

Court File No.

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

BETWEEN:

**KSV RESTRUCTURING INC., IN ITS CAPACITY AS PROPOSAL TRUSTEE OF
2806401 ONTARIO INC. o/a ALLIED TRACK SERVICES INC.**

Applicant

- and -

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

Respondent

**FACTUM OF THE APPLICANT
(Appointment of Interim Receiver)
Returnable September 6, 2022**

September 4, 2022

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TO: SERVICE LIST

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**IN THE MATTER OF AN APPLICATION PURSUANT
SECTION 47.1 OF THE *BANKRUPTCY AND INSOLVENCY*
ACT, R.S.C. 1985, c. B-3, AS AMENDED**

**FACTUM OF THE APPLICANT
(APPOINTMENT OF INTERIM RECEIVER)**

PART I - OVERVIEW

1. KSV Restructuring Inc. (“**KSV**”) in its capacity as proposal trustee (in such capacity, the “**Proposal Trustee**”) of 2806401 Ontario Inc. o/a/ Allied Track Services Inc. (“**Allied**”) brings this application for the appointment of KSV as interim receiver (in such capacity, the “**Interim Receiver**”) over the property, assets and undertakings (the “**Property**”) of Allied pursuant to section 47.1 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985 (the “**BIA**”)
2. On August 25, 2022, Allied filed a Notice of Intention to Make a Proposal (“**NOI**”) pursuant to subsection 50.4(1) of the BIA. KSV was appointed as Proposal Trustee.

3. The principal purpose of Allied’s restructuring proceeding is to wind-down its operations and liquidate its assets for the benefit of its creditors and other stakeholders.

4. In connection with the NOI filing, Allied entered into an agreement (the “**Close Out Agreement**”) with one of its key customers, the Canadian Pacific Railway Company (“**CP**”) to fund the continued services by Allied to CP, and an orderly transition of Allied’s services to another vendor.

5. The Proposal Trustee seeks the appointment of KSV as Interim Receiver to (i) facilitate Allied’s obligations under the Close Out Agreement, (ii) coordinate the efficient wind-down of Allied’s business, and (iii) protect Allied’s remaining assets.

PART II – THE FACTS

6. The facts relevant to the relief sought by the Proposal Trustee are set out in the First Report of the Proposal Trustee dated September 4, 2022 (the “**First Report**”) and are summarized below. All capitalized terms not otherwise defined herein have the meanings given to them in the First Report.

A. BACKGROUND

7. Allied is a railroad maintenance service provider offering various services, including track maintenance and repair, construction, bridging, civil engineering, 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 at para 2.0(1).

8. Allied's largest secured creditor and sole shareholder is Bridging Finance Inc. ("**Bridging**"). On April 30, 2021, the Ontario Superior Court of Justice (Commercial List) (the "**Court**") appointed PricewaterhouseCoopers Inc. as receiver and manager (in such capacity, the "**Bridging Receiver**") of Bridging and certain related entities and investment funds upon application by the Ontario Securities Commission.²

9. Bridging purchased all of the assets and undertakings of Allied out of a proposal proceeding in April 2021. Despite successful implementation of the transaction, Allied continued to generate losses and never reached profitability. Allied is insolvent and does not have the liquidity to carry on its business. Accordingly, on August 25, 2022, Allied filed an NOI.³

10. Allied's wind-down and discontinuance of several of its customer projects has resulted in numerous employee resignations at both the management level and field services. These departures threaten the ability of Allied to efficiently wind-down its business and to fulfill the terms of the Close Out Agreement.⁴

B. THE CLOSE OUT AGREEMENT

11. A substantial portion of Allied's revenue is derived from track and signals contracts entered into between Allied and CP (the "**Service Contracts**"). The Proposal Trustee has been in daily contact with CP since the filing date of the NOI in order to determine if there was a path to (a) recover the outstanding accounts receivable and work-in-progress owing by CP, and (b) continue

² First Report at para 2.0(5).

³ First Report at paras 2.0(3), (4) and (6).

⁴ First Report at para 5.0(3)

the work remaining under the Service Contracts so that CP can transition it on an orderly basis, without disruption to its business.⁵

12. On September 3, 2022, Allied, the Proposal Trustee and CP entered into the Close Out Agreement, which provides for CP to fund the outstanding accounts receivable and work-in-progress owing to Allied (subject to CP's approval of the corresponding invoices), and for Allied to continue the Service Contracts on a pre-funded basis. At the request of CP, the Close Out Agreement is conditional on the Proposal Trustee being appointed as Interim Receiver, which will ensure that the amounts pre-funded by CP are held by a Court officer and ensure that Allied's services are provided under the direction, and not merely the supervision, of a Court officer.⁶

PART III – ISSUES AND THE LAW

13. The issues on this application are:

- (a) whether this Honourable Court should appoint KSV as Interim Receiver over Allied's Property pursuant to section 47.1 of the BIA; and
- (b) whether the charges sought by the Proposal Trustee are appropriate in the circumstances.

A. TEST FOR APPOINTING AN INTERIM RECEIVER IS MET

14. Section 47.1 of the BIA provides the Court with express jurisdiction to appoint an interim receiver where a notice of intention has been filed under section 50.4 of the BIA:

Appointment of interim receiver

⁵ First Report at para 4.0(1)

⁶ First Report at para 4.0(3).

47.1 (1) If a notice of intention has been filed under section 50.4 or a proposal has been filed under subsection 62(1), the court may at any time after the filing, subject to subsection (3), appoint as interim receiver of all or any part of the debtor's property,

(a) the trustee under the notice of intention or proposal;

(b) another trustee; or

(c) the trustee under the notice of intention or proposal and another trustee jointly.⁷

15. Section 47.1 of the BIA does not specify who can bring an application for appointment of an interim receiver. The trustee acting in the proposal is presumed to be able to bring the application.⁸

16. Pursuant to section 47.1(3) of the BIA, an interim receiver may be appointed only if it is shown to the Court to be necessary for the protection of:

(a) the debtor's estate; or

(b) the interests of one or more creditors, or of the creditors generally.⁹

17. This Court has previously appointed an interim receiver pursuant to section 47.1 of the BIA in circumstances similar to Allied's, where it was necessary to enable a corporation to meet payroll and independent contractor obligations and to avoid disruption to a corporation's ability to provide its core services.¹⁰

⁷ BIA, s. 47.1(1).

⁸ The Honourable Mr. Justice Lloyd W. Houlden, Mr. Justice Geoffrey B. Morawetz, Dr. Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th Edition § 3:120.

⁹ BIA, s. 47.1(3).

¹⁰ [Comstock Canada Ltd. Re, 2013 ONSC 4700](#) ("Comstock").

18. The Proposal Trustee submits that it does not have sufficient powers as proposal trustee to effectively wind-down Allied's estate, and that the appointment of KSV as Interim Receiver is necessary for the protection of Allied's estate and for the benefit of its creditors and other stakeholders. The proposed interim receivership therefore satisfies the legal test set out in section 47.1(3) of the BIA for the following reasons:

- (a) the Proposal Trustee believes that the order and certainty imposed by its appointment as Interim Receiver will allow it to provide some comfort to Allied employees that are required to undertake the Close Out Agreement.¹¹;
- (b) employees not involved in the Service Contracts or needed for the wind-down will need to be terminated, in order to minimize the costs of the estate. A proposal trustee does not have the ability to terminate employees, and Allied's existing management has expressed concerns about doing so in the proposal proceedings. As Interim Receiver, KSV can work to facilitate an orderly transition for terminated employees and assist with applications under the Wage Earner Protection Program¹²;
- (c) appointment of an interim receiver will generally benefit all of Allied's stakeholders by (i) allowing continuity of Allied's operations while the terms of the Close Out Agreement and a liquidation are completed, (ii) providing for a Court-supervised process, which is particularly necessary when personnel are leaving and resigning on a daily basis, and (iii) allowing KSV to maintain

¹¹ First Report at para 5.0(3).

¹² First Report at para 5.0(4).

transparent and coordinated communications with Allied's employees and manage receipts and disbursements¹³;

(d) the appointment of the interim receiver and fulfillment of the terms of the Close Out Agreement will assist CP to avoid disruption to its business, while at the same time generating recoveries to the estate of Allied from the proceeds of the Close Out Agreement; and¹⁴

(e) the Close Out Agreement is conditional on the Proposal Trustee being appointed as interim receiver, which condition was included at CP's request. Fulfilment of the terms of the Close Out Agreement will generate additional proceeds for Allied's creditors that would otherwise be forfeited.¹⁵

19. Allied is out of cash, and Bridging has advised that it will not fund any further unless Allied is in bankruptcy or receivership proceedings. In the Proposal Trustee's view, an interim receivership provides several advantages over a bankruptcy, including because:

(a) the interim receivership will enable the interim receiver to direct Allied's employees with the benefit of Allied's existing workers compensation coverage, which would not be possible for a bankruptcy trustee;

¹³ First Report at para 5.0(5).

¹⁴ First Report at para 5.0(5).

¹⁵ First Report at paras 1.0(3) and 4.0(3).

- (b) the proposed Order permits the Interim Receiver to continue to utilize Allied's cash management system. In the context of a bankruptcy, the BIA's banking provisions are more suited to non-operating companies.
- (c) there are a myriad of operational and other issues that will need to be addressed on a daily basis while Allied fulfills the terms of the Close Out Agreement. In a bankruptcy, resolution of those issues would typically first require inspector approval and inspectors would not be appointed until the first meeting of Allied's creditors;
- (d) the proposed Order, if granted, will ensure the continuation of services by Allied's vendors;
- (e) Allied's existing insurance coverage will be unaffected by an interim receivership, while the effect on insurance is not clear in a bankruptcy;
- (f) an interim receivership does not require the commencement of creditor meetings or other administrative steps required in a bankruptcy, which would be time consuming and divert resources needed to focus on completing the Close Out Agreement and locating and securing assets;
- (g) Allied's wind-up will need funding, and the structure for the Bridging Receiver to fund an interim receivership process is clear, while funding a bankruptcy trustee requires money to be paid into the estate on a non-priority basis, absent a Court-ordered charge; and

(h) the protections and limitations of liability afforded to an interim receiver are clear and comprehensive, while the protections for a bankruptcy trustee are limited, and thus no indemnity is required to be provided in an interim receivership.¹⁶

20. The appointment of KSV as Interim Receiver is also supported by the Bridging Receiver, the sole shareholder and senior secured creditor of Allied, and by CP.¹⁷

21. If the requested relief is not granted, Allied's operations will immediately cease, which will result in the immediate loss of additional jobs and the potential loss of approximately \$2 million of recoveries from CP.

B. THE CHARGES SOUGHT ARE APPROPRIATE IN THE CIRCUMSTANCES

22. If an order for appointment of an interim receiver is made under section 47.1 of the BIA, the court has the jurisdiction to make any order respecting the payment of fees and disbursements of the interim receiver that it considers proper, including giving the interim receiver security ranking ahead of any or all secured creditors, over any or all of the assets of the debtor in respect of the interim receiver's claim for fees or disbursements.¹⁸

23. The Proposal Trustee is seeking charges (i) securing the fees and disbursements of the Interim Receiver and its counsel (the "**Interim Receiver's Charge**") and (ii) a borrowing charge to secure any funding it requires to administer the Allied proceedings (the "**Interim Receiver's Borrowings Charge**").

¹⁶ First Report at para 5.0(6).

¹⁷ First Report at para 1.0(5).

¹⁸ BIA, s. 47.2.

24. A receiver's charge and receiver's borrowings charge are common features in receivership proceedings, including interim receivership proceedings.¹⁹ The Interim Receiver's Charge will ensure that KSV and its counsel are able to recover any fees and disbursements owed to them and provide protection in the event that Allied is unable to pay professional fees and costs during the proceedings.²⁰

25. The Proposal Trustee believes that the Interim Receiver's Charge is reasonable and appropriate in the circumstances given the complexities of Allied's proceedings, Allied's lack of liquidity and the services to be provided by the professionals involved in these proceedings. These professionals will serve distinct and key roles in these proceedings.²¹

26. With respect to the Interim Receiver's Borrowings Charge, the Bridging Receiver has advised that it is willing to provide funding for necessary expenses in the interim receivership process, but that it requires a priority charge to secure all funding provided.²² This Court has previously seen fit to grant an Interim Receiver's Borrowings Charge, including to cover disbursements used in operating the debtor's business, where, in absence of granting the charge, there was a significant likelihood, as there is here, that job sites would be shut down, causing damage to many parties.²³

27. As the Proposal Trustee's application for the appointment of the interim receiver is not being made on notice to Allied's secured creditors (other than Bridging), the draft order sought by the Proposal Trustee provides that the Interim Receiver's Charge and the Interim Receiver's

¹⁹ See, for example, *Comstock*.

²⁰ First Report at para 6.1(2).

²¹ First Report at para 6.1(3).

²² First Report at para 6.1(4).

²³ *Comstock* at para 20.

Borrowings Charge will be in priority to Bridging but subordinate to all other registered encumbrances on Allied's assets. If such an order is granted, the Interim Receiver may return to Court on notice to affected parties seeking an order elevating the priority of the Interim Receiver's Charge and the Interim Receiver's Borrowings Charge.²⁴

PART IV – ORDER REQUESTED

28. For the reasons set forth above, the Proposal Trustee respectfully requests that this Court grant the Order appointing KSV as Interim Receiver included at Tab 4 of the Application Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of September, 2022.



Chris Burr/Caitlin McIntyre
Lawyers for the Proposal Trustee

²⁴ First Report at para 6.1(5).

SCHEDULE “A”

LIST OF AUTHORITIES

<u>Cases</u>	
1.	<i>Comstock Canada Ltd. Re</i>, 2013 ONSC 4700

SCHEDULE “B”

TEXT OF RELEVANT STATUTES AND REGULATIONS

Appointment of interim receiver

47.1 (1) If a notice of intention has been filed under section 50.4 or a proposal has been filed under subsection 62(1), the court may at any time after the filing, subject to subsection (3), appoint as interim receiver of all or any part of the debtor’s property,

- (a) the trustee under the notice of intention or proposal;
- (b) another trustee; or
- (c) the trustee under the notice of intention or proposal and another trustee jointly.

Duration of appointment

(1.1) The appointment expires on the earliest of

- (a) the taking of possession by a receiver, within the meaning of subsection 243(2), of the debtor’s property over which the interim receiver was appointed,
- (b) the taking of possession by a trustee of the debtor’s property over which the interim receiver was appointed, and
- (c) court approval of the proposal.

Directions to interim receiver

(2) The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:

- (a) carry out the duties set out in subsection 50(10) or 50.4(7), in substitution for the trustee referred to in that subsection or jointly with that trustee;
- (b) take possession of all or part of the debtor’s property mentioned in the order of the court;
- (c) exercise such control over that property, and over the debtor’s business, as the court considers advisable;
- (d) take conservatory measures; and
- (e) summarily dispose of property that is perishable or likely to depreciate rapidly in value.

When appointment may be made

(3) An appointment of an interim receiver may be made under subsection (1) only if it is shown to the court to be necessary for the protection of

- (a) the debtor's estate; or
- (b) the interests of one or more creditors, or of the creditors generally.

Place of filing

(4) An application under subsection (1) is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Orders respecting fees and expenses

47.2 (1) If an appointment of an interim receiver is made under section 47 or 47.1, the court may make any order respecting the payment of fees and disbursements of the interim receiver that it considers proper, including an order giving the interim receiver security, ranking ahead of any or all secured creditors, over any or all of the assets of the debtor in respect of the interim receiver's claim for fees or disbursements, but the court shall not make such an order unless it is satisfied that all secured creditors who would be materially affected by the order were given reasonable advance notification and an opportunity to make representations to the court.

Meaning of disbursements

(2) In subsection (1), "disbursements" do not include payments made in operating a business of the debtor.

Accounts, discharge of interim receivers

- (3) With respect to interim receivers appointed under section 46, 47 or 47.1,
- (a) the form and content of their accounts, including their final statement of receipts and disbursements,
 - (b) the procedure for the preparation and taxation of those accounts, and
 - (c) the procedure for the discharge of the interim receiver
- shall be as prescribed.

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Proceeding Commenced at Toronto

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