

No. CV-10-8556-00CL

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

BANK OF MONTREAL

Applicant

- and -

**FINANCIAL TRANSPORT INC., FREIGHTLINER OF KINGSTON INC.,
6181732 CANADA INC., GLOBAL TRANSPORT INSURANCE BROKERS INC.,
JAIN TRUCK LEASE LTD. and 2105810 ONTARIO INC.**

Respondents

FIFTH REPORT OF THE RECEIVER

February 15, 2011

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I. Introduction

1. By Order of the Honourable Justice Cameron dated February 4, 2010 (the “**Receivership Order**”), Deloitte & Touche Inc. was appointed receiver (the “**Receiver**”), without security, of all of the assets, undertakings and properties of the Respondents (the “**Companies**”) pursuant to Section 243(1) of the *Bankruptcy and Insolvency Act* (“**BIA**”) and Section 101 of the *Courts of Justice Act*. A copy of the Receivership Order is attached hereto as Exhibit “**A**”.
2. There are six related respondents in this matter, namely:
 - Financial Transport Inc. (“**FTI**”)
 - Freightliner of Kingston Inc. (“**FKI**”)
 - 6181732 Canada Inc. (“**618**”)
 - Global Transport Insurance Brokers Inc. (“**GTIB**”)
 - Jain Truck Lease Ltd. (“**JTL**”)
 - 2105810 Ontario Inc. (“**210**”)
3. By Order of the Honourable Justice Wilton-Siegel dated February 26, 2010 (the “**February 26 Order**”), the Receiver was authorized to implement the disposition strategy with respect to the assets of the Companies as outlined in the Receiver’s First Report to Court dated February 23, 2010 (the “**First Report**”) provided that the Receiver return to the Court for approval of the sale of the truck inventory. Attached hereto as Exhibits “**B**” and “**C**” are copies of the First Report (without exhibits) and the February 26 Order, respectively.
4. On March 5, 2010, the Receiver filed assignments in bankruptcy on behalf of FTI and FKI and Deloitte & Touche Inc. was appointed trustee in bankruptcy of both companies (the “**Trustee**”).
5. By Order of the Honourable Justice Hoy dated March 23, 2010 (the “**March 23 Order**”), this Honourable Court approved the sale by the Receiver of the truck and trailer inventory of FTI and FKI to Ritchie Bros. Auctioneers (Canada) Ltd. (“**Ritchie**” and the “**Ritchie Sale**”). The March 23 Order approved the process proposed by the Receiver to deal with both undisputed vehicles and vehicles with conflicting security interests as set out in the Receiver’s Second Report to Court dated March 15, 2010 (the “**Second Report**”). The March 23 Order also approved a listing price of not less than \$3.5 million for the property owned by 618 located at 4598 Tomken Road,

Mississauga, Ontario (the “**Tomken Property**”). Attached hereto as Exhibits “**D**” and “**E**” are copies of the Second Report (without exhibits) and the March 23 Order, respectively.

6. As a result of the conflicting and undetermined security interests over a number of FTI and FKI vehicles that were included in the Ritchie Sale, Landmark Vehicle Leasing Corporation (“**Landmark**”) filed a Notice of Motion which was heard by this Honourable Court on April 29, 2010 requesting *inter alia* that eleven vehicles registered as being owned by FTI or FKI not be included in the Ritchie Sale and that Landmark be declared as the owner of the vehicles in question.
7. By Order of the Honourable Justice Morawetz dated April 29, 2010 (the “**April 29 Order**”), two vehicles that were to be included in the Ritchie Sale and in which Landmark claimed a security interest were excluded from the sale pending further Order of the Court. In addition, the April 29 Order provided that nine other vehicles in which Landmark claimed a security interest but which were not in the possession of the Receiver were not to be sold, transferred, leased, rented or encumbered without a further Court Order. Attached hereto as Exhibit “**F**” is a copy of the April 29 Order.
8. By Order of the Honourable Justice Morawetz dated July 27, 2010 (the “**July 27 Order**”), this Honourable Court, among other things, granted relief to the Receiver against various parties in possession of vehicles registered to FTI, approved the Receiver’s disposition proposal with respect to the treatment of funds in GTIB’s trust account, and approved the Receiver’s activities with respect to the Tomken Property. Details of the relief sought and granted are set out in the Receiver’s Third Report to Court dated July 9, 2010 (the “**Third Report**”). Attached hereto as Exhibits “**G**” and “**H**” are copies of the Third Report (without exhibits) and the July 27 Order, respectively.
9. By Order of the Honourable Justice Pepall dated December 14, 2010 (the “**December 14 Order**”), this Honourable Court disallowed the claims of Quantum Sales & Leasing, Crew Chief Conversions Ltd. (“**Crew Chief**”) and Cheetah TT&T under the Repair & Storage Liens Act (“**RSLA**”). The Court also approved the agreements that the Receiver had entered into with Pacific Heavy Truck Group, Landmark and parties related to FTI with respect to the disposition of certain vehicles subject to competing claims. Details of the relief sought are described in the Receiver’s Fourth Report to the Court dated December 1, 2010 (the “**Fourth Report**”). Attached hereto as Exhibits “**I**” and “**J**” are copies of the Fourth Report (without exhibits) and the December 14 Order.

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10. The Receiver considers it advisable at this time to:
- a) Inform this Honourable Court of the status of matters since the Fourth Report;
 - b) Seek this Honourable Court's direction with respect to the refusal of Hightech Diesel Repair Centre Inc. ("**Hightech**") to comply with the December 14 Order;
 - c) Seek this Honourable Court's direction with respect to a claim registered under the RSLA by Crew Chief against a vehicle sold by the Receiver;
 - d) Provide this Honourable Court with an update on the sales process;
 - e) Seek this Honourable Court's approval of the proposed sale by the Receiver of the Tomken Property;
 - f) Provide this Honourable Court with a summary of the Receiver's cash receipts and disbursements for the period December 1, 2010 to January 31, 2011; and
 - g) Seek this Honourable Court's approval of the Receiver's activities since the Fourth Report.

II. Background

11. FTI is an Ontario corporation incorporated in 1995 that provided lease financing and sold new and used transport vehicles to operators in Canada and the United States. FTI operated from premises located at 7280 Dixie Road, Mississauga, Ontario (the "**Dixie Location**") that it leased from a related company and shared with other related companies. FTI is wholly owned by 6145086 Canada Inc., which itself is owned in equal shares by Eric Jain ("**Eric**") and Chanderkant Jain ("**Chanderkant**"), who are brothers.
12. FKI is an Ontario corporation and operated Jain Truck Centres from leased premises located at 21 Enterprise Drive, Belleville, Ontario (the "**Belleville Location**"). The Belleville Location is owned by a related company. FKI was a retail dealer of Freightliner brand trucks and trailers as well as a service centre offering service and parts sales. FKI's franchise agreement with Freightliner was terminated by Freightliner at the beginning of January 2010. FKI is owned by Eric (20%) and Chanderkant (80%).
13. 618 is a federally incorporated company incorporated in 2004, originally for the purpose of holding title to the Tomken Property. 618's office was located at the Dixie Location. 618 is owned in equal shares by Eric and Chanderkant. The Tomken Property was developed for use as

a parking facility for tractor trailers. 618 was unable to obtain the required rezoning to allow the property to be rented for parking lot purposes.

14. GTIB is an Ontario corporation incorporated in 2004 as an independent insurance brokerage for companies in the trucking industry who operate within Ontario. GTIB operated from premises leased from a third party located at 1215 Meyerside Drive, Mississauga, Ontario. Robert Hilbert, GTIB's Managing Partner, started GTIB in 2005 with the assistance of a loan from Chanderkant. GTIB's shares are owned by Soniya Jain, the spouse of Chanderkant.
15. JTL is an Ontario corporation that was incorporated in 2007. JTL was in the business of maintaining vehicles. JTL also rented trailers which it did through related and third party leasing companies. JTL was formerly located in Belleville, Ontario with one person managing the operations. The business was transferred to the Dixie Location some time in 2008.
16. 210 is an Ontario corporation and is the owner of a rental property located at 29 Dalton Road, Kingston, Ontario which was previously occupied by FKI. 210's office was located at the Dixie Location.
17. The Bank of Montreal (the "Bank") is a secured creditor and lender to the Companies except JTL and 210 who have business chequing accounts but no loan accounts or credit facilities with the Bank.

III. Activities of the Receiver

Vehicle in the possession of Hightech

18. In the Fourth Report, the Receiver reported on a trailer with VIN number 1JJV532W45L922360 which had been leased by FTI to Mander Trucklines Inc. ("**Mander**") which is currently in the possession of Hightech (the "**Hightech Vehicle**"). Originally the Receiver sought to recover the vehicle from Mander. Mander advised the Receiver on August 13, 2010 that the Receiver could attend to pick up the Hightech Vehicle. When the Receiver attended to pick up the vehicle it was no longer there, and Mander advised that Hightech had repossessed the vehicle on or about August 14, 2010. Hightech had refused to deliver the Hightech Vehicle to the Receiver, as it claimed a possessory RSLA lien for \$10,022 on its own account and for \$3,777 on account of work that it had undertaken to pay to another garage, Popular Tire Sales & Service Inc., for services rendered.

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19. On December 14, 2010, the Receiver sought and obtained from this Honourable Court, an order which directed Hightech to forthwith, and at their own expense, deliver up to the Receiver possession of the Hightech Vehicle; and within 7 days of the December 14 Order, file with the Court any evidence which they may choose to advance to explain their conduct in refusing to turn over the Hightech Vehicle to the Receiver. Hightech had been personally served with the Receiver's Fourth Report and Notice of Motion, but did not attend at the return of the Motion. Receiver's counsel delivered a copy of the December 14th Order by facsimile transmission and by overnight courier on December 15, 2010, and subsequently received a telephone call from a solicitor, Mr. Paul Luizos, who indicated that he acted on behalf of Hightech.
 20. Aird & Berlis LLP ("**AB LLP**"), counsel to the Receiver, wrote to Hightech's legal counsel, Mr. Luizos, on December 22, 2010, January 17, 2011, and January 25, 2011 to inquire as to Hightech's intentions. A copy of the correspondence between AB LLP and Hightech/Mr. Luizos is attached hereto as Exhibit "**K**". No formal response has ever been received from Hightech or its counsel. Mr. Luizos indicated orally to Receiver's counsel that his client may bring a motion to seek a declaration that it had a priority interest in the assets, but no such motion has been brought.
 21. A Corporation Profile Report for Hightech indicates that the principal of Hightech is Mr. Manprit Singh Basi. A copy of the Corporation Profile Report is attached hereto as Exhibit "**L**".
 22. Hightech continues to refuse to comply with the terms of the initial Receivership Order and the terms of the December 14 Order by refusing to deliver the vehicle to the Receiver.
 23. As a result of Hightech's refusal to deliver the vehicle to the Receiver, the Receiver has expended time and costs related to the following:
 - Arranging for a bailiff to attend at Hightech's place of business on August 24, 2010 to serve a copy of the Receivership Order and to attempt to take delivery of the Hightech Vehicle;
 - Correspondence sent by the Receiver to Hightech on August 25
 - Review of correspondence from Hightech dated August 26, 2010.
 - Correspondence sent by AB LLP to Hightech on September 7, September 20, September 30, and December 13.
 - Application to Court for relief with respect to the December 14 Order;
 - Telephone calls between the Receiver and Hightech on December 16 and December 22;

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- Correspondence sent by AB LLP to Hightech/Mr. Luizos on December 15 and 22, 2010, and on January 17 and 25, 2011;
 - Application to Court for relief as set out in this Fifth Report; and
 - Discussions and e-mail correspondence between the Receiver and AB LLP with respect to the foregoing.

24. The Receiver respectfully requests that this Honourable Court grant an order which:

- finds Hightech to be in contempt of the Receivership Order and the December 14 Order;
- directs the sheriff to take into custody Mr. Basi and to hold him in custody until the contempt is purged by the return of the vehicle to the Receiver;
- requires Hightech to pay a fine of \$30,000 to compensate the Receiver for the trouble caused; and
- grants such further and other relief as this Honourable Court may deem just.

Vehicles subject to the April 29 Order

25. Pursuant to the December 14 Order, the Receiver released the two vehicles in its possession which were subject to the April 29 Order to Landmark and granted leave to Landmark to exercise the lawful remedies to which it may be entitled as against the other nine vehicles.

Vehicle subject to RSLA Claim by Crew Chief

26. On March 16, 2010 Crew Chief registered a lien under the RSLA against a vehicle with the VIN number 1FUJBCK35LN64859 (the “**64859 Claim**”). This vehicle was sold by the Receiver in May 2010 for \$3,000. No notice of this lien registration was received by the Receiver who discovered its existence in December 2010 in the course of obtaining updated lien searches for vehicles which it had sold.

27. On December 2, December 9, and December 23, 2010, the Receiver wrote to Crew Chief to request a copy of the supporting documentation for the 64859 Claim (the “**Crew Chief Correspondence**”). As of the date of this report, Crew Chief has not responded. Without this documentation, the Receiver is unable to determine the validity of this claim. A copy of the Crew Chief Correspondence is attached hereto as Exhibit “**M**”.

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28. The Receiver respectfully requests that this Honourable Court grant an order which declares that Crew Chief has no interest in the vehicle with VIN number 1FUJBBCK35LN64859 and that the Receiver may proceed to distribute the sale proceeds without consideration to the 64859 Claim.

Trade Accounts Receivable

29. As of January 31, 2011, the Receiver has collected \$245,692 in trade accounts receivable owed to FTI and \$110,286 in trade accounts receivable owed to FKI. The Receiver continues to collect monthly lease payments for twelve vehicles leased out by FTI. The Receiver does not expect any further recoveries on outstanding receivables owed to FKI.

Review of Intercompany Cash Activity

30. As noted in the Third Report, a review of the Companies' bank activity for July 2009 to January 2010 indicated that there was a net cash outflow from the Companies to related parties of approximately \$3.0 million. The Receiver requested an explanation for the cash transfers from these related parties which included Freight Trans Ltd. ("**FTL**"), TruckDepot Expedite Inc. ("**TDEX**"), and The TruckDepot.com ("**TD.com**"). As of the date of the Fourth Report and described in greater detail therein, no response had been received from FTIL, while the information provided by TDEX and TD.com was incomplete.
31. No additional documentation has been provided by TDEX, TD.com, or FTL since the date of the Fourth Report. Without this additional documentation, the Receiver is unable to determine whether the cash transfers to TDEX, TD.com or FTL were appropriate. Given the costs that would be incurred, the Receiver is not presently pursuing further inquiries. We understand that the Bank is considering a Section 38 application under the Bankruptcy & Insolvency Act.

IV. Sales Process

FTI and FKI Truck and Trailer Inventory

32. Four vehicles were sold at the Ritchie auction on December 6, 2010 for gross proceeds of \$26,500. All vehicles delivered by the Receiver to Ritchie for sale have now been sold. The Receiver is not currently pursuing the repossession of any other vehicles, except the Hightech Vehicle.

618 – Tomken Property

33. The February 26 Order approved the sales process to be followed by the Receiver to sell the Tomken Property.
34. The March 23 Order approved a listing price of not less than \$3.5 million for the Tomken Property.
35. On March 26, 2010, the Receiver listed the Tomken Property for sale with Royal LePage Innovators Realty (“**LePage**”) for \$3.5 million. The listing price of \$3.5 million was based on an updated appraisal dated March 17, 2010 by Hendren Appraisals (“**Hendren**”) and a letter dated March 10, 2010 outlining the current market for such properties received from LePage.
36. Four offers were received for the Tomken Property and based on the interest shown in the Tomken Property to date, the listing price was amended to \$4.5 million on April 5, 2010.
37. On April 16, 2010, the Receiver entered into an Agreement of Purchase and Sale with 1199812 Ontario Ltd. (“**119**”) based on the fact that the 119 offer was the highest offer received and required the shortest due diligence period of the four offers received. On May 3, 2010, 119 advised the Receiver that it was terminating the Agreement of Purchase and Sale.
38. On May 11, 2010, the Receiver entered into an Agreement of Purchase and Sale with 678604 Ontario Inc. (“**678**”) for the Tomken Property subject to a 45 day due diligence period. On June 24, 2010, 678 advised the Receiver that it was terminating the Agreement of Purchase and Sale as a result of alleged geotechnical issues discovered during their due diligence.
39. As a result of the two failed attempts at closing a sale of the Tomken Property due to alleged adverse findings by potential purchasers, the Receiver suspended the MLS listing on July 8, 2010 in order to engage a soil engineer to conduct a review to determine the nature and extent of any soil issues. A preliminary geotechnical investigation and limited Phase II environment site assessment (the “**Trow Report**”) was conducted by Trow Associates Inc. who found that there were no serious geotechnical or environmental problems with the Tomken Property.
40. As outlined in the Third Report and subsequently approved by the July 27 Order, the Tomken Property was re-listed for \$3.9 million on August 23, 2010.
41. On February 3, 2011, the Receiver entered into an Agreement of Purchase and Sale with 2270886 Ontario Inc. (the “**227 Offer**”) for the Tomken Property, the Agreement being subject only to the approval of this Court. The Receiver currently seeks this Honourable Court’s approval of the 227 Offer.

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42. The sales process can be summarized as follows:
- The Tomken Property was listed on the Multiple Listing Service.
 - The Tomken Property was advertised in a local monthly business publication, the *Brampton Business Times*, in March 2010 and February 2011.
 - The Tomken Property was advertised in *Trade Talks*, a local monthly business publication distributed by the Brampton Board of Trade, in November 2010, January 2011 and February 2011;
 - A description of the Tomken Property (the “**Feature Sheet**”) was directly distributed via e-mail to approximately 100 brokers in the industrial commercial investment brokerage community in the Greater Toronto Area in March 2010. A copy of the Feature Sheet is attached hereto as Exhibit “**N**”;
 - The Feature Sheet was directly distributed to a select group of approximately 15-20 major developers in March-April 2010;
43. A total of 50 developers and brokers requested additional information and received a copy of an updated Feature Sheet, additional zoning information (“**Zoning Package**”), and the Trow Report. A copy of the Zoning Package is attached hereto as Exhibit “**O**”.
44. A total of eight offers were received.
45. The Receiver believes that the Sales Process undertaken by the Receiver was appropriate for the type of property in question, that it provided sufficient market exposure to the Tomken Property and that it resulted in obtaining a commercially reasonable offer for the following reasons:
- The Tomken Property has been listed for sale for a period of almost one year;
 - A prospective purchaser faces significant challenges with respect to the following issues, which have negatively impacted the market value of the Tomken Property:
 - i. Fill issues – When the site was filled in by 618, the filling work was not properly engineered. Fill removal and structural re-engineering is required for pavement and building areas at the site. The cost of this structural remediation was estimated at \$900,000 by an engineer engaged by one of the prospective buyers;
 - ii. Location – The site is an irregular L-shape with limited highway access to Tomken Road and no access to Eglinton Avenue;

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- iii. Access road requirement - The City of Mississauga (the “City”) has advised that it will require any developer to build a public access road, to be paid for by the developer. The cost of road construction has been estimated at \$2,000,000;
 - iv. Requisite bond – The City requires that a developer of the Tomken Property post a bond in the amount of \$2,000,000 with respect to the cost of road construction;
 - v. Access to woodlot – The southwest portion of the Tomken Property is bounded by forest lands belonging to the City. The City will require a right of way or easement to access the woodlot. In addition, as top soil was improperly piled by 618 along the woodlot, the City will require that a buffer zone be set aside along the woodlot;
 - vi. Zoning issues - The Tomken Property is currently vacant land zoned as “D”, meaning development which does not permit the erection of new buildings or structures. An application was commenced in March 2006 to have the site rezoned; however, to date, the rezoning has not been obtained. A purchaser would have to negotiate a development agreement with the City before undertaking any development. Such negotiations can take six months to five years to complete;
 - vii. Reduced developable acreage – While the site is 9.25 acres in size, the construction of an access road and the requirement for a buffer zone along the woodlot would reduce the net acreage available for development by at least 2 acres; and
 - viii. Time costs – A developer would have to invest a significant amount of time to fill removal and re-engineering and negotiating a development agreement with the City before they would be able to develop the Tomken Property for commercial use.
- Market conditions for commercial properties in Mississauga are currently depressed. The major developers have not shown any interest in the Tomken Property and there has been only one sale in Mississauga in the past three months, which was for a site without any fill issues or zoning or development agreement requirements;
 - It is the opinion of LePage that until there has been a significant turnaround in the commercial real estate market, sites of this nature will continue to pose significant marketing challenges;
 - The Feature Sheet was sent to over 100 potential purchasers;

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- The Marketing Package was distributed to 50 potential purchasers; and
 - Eight offers were received.
46. The Receiver recommends that this Honourable Court approve the Receiver's acceptance of the 227 Offer for the following reasons:
- The Receiver believes that the Sales Process was fair and commercially reasonable;
 - The 227 Offer is unconditional, while all other offers that were submitted (other than one from a party related to 227) were conditional with a stipulated due diligence period;
 - The 227 Offer is likely to close. The purchaser is a local developer who is aware of the zoning, remediation and other issues associated with the Tomken Property;
 - There were two failed attempts at closing a sale of the Tomken Property when previous offers that were submitted were withdrawn due to alleged adverse findings by potential purchasers;
 - The 227 Offer conforms to the standard Agreement of Purchase and Sale prepared by the Receiver; and
 - The Bank is supportive of the 227 Offer.
47. The Receiver believes that the amount of the 227 Offer should be kept confidential until the closing of the transaction as disclosure of such detail could prejudice future sales efforts should the 227 Offer not close for any reason.
48. The Supplemental Report to the Fifth Report of the Receiver dated February 15, 2011 (the "**Supplemental Report**") contains copies of the 227 Offer, the Hendren appraisal, the LePage market assessment, and a summary of the eight offers for the Tomken Property.
49. A copy of the Supplemental Report will be provided to this Honourable Court which the Receiver respectfully requests be sealed until the transaction closes.

V. Receiver's Interim Statement of Receipts & Disbursements

50. Attached hereto as Exhibit "**P**" is a statement of the Receiver's cash receipts and disbursements for the period February 4, 2010 to January 31, 2011 which indicates a surplus of receipts over disbursements of \$437,788. Since its appointment, the Receiver has collected total cash receipts

of \$1,691,810 and has made \$1,254,022 of disbursements. Receipts include \$949,909 from the sale of vehicles and \$361,636 from the collection of accounts receivable.

51. A Receiver's certificate in the amount of \$250,000 was issued to the Bank on February 12, 2010 and has not yet been repaid.
52. No distribution has been made as yet to creditors with valid security interests over vehicles sold by the Receiver. The amount payable with respect to known secured claims is approximately \$135,000.

VI. Conclusion

53. The Receiver respectfully requests that this Honourable Court grant an Order which provides for the following:
 - a) Approval of the activities of the Receiver since the Fourth Report;
 - b) Declaring that Crew Chief has no interest in the vehicle with VIN number 1FUJBBCK35LN64859 and that the Receiver may proceed to distribute the sale proceeds without consideration to the 64859 Claim;
 - c) Granting an order which:
 - o finds Hightech to be in contempt of the Receivership Order and the December 14 Order;
 - o directs the sheriff to take into custody Mr. Basi and to hold him in custody until the contempt is purged by the return of the vehicle to the Receiver;
 - o requires Hightech to pay a fine of \$30,000; and
 - o grants such further and other relief as this Honourable Court may deem just
 - d) Approving the Sales Process carried out by the Receiver;
 - e) Approving the 227 Offer accepted by the Receiver in connection with the sale of the Tomken Property;
 - f) Sealing the Supplemental Report until the closing of the transaction; and
 - g) Approval of the Receiver's Interim Statement of Receipts & Disbursements for the period December 1, 2010 to January 31, 2011.

54. All of the foregoing is respectfully submitted to this Honourable Court as of this 15th day of February, 2011.

Deloitte & Touche Inc.

In its capacity as Court-appointed Receiver of Financial Transport Inc.,
Freightliner of Kingston Inc., 6181732 Canada Inc.,
Global Transport Insurance Brokers Inc., Jain Truck Lease Ltd.
and 2105810 Ontario Inc. and not in its personal capacity



Robert J. Bougie, CA • CIRP
Senior Vice-President