") pursuant to which Allied Track purchased 33 pieces of rail equipment (the "**Purchased Equipment**") for USD \$10,560,051 (the "**Purchase Price**"). Pursuant to the Sale Contract, the Purchase Price less the deposit of USD \$775,000 is to be paid by 84 equal monthly installments of USD \$149,153.59 beginning on March 1, 2017 and ending on March 1, 2024.¹³

17. Under an Assignment and Assumption Agreement dated June 6, 2019, Progress agreed to sell and Bridging agreed to purchase, Progress' interest in the Sale Contract for USD \$7,612,645.50, including, among other things, all of Progress' rights, claims, demands and causes of action, which Progress has under the Sale Contract, at law or under the provisions of the PPSA (collectively, the "**Assigned Assets**"). Bridging subsequently conveyed the Assigned Assets to 2700902 Ontario Inc. pursuant to an Assignment and Assumption Agreement dated June 11, 2019.¹⁴

18. As of the date of the Jones Affidavit, Allied Track is overdue in its payments under the Sale Contract by approximately USD \$3,400,000.¹⁵

3. Allied Track Equipment Company LLC

19. In connection with the purchase of the Purchased Equipment, Allied Track Equipment Company LLC ("**ATEC**") paid Progress the sum of USD \$2,750,000, which was treated as a loan advance to Allied Track (the "**Loan Advance**"). On April 5, 2018, Allied Track executed (i) a

¹³ *Ibid* at para 41, Motion Record at Tab 2.

¹⁴ *Ibid* at paras 42-43, Motion Record at Tab 2.

¹⁵ *Ibid* at para 44, Motion Record at Tab 2.

Promissory Note in favour of ATEC for the amount of USD \$3,000,000, reflecting the Loan Advance, plus interest thereon and (ii) an Equipment Security Agreement granting to ATEC a security interest in the Purchased Equipment and certain related assets (the "**Equipment Lender Collateral**").¹⁶

20. Pursuant to a Priorities Agreement dated April 5, 2018 between Bridging, Allied Track and ATEC, Bridging postponed its security interest in the Equipment Lender Collateral to ATEC.¹⁷

4. Equipment Lessors

21. Allied Track leases numerous vehicles, equipment and heavy machinery to conduct its business beyond the Purchased Equipment. As of the date of the Jones Affidavit, approximately \$653,000 is outstanding under Allied Track's vehicle, equipment and heavy machinery leases.¹⁸

5. Unsecured Indebtedness

22. The Applicant has a number of unsecured creditors more fully discussed in the Jones Affidavit and the First Report. Among them are certain employees, the Canada Revenue Agency, third party suppliers and Swift.¹⁹

23. Employee liabilities include gross payroll of approximately \$300,000 monthly. While the Applicant is current with respect to its payroll obligations and source deductions, it is in arrears in the amount of approximately \$107,000 in respect of union dues for the month of November 2020.²⁰

¹⁶ *Ibid* at paras 45-47, Motion Record at Tab 2.

¹⁷ *Ibid* at para 47, Motion Record at Tab 2.

¹⁸ *Ibid* at para 50, Motion Record at Tab 2.

¹⁹ *Ibid* at paras 51-54, Motion Record at Tab 2; First Report, *supra* note 1 at para 3.2.

²⁰ Jones Affidavit, *ibid* at para 51, Motion Record at Tab 2.

24. The Applicant is indebted to a variety of third party suppliers that provide services and products essential to its business operations in the amount of approximately \$798,000.²¹ Further, the Applicant is not current with respect to its HST remittances. Approximately \$1,514,131 remains outstanding to the Canada Revenue Agency in respect of HST.²²

E. Proposed DIP Loan

25. On January 21, 2021, Allied Track, as borrower (in such capacity, the "**Borrower**") and Bridging, as Agent (in such capacity the "**DIP Lender**"), entered into a DIP term sheet (the "**DIP Term Sheet**") in respect of a non-revolving demand credit facility up to a maximum principal amount of \$3,000,000 (the "**DIP Loan**"). The DIP Loan is intended to provide Allied Track with the liquidity necessary to fund its ordinary course operations and professional fees during the Proposal Proceedings.²³

26. The proceeds of the DIP Loan will be used to fund, among other things: (i) the Applicant's working capital needs; (ii) the professional fees and expenses incurred by the Borrower and the Proposal Trustee in respect of the Proposal Proceedings; and (iii) such other costs and expenses of the Borrower as may be agreed to by the DIP Lender.²⁴

27. The proposed DIP Loan is subject to customary conditions precedent, covenants and representations and warranties.²⁵ Pursuant to the DIP Term Sheet, the proposed DIP Loan is also conditional on the granting of a super-priority charge over all present and future assets of the

²¹ *Ibid* at para 54, Motion Record at Tab 2.

²² *Ibid*, Motion Record at Tab 2.

²³ *Ibid* at paras 55-56, Motion Record at Tab 2.

²⁴ *Ibid* at para 57, Motion Record at Tab 2.

²⁵ *Ibid* at para 58, Motion Record at Tab 2.

Borrower (the "**DIP Lender's Charge**"), subordinate only to the Administration Charge and the Directors' Charge (each as defined below).²⁶

F. SISP and Stalking Horse Agreement

28. With the support of its senior secured creditor, Bridging, and in consultation with the Proposal Trustee, Allied Track developed the SISP and corresponding bid procedures (the "**Bid Procedures**"). To facilitate the SISP and establish an appropriate floor for bids submitted therein, Allied Track, in consultation with the Proposal Trustee, also entered into a stalking horse asset purchase agreement dated January 21, 2021 with 2806401 Ontario Inc., a nominee of Bridging (the "**Stalking Horse Agreement**").²⁷

29. The SISP will solicit offers for the assets, undertakings and interests of Bottom Line and Allied Track, on an en bloc or piecemeal basis. In an effort to maximize value and flexibility, the SISP also solicits offers that contemplate a plan of restructuring, recapitalization or other form of reorganization. The Stalking Horse Agreement will serve as the stalking horse bid in the SISP (the "**Stalking Horse Bid**") and ensure that Allied Track will emerge from the Proposal Proceedings on a going-concern basis, while the Bid Procedures provide a fair and transparent process for governing the submission of higher and better bids.²⁸

²⁶ *Ibid* at para 80, Motion Record at Tab 2.

²⁷ *Ibid* at paras 60-61, Motion Record at Tab 2.

²⁸ *Ibid* at paras 60-61, 64-66, 70-71 Motion Record at Tab 2.

PART III: ISSUES

30. The issues to be considered on this motion are whether:

- (a) the Stalking Horse Agreement should be approved;
- (b) the SISP and related Bid Procedures should be approved;
- (c) the Court should approve the DIP Loan and DIP Lender's Charge;
- (d) the Administration Charge should be granted;
- (e) the Directors' Charge should be granted;
- (f) the Court should grant an extension of the stay of proceedings and the time for the Applicant to file a proposal (the "**Stay Extension**"); and
- (g) the Court should authorize the Applicant to pay certain pre-filing amounts with the consent of the Proposal Trustee and the DIP Lender.

PART IV: LAW AND ARGUMENT

A. The Stalking Horse Agreement

31. As this Court recognized in *Danier Leather Inc., Re*, stalking horse agreements are commonplace in insolvency proceedings as they facilitate sales by establishing a baseline price and transactional structure to assess and optimize superior bids from interested parties. Such agreements

aim to maximize the value of a business for the benefit of its stakeholders, enhance the fairness of the sale process, and assure a going-concern outcome.²⁹

32. In approving a stalking horse agreement for the purpose of acting as a stalking horse bid in a sale process, courts have considered whether the proposed stalking horse bid encourages the sale process without unduly tempering its efficiency and expediency.³⁰ These considerations are appropriately balanced by the Stalking Horse Bid in the present case, given that:

- (a) the Stalking Horse Agreement sets a floor purchase price for the purchased assets and encourages interested parties to submit a higher and better offer, maximizing the value of the transaction for the benefit of all of Allied Track's stakeholders;
- (b) the Stalking Horse Agreement promotes an efficient, transparent and competitive SISP;
- (c) the Stalking Horse Agreement assures that the Applicant's business will continue as a going concern;
- (d) the Stalking Horse Agreement does not include any break fee or expense reimbursement fee that may deter the submission of bids from interested parties; and

²⁹ [*Danier Leather Inc \(Re\)*, 2016 ONSC 1044](#) at para 20 [*Danier*]; [*CCM Master Qualified Fund Ltd v blutip Power Technologies Ltd*, 2012 ONSC 1750 \(Ont. S.C.J. \[Commercial List\]\)](#) at para 7 [*CCM*].

³⁰ [*CCM*](#), *ibid* at paras 7-8.

- (e) having regard to the timelines contemplated by the SISP, the Proposal Trustee believes that the terms of the Stalking Horse Agreement are fair and commercially reasonable, and is supportive of its approval.³¹

33. In the circumstances, the Applicant submits the Stalking Horse Agreement is fair, reasonable and appropriate in the circumstances.

B. The SISP

34. When considering approval of a sale process under the proposal provisions of the BIA, this Court has stated that the following four factors should be considered:

- (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?
- (d) Is there a better viable alternative?³²

35. Although the decision to approve a particular sales process is distinct from approving a sale under section 65.13 of the BIA, courts have nonetheless noted that the adequacy of a sales process should be assessed with regard to whether it will result in a transaction that is capable of satisfying the non-exhaustive criteria enumerated in section 65.13.³³ Namely:

³¹ First Report, *supra* note 1 at paras 4.3-4.4; Jones Affidavit, *supra* note 1 at paras 61-62, 72-75, Motion Record at Tab 2.

³² [Danier](#), *supra* note 29 at paras 23-25; [Mustang GP Ltd \(Re\), 2015 ONSC 6562](#) at paras 37-38 [*Mustang*].

³³ [Danier](#), *ibid* at paras 21-23, 34.

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the proposal trustee approved the process leading to the proposed sale or disposition;
- (c) whether the proposal 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 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.³⁴

36. Having regard to the above considerations, the Applicant submits that the SISP should be approved because:

- (a) in light of the Applicant's financial circumstances, a sale of its business on a going-concern basis is in the best interests of Allied Track and its stakeholders, and is warranted at this time to avoid the cessation of the Applicant's business;
- (b) the SISP was designed to be flexible and capable of accommodating virtually any type of transaction and the inclusion of the Bottom Line Assets enhances the SISP's flexibility and opportunities to maximize value;

³⁴ [Bankruptcy and Insolvency Act, RSC 1985, c. B-3](#) s 65.13 [BIA]; *ibid* at paras 34-35.

- (c) the Proposal Trustee believes that the six-week solicitation period contemplated by the SISP will provide sufficient time to expose the Allied Group's assets to the market and identify a value maximizing transaction;
- (d) a sale of the Applicant's business will maximize value for stakeholders, including Allied Track's employees, and is expected to provide a better and higher result than a bankruptcy or liquidation;
- (e) the SISP will be conducted by the Proposal Trustee in a fair and transparent manner, and the Stalking Horse Bid will serve as a public opening bid therein;
- (f) the SISP will be conducted with minimal disruption to the Applicant's ordinary course operations and the assurance of a going concern sale through the Stalking Horse Agreement will allow Allied Track to remain competitive in tendering processes for new contracts; and
- (g) the Proposal Trustee is supportive of the SISP and believes it is the best option for Allied Track to preserve the value of its business and continue as a going-concern.³⁵

C. The DIP Loan and DIP Lender's Charge Should be Granted

37. Subsection 50.6(1) of the BIA expressly provides this Court with the jurisdiction to order a charge to secure interim financing advanced to a debtor "on notice to the secured creditors who are likely to be affected by the charge [...] in an amount that the court considers appropriate".³⁶ Such a

³⁵ First Report, *supra* note 1 at para 4.5; Jones Affidavit, *supra* note 1 at paras 60-62, 64-71, Motion Record at Tab 2.

³⁶ [BIA](#), *supra* note 34 s 50.6(1).

charge may not "secure an obligation that exists before the order is made."³⁷ Pursuant to subsection 50.6(3), the charge may "rank in priority over the claim of any secured creditor".³⁸

38. When determining whether to grant a charge securing interim financing, subsection 50.6(5) of the BIA requires the Court to consider, among other things:

- (a) the period during which the debtor is expected to be subject to proceedings under [the BIA];
- (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.³⁹

39. Recognizing that a charge securing interim financing will invariably "impact all creditors' positions to some degree",⁴⁰ courts have granted such charges where:

- (a) declining to approve interim financing and an attendant charge would result in the cessation of the debtor's business;

³⁷ *Ibid.*

³⁸ *Ibid* s 50.6(1), s 50.6(3).

³⁹ *Ibid* s 50.6(5); *Eureka 93 Inc et al (Re)*, 2020 ONSC 1482 at para 16 [*Eureka*].

⁴⁰ *P.J. Wallbank Manufacturing Co. Re*, 2011 ONSC 7641 at para 24 [*Wallbank*]; *Mustang*, *supra* note 32 at para 29; *OVG Inc. Re*, 2013 ONSC 1794 at para 34.

- (b) the interim financing and a corresponding charge were supported by the proposal trustee; and
- (c) the interim financing provided "at least the prospect of increased value and a successful proposal".⁴¹

40. The circumstances in which courts have granted interim financing and a charge securing same reflect the remedial purposes of the BIA's proposal provisions – to "avoid the social and economic losses resulting from liquidation of an insolvent company" and "create conditions for preserving the *status quo*" while an insolvent company has an opportunity to establish a proposal.⁴²

41. Applied to this case, the statutory considerations enumerated in subsection 50.6(5) of the BIA and the remedial purpose of the BIA's proposal provisions support the granting of the DIP Loan and DIP Lender's Charge. Namely:

- (a) the Applicant has nominal cash on hand and, as the Cash Flow Statement illustrates, requires additional financing to continue its ordinary course business operations while the SISP is conducted;
- (b) absent additional financing, Allied Track will be forced to cease its business operations and will be subject to enforcement actions by its creditors – the SISP will not be conducted and there will be no chance for a viable proposal to be put forward;

⁴¹ [Mustang](#), *ibid* at para 28; [Wallbank](#), *ibid* at para 24; [Eureka](#), *supra* note 39 at para 24.

⁴² [NS United Kaium Kaisha, Ltd v Gogent Fibre Inc, 2015 ONSC 5139](#) at para 8 [*Cogent*]; [Clothing for Modern times Ltd, Re, 2011 ONSC 7522](#) at para 11 citing [Ted Leroy Trucking Ltd, Re, 2010 SCC 60](#).

- (c) the preservation of the value and going concern operations of the Applicant's business, is in the best interests of the Applicant and its stakeholders;
- (d) the DIP Loan is conditional upon the DIP Lender's Charge being granted;
- (e) given the Applicant's capital structure, no alternative financing is expected to be forthcoming;
- (f) as the Cash Flow Statement demonstrates, with the benefit of the DIP Loan, the Applicant will have sufficient liquidity to fund its obligations, the SISP and the costs of the Proposal Proceedings; and
- (g) the Proposal Trustee is supportive of the DIP Loan and the DIP Lender's Charge and does not believe that creditors will be prejudiced as a result of its approval.⁴³

42. The Applicant submits that the approval of the proposed DIP Loan and DIP Lender's Charge will enhance the prospect of a viable proposal being made, is consistent with the BIA's purposes and is necessary to prevent the "devastating social and economic effects of bankruptcy".⁴⁴

D. The Administration Charge Should Be Granted

43. The Applicant is seeking a charge in the amount of \$500,000 to secure the professional fees and disbursements of the Proposal Trustee, along with its counsel and the Applicant's counsel (the "**Administration Charge**").⁴⁵

⁴³ Jones Affidavit, *supra* note 1 at paras 27, 59, 80-82, Motion Record at Tab 2; First Report, *supra* note 1 at paras 5.1-5.2, 8.3.

⁴⁴ *Mustang*, *supra* note 32 at para 30 citing *Comstock Canada Ltd, Re*, 2013 ONSC 4756.

⁴⁵ Jones Affidavit, *supra* note 1 at para 83, Motion Record at Tab 2.

44. Section 64.2 of the BIA authorizes the Court to grant a super-priority charge on a debtor's property to secure professional fees.⁴⁶ Specifically, subsection 64.2(1) of the BIA states that:

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 [...] 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.⁴⁷

45. Subsection 64.2(2) provides that the Court "may order that the security or charge rank in priority over the claim of any secured creditor".⁴⁸ Such administration charges are routinely granted where, as here:

- (a) the debtor has limited means to obtain professional assistance;
- (b) the involvement of professional advisors is critical to the success of the proceedings under the BIA; and
- (c) the quantum of the proposed charge is commensurate with the complexity of the debtor's business.⁴⁹

⁴⁶ [BIA](#), *supra* note 34 s 64.2(1), s 64.2(2); [Colossus Minerals Inc. Re, 2014 ONSC 514](#) at para 12 [Colossus].

⁴⁷ [BIA](#), *ibid* s 64.2(1).

⁴⁸ [Ibid](#) s 64.2(2).

⁴⁹ [Mustang](#), *supra* note 32 at para 33; [Colossus](#), *supra* note 46 at paras 13-14; [Danier](#), *supra* note 29 at para 57.

46. The Applicant submits that it is appropriate for this Court to exercise its jurisdiction to grant the Administration Charge given, among other things, that:

- (a) Allied Track requires the assistance of professional advisors to navigate the Proposal Proceedings;
- (b) the involvement of the beneficiaries of the Administration Charge, each of which has a critical role, is essential to the success of the Proposal Proceedings;
- (c) the roles of the beneficiaries of the Administration Charge are not duplicative;
- (d) the quantum of the proposed Administration Charge accords with the size and complexity of Allied Track's business;
- (e) the Proposal Trustee supports the granting of the Administration Charge and its quantum; and
- (f) Bridging is supportive of the Administration Charge.⁵⁰

E. The Directors' Charge Should be Granted

47. The Applicant is seeking a charge in the amount of \$1,500,000 to secure the indemnity of its directors and officers for liabilities they may incur during the Proposal Proceedings (the "**Directors' Charge**"). Pursuant to the Order, the Directors' Charge is to be in priority to the DIP Lender's Charge but subordinate to the Administration Charge.⁵¹

⁵⁰ Jones Affidavit, *supra* note 1 at paras 84-85, Motion Record at Tab 2; First Report *supra* note 1 at para 8.1.

⁵¹ Jones Affidavit, *ibid* at para 88, Motion Record at Tab 2.

48. Subsection 64.1(1) of the BIA authorizes this Court to grant the Directors' Charge and provides that:

[o]n application by a person in respect of whom a notice of intention is filed under section 50.4 [...] and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the property of the person is subject to a security or charge – in an amount that the court considers appropriate – in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention.⁵²

49. Pursuant to subsection 64.1(2), the charge may "rank in priority over the claim of any secured creditor".⁵³

50. This Court has previously approved charges in favour of an insolvent company's directors and officers charge where:

- (a) the existing insurance coverage may have been insufficient to cover all potential claims;
- (b) the continued involvement of the debtor's directors and officers was essential to a successful proceeding under the BIA;
- (c) the debtor's directors and officers may not have been willing to continue to provide their services absent the protection of a court-ordered charge; and
- (d) the proposal trustee was supportive of the proposed charge.⁵⁴

⁵² [BIA](#), *supra* note 34 s 64.1(1).

⁵³ *Ibid* s 64.1(2).

⁵⁴ [Danier](#), *supra* note 29 at para 65-71; [Mustang](#), *supra* note 32 at para 35; [Colossus](#), *supra* note 46 at paras 17-21.

51. The Applicant's existing directors' and officers' liability insurance may not provide sufficient coverage against the potential liabilities that Allied Track's directors and officers could incur during the Proposal Proceedings.⁵⁵ These liabilities may include obligations owing to employees and government entities, such as unpaid accrued wages and unpaid accrued vacation pay, together with unremitted excise, sales, goods and services, and harmonized sales taxes.

52. Given the risks attending the Proposal Proceedings, Allied Track's directors and officers have indicated their continued service and involvement in the Proposal Proceedings is conditional upon the granting of the Directors' Charge.⁵⁶ For this reason, the Directors' Charge is necessary to ensure that the Applicant continues to benefit from the knowledge and expertise of Allied Track's directors and officers.⁵⁷

53. The Proposal Trustee is supportive of the Directors' Charge and its quantum.⁵⁸

F. The Court Should Grant the Stay Extension

54. The automatic stay period afforded to the Applicant as a result of filing the NOI expires on February 20, 2021. The Applicant is seeking an extension of time to file a proposal and a corresponding extension of the stay period until and including April 6, 2021. The Stay Extension will afford Allied Track the breathing space necessary to conduct the SISP and develop a viable proposal for the benefit of its stakeholders. Further, the granting of the Stay Extension at this time will decrease the professional fees that would be expended in seeking a stay extension prior to February 20, 2021.⁵⁹

⁵⁵ Jones Affidavit, *supra* note 1 at para 87, Motion Record at Tab 2.

⁵⁶ *Ibid* at paras 87-89, Motion Record at Tab 2.

⁵⁷ *Ibid*, Motion Record at Tab 2.

⁵⁸ *Ibid* at para 89, Motion Record at Tab 2; First Report, *supra* note 1 at paras 8.2.

⁵⁹ Jones Affidavit, *ibid* at paras 78-79, Motion Record at Tab 2; First Report, *ibid* at para 6.0.

55. Section 50.4(9) of the BIA authorizes this Court to grant the Stay Extension, including immediately after the filing of a notice of intention to make a proposal,⁶⁰ where it is satisfied that:

- (a) the insolvent person has acted, and is acting, in good faith and with due diligence;
- (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
- (c) no creditor would be materially prejudiced if the extension being applied for were granted.⁶¹

56. These criteria continue to apply where, as here, an extension of time is necessary to allow a debtor company to pursue a SISP and assess the merits of a proposal.⁶²

(i) The Applicant has Acted and is Acting in Good Faith and with Due Diligence

57. Prior to and following the commencement of the Proposal Proceedings, the Applicant has acted and continues to act in good faith and with due diligence.⁶³ Specifically, the Applicant has taken the following steps to address its liquidity issues and implement a restructuring that would see its business emerge as a going concern:

- (a) with the assistance of the Proposal Trustee and the Applicant's legal advisors, undertaking an analysis of its restructuring options for the benefit of Allied Track's stakeholders, including its customers, suppliers and employees;

⁶⁰ See for instance [*In the Matter of the Notices of Intention to Make a Proposal of 957855 Alberta Ltd.*, \(April 7, 2020\), Toronto, 31-2636843](#) (Bankruptcy Procedure Order) where the notice of intention to make a proposal was filed on April 6, 2020 and the extension was granted on April 7, 2020; [*In the Matter of the Proposal of Via Four Inc.*, \(December 3, 2019\), Toronto, 31-2590812](#) (Interim Facility Approval Order) where the notice of intention to make a proposal was filed on December 1, 2019 and the extension was granted on December 3, 2019; [*In the Matter of the Notice of Intention to Make a Proposal of Muskoka Grown Limited* \(May 6, 2020\), Toronto, 31-2643278](#) (NOI Process Order) where the notice of intention to make a proposal was filed on May 5, 2020 and the extension was granted on May 6, 2020.

⁶¹ [*BIA*](#), *supra* note 34 s 50.4(9).

⁶² [*Mustang*](#), *supra* note 32 at para 41; [*Colossus*](#), *supra* note 46 at para 37.

⁶³ Jones Affidavit, *supra* note 1 at para 77, Motion Record at Tab 2; First Report, *supra* note 1 at para 6.0.

- (b) developing the SISP in consultation with the Proposal Trustee;
- (c) negotiating the Stalking Horse Agreement to serve as the Stalking Horse Bid in the SISP;
- (d) arranging for the DIP Loan to ensure that Allied Track has the necessary liquidity to fund the Proposal Proceedings, continue its ordinary course business operations, and meet its obligations while the SISP is conducted; and
- (e) continuing to engage in tendering processes to secure new contracts.⁶⁴

(ii) The Applicant is Likely to Make a Viable Proposal if the Extension is Granted

58. It is well established that the purpose of the BIA proposal provisions is to give an insolvent company an opportunity to put forward a plan.⁶⁵ To this end, the BIA proposal provisions offer insolvent debtors breathing space in the form of a stay of proceedings such that a viable proposal may be developed.

59. This breathing space has previously been afforded to insolvent debtors to conduct a SISP and evaluate whether a viable proposal can be formulated for the benefit of their creditors.⁶⁶ The alternative for such insolvent debtors, as recognized in *Mustang GP Ltd., Re*, is a bankruptcy – a result that surely forecloses any possibility of a proposal.⁶⁷

60. Here, the Applicant has commenced the Proposal Proceedings to conduct the SISP and consummate a value-maximizing transaction that will see Allied Track continue as a going concern.

⁶⁴ Jones Affidavit, *ibid* at para 77, Motion Record at Tab 2; First Report, *ibid* at para 6.0.

⁶⁵ *Cogent*, *supra* note 42 at para 8.

⁶⁶ *Mustang*, *supra* note 32 at para 41. See also, *Colossus*, *supra* note 46 at paras 37-43.

⁶⁷ *Mustang*, *ibid*. See also, *Colossus*, *ibid*.

Not only is the SISP in the best interest of Allied Track and its stakeholders, it may permit the Applicant to develop a viable proposal for its creditors.⁶⁸

61. Ultimately, the Stay Extension will ensure that the Applicant is able to conduct the SISP and assess the viability of a proposal while it continues its operations in the ordinary course.⁶⁹

(iii) No Creditor is Likely to be Materially Prejudiced by the Stay Extension

62. The Applicant is not aware of any creditor who would be materially prejudiced if the Stay Extension were granted and the Applicant's major stakeholder, Bridging, is supportive of the Stay Extension.⁷⁰

63. As the Cash Flow Statement illustrates, the Applicant is forecast to have sufficient liquidity to fund its obligations and the costs of the Proposal Proceedings through the end of the Stay Extension. The Applicant's continued operations in that time will preserve value for the benefit of its stakeholders.

64. For the foregoing reasons, the Applicant believes the granting of the Stay Extension is in the best interests of Allied Track and its stakeholders, meets the statutory requirements under the BIA, and is appropriate in the circumstances. The Proposal Trustee is equally supportive of the Stay Extension.⁷¹

⁶⁸ Jones Affidavit, *supra* note 1 at paras 77-78, Motion Record at Tab 2; First Report, *supra* note 1 at para 6.0.

⁶⁹ *Ibid* at paras 60-62, 78, Motion Record at Tab 2; First Report, *ibid*.

⁷⁰ Jones Affidavit, *ibid* at para 78, Motion Record at Tab 2.

⁷¹ First Report, *supra* note 1 at para 6.0, Motion Record at Tab 2.

G. The Applicant Should be Authorized to Pay Pre-Filing Amounts

65. To preserve its ordinary course business operations, Allied Track is seeking authorization to make certain pre-filing payments with the consent of both the Proposal Trustee and the DIP Lender for goods and services actually supplied to Allied Track prior to the NOI.

66. In the context of restructurings under the *Companies' Creditors Arrangement Act*, R.S.C. 195, c. C-36, this Court has recognized its general and inherent jurisdiction to "permit payment of pre-filing obligations to persons whose services are critical to the ongoing operations of the debtor companies."⁷² This Court's general and inherent jurisdiction to authorize such payments is preserved by subsection 183(1) of the BIA, which confers such "jurisdiction at law and in equity as will enable [it] to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act".⁷³

67. In authorizing such pre-filing payments, courts have considered the following:

- (a) whether the goods and services were integral to the business of the applicant;
- (b) the applicant's dependency on the uninterrupted supply of the goods or services;
- (c) the fact that no payments would be made with the consent of the court-appointed officer;

⁷² [Performance Sports Group Ltd. Re, 2016 ONSC 6800](#) at para 24; [Canwest Global Communications Corp. Re \(2009\), OJ No. 4286](#) at para 43 [*Canwest*].

⁷³ [BIA, supra note 34 s 183\(1\)](#); [Eagle River International Ltd. Re, 2001 SCC 92](#) at para 20; [Cheerio Toys & Games Ltd. Re, \[1971\] 3 OR 721](#) at para 16 varied in part [1972] 2 OR 845 (CA). See also, [Residential Warranty Co of Canada Inc. Re, 2006 ABQB 236](#) at paras 26-27 [*Residential Warranty (Queen's Bench)*], aff'd [Residential Warranty Co of Canada Inc. Re, 2006 ABCA 293](#) at para 20. The court's inherent jurisdiction should be used sparingly in clear cases where (i) the BIA is silent on a point or has not dealt with the matter exhaustively; and (ii) after balancing the competing interests, the benefit of granting the relief outweighs the relative prejudice to those affected by it. These considerations are to be applied pragmatically and flexibly.

- (d) the court-appointed officer's support and willingness to work with the applicants to ensure that payments to suppliers in respect of pre-filing liabilities are minimized;
- (e) whether the applicant has sufficient inventory of the goods on hand to meet its needs; and
- (f) the effect on the applicant's ongoing operations and ability to restructure if they were unable to make pre-filing payments to their critical suppliers.⁷⁴

68. In the present case, it is critical that Allied Track be permitted to pay for goods and services supplied to it prior to the date of the NOI to preserve key supplier relationships and ensure the uninterrupted continued operation of its business. Any disruption to the provision of such goods and services could jeopardize the value of Allied Track's business and the viability of a sale transaction within the SISP. Such payments are appropriately limited and must be approved by both the Proposal Trustee and the DIP Lender.⁷⁵

PART V: RELIEF REQUESTED

69. The Applicant submits that it meets all of the qualifications required to obtain the relief sought and requests that this Court grant the proposed Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

January 21, 2021.



BENNETT JONES/LLP

⁷⁴ [Cinram International Inc. Re. 2012 ONSC 3767](#) at paras 37, 68; [Canwest](#), *supra* note 72 at para 43.

⁷⁵ Jones Affidavit, *supra* note 1 at para 91, Motion Record at Tab 2; First Report, *supra* note 1 at para 7.0.

SCHEDULE "A"
LIST OF AUTHORITIES

Cases Cited

1. [Canwest Global Communications Corp, Re \(2009\), OJ No. 4286](#)
2. [CCM Master Qualified Fund Ltd v blutip Power Technologies Ltd, 2012 ONSC 1750 \(Ont. S.C.J. \[Commercial List\]\)](#)
3. [Cheerio Toys & Games Ltd, Re, \[1971\] 3 OR 721](#)
4. [Cinram International Inc, Re, 2012 ONSC 3767](#)
5. [Clothing for Modern times Ltd, Re, 2011 ONSC 7522](#)
6. [Colossus Minerals Inc \(Re\), 2014 ONSC 514](#)
7. [Danier Leather Inc \(Re\), 2016 ONSC 1044](#)
8. [Eagle River International Ltd, Re, 2001 SCC 92](#)
9. [Eureka 93 Inc et al \(Re\), 2020 ONSC 1482](#)
10. [In the Matter of the Notice of Intention to Make a Proposal of Muskoka Grown Limited \(May 6, 2020\), Toronto, 31-2643278 \(NOI Process Order\)](#)
11. [In the Matter of the Notices of Intention to Make a Proposal of 957855 Alberta Ltd, \(April 7, 2020\), Toronto, 31-2636843 \(Bankruptcy Procedure Order\)](#)
12. [In the Matter of the Proposal of ViaFoura Inc, \(December 3, 2019\), Toronto, 31-2590812 \(Interim Facility Approval Order\)](#)
13. [Mustang GP Ltd, Re, 2015 ONSC 6562](#)
14. [NS United Kaiun Kaisha, Ltd v Gogent Fibre Inc, 2015 ONSC 5139](#)
15. [OVG Inc, Re, 2013 ONSC 1794](#)
16. [Performance Sports Group Ltd, Re, 2016 ONSC 6800](#)
17. [P.J. Wallbank Manufacturing Co, Re, 2011 ONSC 7641](#)
18. [Residential Warranty Co of Canada Inc, Re, 2006 ABQB 236](#)
19. [Residential Warranty Co of Canada Inc, Re, 2006 ABCA 293](#)

SCHEDULE "B"

STATUTES RELIED ON

Bankruptcy and Insolvency Act, RSC 1985, c. B-3

Section 50.4

Notice of Intention

(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.

Section 50.6

Order – interim financing

(1) On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the debtor's property is subject to a security or charge – in an amount that the court considers appropriate – in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(6)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.

Individuals

(2) In the case of an individual,

- (a) they may not make an application under subsection (1) unless they are 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.

Priority

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

Priority – previous orders

(4) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

- (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.

Section 64.1

Security or charge relating to director's indemnification

(1) On application by 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) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the property of the person is subject to a security or charge - in an amount that the court considers appropriate - in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention or the proposal, as the case may be.

Priority

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

Restriction - indemnification insurance

(3) The court may not make the order ii in its opinion the person could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Negligence, misconduct or fault

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer ii in its opinion the obligation or liability was incurred as a result of the director's or

(2) officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

Section 64.2

Court may order security or charge to cover certain costs

(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.

Section 65.13

Restriction on disposition of assets

(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.

Section 183

Courts vested with jurisdiction

(1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

- (a) in the Province of Ontario, the Superior Court of Justice;
- (b) [Repealed, 2001, c. 4, s. 33]
- (c) in the Provinces of Nova Scotia and British Columbia, the Supreme Court;
- (d) in the Provinces of New Brunswick and Alberta, the Court of Queen's Bench;
- (e) in the Province of Prince Edward Island, the Supreme Court of the Province;
- (f) in the Provinces of Manitoba and Saskatchewan, the Court of Queen's Bench;
- (g) in the Province of Newfoundland and Labrador, the Trial Division of the Supreme Court; and
- (h) in Yukon, the Supreme Court of Yukon, in the Northwest Territories, the Supreme Court of the Northwest Territories, and in Nunavut, the Nunavut Court of Justice.

Superior Court jurisdiction in the Province of Quebec

(1.1) In the Province of Quebec, the Superior Court is invested with the jurisdiction that will enable it to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during its term, as it is now, or may be hereafter, held, and in vacation and in chambers.

Courts of appeal — common law provinces

(2) Subject to subsection (2.1), the courts of appeal throughout Canada, within their respective jurisdictions, are invested with power and jurisdiction at law and in equity, according to their ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals from the courts vested with original jurisdiction under this Act.

Court of Appeal of the Province of Quebec

(2.1) In the Province of Quebec, the Court of Appeal, within its jurisdiction, is invested with power and jurisdiction, according to its ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals from the Superior Court.

Supreme Court of Canada

(3) The Supreme Court of Canada has jurisdiction to hear and to decide according to its ordinary procedure any appeal so permitted and to award costs.

**IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED
IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF ALLIED TRACK SERVICES INC.,
A CORPORATION INCORPORATED UNDER THE LAWS OF ONTARIO**

Estate/Court File No.: _____

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

Proceedings commenced in Toronto

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