

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

*IN THE MATTER OF Section 101 of the Courts of Justice Act, R.S.O. 1990 c.C.43, as amended,
and in the matter of Section 243(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3,
as amended*

B E T W E E N:

PRICEWATERHOUSECOOPERS INC.

(solely in its capacity as court-appointed receiver and manager of
Bridging Finance Inc. and certain related entities and investment funds)

Applicant

- and -

2806401 ONTARIO INC. o/a ALLIED TRACK SERVICES INC.

Respondent

**FACTUM OF THE APPLICANT
(Application Returnable September 23, 2022)**

September 21, 2022

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FACTUM OF THE APPLICANT

PART I - OVERVIEW

1. PricewaterhouseCoopers Inc. (“**PwC**”), solely in its capacity as court-appointed receiver and manager of Bridging Finance Inc. and certain related entities and investment funds (in such capacity, the “**Applicant**” or the “**Bridging Receiver**”), seeks an order (the “**Receivership Order**”) appointing KSV Restructuring Inc. (“**KSV**”) as receiver and manager (in such capacity, the “**Receiver**”), without security, of all of the current and future assets, undertakings, and properties (the “**Property**”) of 2806401 Ontario Inc. o/a Allied Track Services Inc. (“**Allied**” or the “**Respondent**”) pursuant to section 243(1) of the *Bankruptcy and Insolvency Act* (the “**BIA**”) and section 101 of the *Courts of Justice Act* (the “**CJA**”).

2. The relief sought by the Bridging Receiver should be granted on the basis that it is “just and convenient” to appoint the proposed Receiver in the circumstances and therefore the applicable legal test set out under section 243 of the BIA and section 101 of the CJA has been satisfied.
3. KSV, in its capacity as Interim Receiver and Proposal Trustee of Allied, supports the relief sought and has consented to act as Receiver of Allied. The Bridging Receiver is unaware of any opposition to this application.

PART II - THE FACTS

4. The facts relevant to the relief sought by the Bridging Receiver are set out in greater detail in the First Report of KSV as Interim Receiver and the Second Report of KSV as Proposal Trustee dated September 16, 2022, located at Tab 2 of the Bridging Receiver’s Application Record (the “**Second Report**”) and are summarized below. All capitalized terms not expressly defined herein are defined in the Second Report.

Background & Overview of Relevant Facts

5. Allied is a railroad maintenance service provider, offering various services including track maintenance and repair, construction, bridging, civil engineering, flagging, signalling and related services. Allied leases its head office in Grimsby, Ontario, and operates in Ontario, Alberta, Manitoba, and British Columbia.¹

¹ First Report of the Proposal Trustee dated September 4, 2022 (the “**First Report**”) at para 2.1.

6. Allied was incorporated on January 8, 2021 by Bridging for the purposes of acting as a stalking horse bidder in the proposal proceedings of a company formerly known as Allied Track Services Inc. (“**Old Allied**”). Bridging was Old Allied’s largest secured creditor.²
7. After a sale process in the Old Allied proposal proceedings, Allied’s stalking horse bid was determined to be the superior bid, and Allied bought substantially all tangible assets, intellectual property, and undertakings of Old Allied in a Court-approved transaction that closed on April 30, 2021 (the “**Allied Transaction**”). This transaction permitted Allied to continue the operations of Old Allied as a going concern and to continue to provide services to its customers, uninterrupted.³
8. Also on April 30, 2021, in proceedings unrelated to the Old Allied proposal proceeding, the Court appointed PwC as the Bridging Receiver pursuant to section 129 of the *Securities Act* (Ontario) upon application by the Ontario Securities Commission.⁴
9. Bridging is presently Allied’s largest secured creditor and its sole shareholder.⁵
10. Despite the successful implementation of the Allied Transaction, Allied has continued to generate losses. Allied is insolvent and does not have the liquidity to continue to carry on its business. Accordingly, on August 25, 2022, Allied filed an NOI.⁶

² First Report at para 2.3.

³ First Report at para 2.4.

⁴ First Report at para 2.5.

⁵ First Report at para 2.5.

⁶ First Report at para 2.6.

11. After the Allied NOI filing, and as a result of personnel departures and stakeholder uncertainty triggered by the Proposal Proceedings, the Proposal Trustee brought an application under section 47.1 of the BIA seeking the appointment of KSV as Interim Receiver. This was done in order to bring stability to Allied's operations and wind-down, and in order to facilitate the completion of certain key contracts between Allied and CP, from which a substantial portion of Allied's revenue is derived (the "**Services Contracts**").⁷
12. As a result of this application, the Interim Receivership Order was granted on September 6, 2022. At the return of the Interim Receivership application, the Proposal Trustee advised the Court that, if appointed, the Interim Receiver would return to Court in due course to seek to either have itself discharged, or have itself appointed as a full receiver, depending on the circumstances at the time.⁸
13. KSV as Interim Receiver and Proposal Trustee is of the view that the circumstances require the appointment of a receiver under section 243 of the BIA to finish the work that the Interim Receiver has started.⁹
14. The Bridging Receiver is of the view that it would be appropriate for the Interim Receivership Order to terminate and for the Receivership Order to be issued. The Interim Receiver shares this view for the following reasons:

⁷ First Report at para 4.1.

⁸ First Report of the Interim Receiver and Second Report of the Proposal Trustee dated September 16, 2022 (the "**Second Report**") at para 7.2.

⁹ Second Report at para 7.2.

- (a) the appointment of the Interim Receiver was intended to be temporary;
 - (b) a receivership is more appropriate than an interim receivership in the context of an asset liquidation as is contemplated with the Equipment, and provides for higher thresholds for the sale of assets out of the ordinary course;
 - (c) a receivership would trigger the provisions of the Wage Earner Protection Program (“**WEPP**”) and therefore allow terminated employees to make claims and receive payments under WEPP on an expedited basis;
 - (d) a Receiver will be best suited to resolve priority disputes with lessors, should such disputes arise; and
 - (e) the charges for the Receiver and its counsel would rank in priority to all registered security interests, which is appropriate in this case as the parties with such charges will benefit from the receiver’s activities.¹⁰
15. The Bridging Receiver therefore seeks the appointment of KSV as Receiver of Allied on the terms of the proposed Receivership Order. The Bridging Receiver understands that Allied does not oppose this application.¹¹
16. KSV as Interim Receiver consents to the lifting of the stay of proceedings imposed pursuant to the Interim Receivership Order for the purposes of the Court appointing the Receiver pursuant to section 243 of the BIA.¹²

¹⁰ Second Report at para 7.4.

¹¹ Second Report at para 7.9.

¹² Second Report at para 7.8.

17. While KSV as Proposal Trustee does not have the ability under the BIA to consent to the lifting of the stay of proceedings in the Proposal Proceedings, it does not object, and it supports the appointment of the Receiver. The Proposal Trustee is of the view that it is just and appropriate for the Court to exercise its discretion under section 69.4 of the BIA to lift the applicable stays of proceedings, to the extent necessary.¹³

Bridging Loan Agreement & Security

18. Pursuant to a loan agreement among Bridging, as lender, and Old Allied, as borrower, dated March 8, 2017 (as amended, the “**Loan Agreement**”), Bridging made available to Old Allied certain credit facilities in the original principal amount of \$20 million (the “**Loans**”).¹⁴
19. As security for all of the present and future indebtedness and obligations of Old Allied to Bridging under the Loans, Old Allied granted to Bridging security over substantially all of its present and after-acquired property pursuant to a general security agreement dated March 8, 2017 (the “**GSA**”).¹⁵
20. Pursuant to the Allied Transaction, Allied assumed all of the indebtedness and obligations of Old Allied to Bridging under the Loan Agreement and the GSA.¹⁶
21. Accordingly, as at the Filing Date, the amount owing by Allied to Bridging under the Loans

¹³ Second Report at para 7.8.

¹⁴ Second Report at Appendix “E”.

¹⁵ Second Report at Appendix “F”.

¹⁶ Second Report at para 7.5.

is approximately \$60 million.¹⁷ Bridging registered its security interest against Allied pursuant to the *Personal Property Security Act* (Ontario) on April 29, 2021.¹⁸

22. Blakes (counsel for KSV) has not yet undertaken a current security review of Bridging's security. However, Blakes previously conducted a security review in connection with the Old Allied proposal proceeding and the Allied Transaction (the "**Original Security Review**"). Subject to the customary assumptions and qualifications, the Original Security Review concluded that the debt and security owing by Old Allied to Bridging (which was assumed by Allied pursuant to the Allied Transaction) was valid and enforceable.¹⁹
23. Pursuant to section 8.4 of the GSA, upon the occurrence of an Event of Default (as defined in the Loan Agreement), Bridging may, in addition to any other rights it may have, appoint a receiver over all or any part of the "Collateral", being substantially all of the assets of Allied, or institute proceedings in any court of competent jurisdiction for the appointment of such a receiver.²⁰
24. Allied has committed an Event of Default under the Loan Agreement and the GSA as a result of, among other things, failing to make certain payments when due to Bridging.²¹

¹⁷ Second Report at para 3.1.

¹⁸ Second Report at para 7.5.

¹⁹ Second Report at para 7.5.

²⁰ Second Report at para 7.7.

²¹ Second Report at para 7.7.

PART III - THE ISSUES

25. The issues on this application are as follows:
- (a) whether the stay of proceedings resulting from Allied's NOI filing should be lifted in order to allow this application to proceed; and
 - (b) whether it is just and convenient for the Court to appoint KSV as Receiver on the terms of the proposed Receivership Order.

PART IV - LAW & ANALYSIS

A. THE NOI STAY OF PROCEEDINGS SHOULD BE LIFTED

26. There are currently two stays of proceedings in favour of Allied. The first is a result of Allied's NOI filing (the "**NOI Stay**"). The second is a result of the Interim Receivership Order (the "**Interim Receivership Stay**").

NOI Stay

27. Pursuant to section 69(1) of the BIA, on the filing of an NOI, no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy.
28. As described above, KSV as Proposal Trustee does not have the ability under the BIA to consent to the lifting of the NOI Stay. As such, a threshold issue for this application is whether the NOI Stay should be lifted by the Court.
29. Although the Proposal Trustee does not have the ability to consent to the lifting of the NOI Stay, it does not object, and it supports the appointment of the Receiver. The Proposal

Trustee is of the view that it is just and appropriate for the Court to exercise its discretion to lift the NOI Stay. The Bridging Receiver shares that view for the reasons set out below.

30. Section 69.4 of the BIA expressly provides the Court with jurisdiction to lift the stay imposed pursuant to section 69(1) of the BIA where there are equitable grounds to do so. The decision to lift the stay is discretionary:

Court may declare that stays, etc., cease

69.4 A creditor who is affected by the operation of sections 69 to 69.31 or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied

(a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or

(b) that it is equitable on other grounds to make such a declaration.

31. It is equitable and appropriate in the circumstances for the Court to lift the NOI Stay to allow this application to proceed. This is not a circumstance in which a creditor is seeking to lift a stay in order to “jump the queue” or otherwise obtain an advantage in terms of recoveries over the other creditors of an insolvent debtor. The Bridging Receiver seeks to lift the NOI Stay for the sole purpose of seeking the appointment of an independent court officer as Receiver of Allied for the benefit of all stakeholders. The terms of the proposed Receivership Order include a broad stay of proceedings to maintain stability while the proposed Receiver takes various steps to maximize the value of Allied for the benefit of all stakeholders, including its employees.
32. The Bridging Receiver submits that no parties will be prejudiced as a result of lifting the NOI Stay and is unaware of any opposition to this application. Accordingly, the Bridging

Receiver submits that the Court should exercise its discretion to lift the NOI Stay for the sole purpose of allowing this application to proceed.

Interim Receivership Stay

33. Pursuant to paragraph 9 of the Interim Receivership Order, no proceeding against or in respect of Allied or the Property shall be commenced or continued except with the written consent of the Interim Receiver or with leave of the Court.
34. As set out at paragraph 7.8 of the Second Report, the Interim Receiver has consented to lift the Interim Receivership Stay to allow this application to proceed. As such, the Interim Receivership Stay has been lifted in accordance with the terms of the Interim Receivership Order and has no impact on this application.

B. THE RECEIVER SHOULD BE APPOINTED

(i) Jurisdiction to Appoint the Receiver

35. Pursuant to Section 243 of the BIA, the Court may, on application by a secured creditor, appoint a receiver to take control of an insolvent person's property if it is just or convenient to do so:

Court may appoint receiver

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(c) take any other action that the court considers advisable.

36. Section 101 of the CJA provides for the appointment of a receiver when "it is just or convenient" to do so.

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

37. The GSA charges the Property of Allied as security for Allied's indebtedness and obligations under the Loans. The Bridging Receiver, on behalf of Bridging, is therefore a "secured creditor" within the meaning of the BIA.²²

38. Allied does not have the liquidity to carry on its business, is unable to meet its obligations as they generally become due, and is therefore an "insolvent person" within the meaning of the BIA.²³

39. Courts have considered the following factors, among others, when determining whether it is just or convenient to appoint a receiver:

- (a) the existence of a debt and a default;
- (b) the quality of the security;

²² BIA, s. 2.

²³ BIA, s. 2.

- (c) the fact that the creditor has the right to appoint a receiver under the documentation provided for in the loan;
- (d) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;
- (e) the likelihood of maximizing the return to the parties; and
- (f) the risk to the security holder.²⁴

40. The fact that a secured creditor has a right under its security documentation to appoint a receiver is of central importance. In cases where the security documentation provides for the appointment of a receiver, the analysis is focused on a consideration of whether it is in the interests of all concerned to have the receiver appointed by the court. As noted by Justice Morawetz (as he then was) in *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*:

...while the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties (emphasis added).²⁵

²⁴ See for example: [Central 1 Credit Union v. UM Financial Inc. and UM Capital Inc.](#), 2011 ONSC 5612 (Commercial List) at para 22; [RMB Australia Holdings Limited v. Seafield Resources Ltd.](#), 2014 ONSC 5205 (Commercial List) at para 28; [Bank of Montreal v. Carnival National Leasing Limited and Carnival Automobiles Limited](#), 2011 ONSC 1007 (Commercial List) at paras 24 and 27 [*Carnival Leasing*]; and [Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.](#), 2009 BCSC 1527 at para 25.

²⁵ [Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.](#), 2013 ONSC 6866 (Commercial List) at para 27.

41. It is not necessary for a creditor whose security documentation provides for the appointment of a receiver to demonstrate that it will suffer irreparable harm if the appointment is not granted by the court.²⁶

(ii) *It is Just and Convenient to Appoint the Receiver in the Circumstances*

42. The Bridging Receiver submits that it is just and convenient to appoint the Receiver in the circumstances and therefore the statutory test for the appointment of a receiver is satisfied for the following reasons:

- (a) Allied is in default of its obligations to Bridging under the Loan Agreement and the GSA as a result of, among other things, its failure to make certain payments when due;
- (b) as a result of the foregoing default, which constitutes an “Event of Default” under the Loan Agreement and the GSA, the Bridging Receiver, on behalf of Bridging, is contractually entitled under the GSA to seek the appointment of KSV as Receiver of the Property of Allied; and
- (c) as described above, a receivership under section 243 of the BIA is more appropriate than an interim receivership the circumstances, may provide benefits to terminated employees under WEPP that would not otherwise be available, and is the most appropriate forum in which to resolve any priority disputes with lessors, should such disputes arise.

²⁶ [Carnival Leasing at paras 24-28.](#)

(iii) *The Proposed Receivership Order & Charges*

43. The proposed Receivership Order substantially follows the terms of the Model Order. It is respectfully submitted that the terms of the draft Receivership Order are necessary and appropriate based on the facts set out herein to permit the Receiver to take possession of, and realize upon, the assets of Allied for the benefit of its stakeholders.
44. In particular, the proposed Receivership Order provides for the standard Receiver's Charge to protect the proposed Receiver and its counsel in the event that Allied is unable to pay their professional fees and costs during the receivership. Consistent with Model Order, it is proposed that the Receiver's Charge rank in priority to all other charges and security interests in respect of Allied, subject to sections 14.06(7), 81.4(4), and 81.6(2) of the BIA. The Court has express statutory jurisdiction pursuant to section 243(6) of the BIA to grant such a charge in priority to all secured creditors of Allied provided that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.
45. The Bridging Receiver, on behalf of Bridging (the primary secured creditor of Allied), supports the Receiver's Charge. The other registered secured parties who may be affected by the Receiver's Charge were served with the Bridging Receiver's application record on September 16, 2022. The Bridging Receiver is unaware of any opposition. The language of the proposed Receivership Order addressing the Receiver's Charge does not deviate from the Model Order.
46. The proposed Receivership Order further provides for the standard Receiver's Borrowings Charge in the amount of \$500,000, which is necessary to secure any funding that the

proposed Receiver may require to administer the receivership. Consistent with the Model Order, it is proposed that the Receiver's Borrowings Charge rank subordinate to the Receiver's Charge but in priority to all other charges and security interests in respect of Allied, subject to sections 14.06(7), 81.4(4), and 81.6(2) of the BIA. Such charges for similar amounts are routinely approved by the Court to facilitate the due administration of receivership proceedings. The Bridging Receiver supports the priority and quantum of the Receiver's Borrowings Charge and is unaware of any opposition. The language of the proposed Receivership Order addressing the Receiver's Borrowings Charge does not deviate from the Model Order.

PART V - RELIEF REQUESTED

47. For all of the foregoing reasons, the Bridging Receiver requests that this Court grant an Order substantially in the form of the draft Receivership Order located at Tab 3 of its Application Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of September, 2022



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**SCHEDULE “A”
LIST OF AUTHORITIES**

No.	Case Law
1.	<u><i>Central 1 Credit Union v. UM Financial Inc. and UM Capital Inc.</i>, 2011 ONSC 5612</u>
2.	<u><i>RMB Australia Holdings Limited v. Seafield Resources Ltd.</i>, 2014 ONSC 5205</u>
3.	<u><i>Bank of Montreal v. Carnival National Leasing Limited and Carnival Automobiles Limited</i>, 2011 ONSC 1007</u>
4.	<u><i>Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.</i>, 2009 BCSC 1527</u>
5.	<u><i>Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.</i>, 2013 ONSC 6866</u>

**SCHEDULE “B”
RELEVANT STATUTES**

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended

Definitions

2 In this Act,

insolvent person means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due

secured creditor means a person holding a mortgage, hypothec, pledge, charge or lien on or against the property of the debtor or any part of that property as security for a debt due or accruing due to the person from the debtor, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable, and includes

(a) a person who has a right of retention or a prior claim constituting a real right, within the meaning of the *Civil Code of Québec* or any other statute of the Province of Quebec, on or against the property of the debtor or any part of that property, or

(b) any of

(i) the vendor of any property sold to the debtor under a conditional or instalment sale,

(ii) the purchaser of any property from the debtor subject to a right of redemption, or

(iii) the trustee of a trust constituted by the debtor to secure the performance of an obligation,

if the exercise of the person’s rights is subject to the provisions of Book Six of the *Civil Code of Québec* entitled *Prior Claims and Hypothecs* that deal with the exercise of hypothecary rights

Court may appoint receiver

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
- (c) take any other action that the court considers advisable.

Orders respecting fees and disbursements

243 (6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

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.

Courts of Justice Act, R.S.O. 1990 c. C-43, as amended

Injunctions and receivers

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

Terms

(2) An order under subsection (1) may include such terms as are considered just.

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