



SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

COUNSEL SLIP / ENDORSEMENT

COURT FILE
NO.:

CV-23-00703754-00CL

DATE: 29 August 2023

NO. ON LIST: 4

TITLE OF PROCEEDING: **MACQUARIE EQUIPMENT FINANCE LIMITED v.
VALIDUS POWER CORP. et al**

BEFORE JUSTICE: **OSBORNE**

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

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ENDORSEMENT OF JUSTICE OSBORNE:

1. This Endorsement should be read together with my Endorsement of the same date released in CV-23-00703754-00CL the receivership proceeding involving the same entities.
2. By order dated August 10, 2023 made in that earlier proceeding, I appointed KSV Restructuring Inc. as Receiver and Manager of Validus Power Corp., Iroquois Falls Power Corp., Bay Power Corp., Kap Power Corp., Validus Hosting Inc. and Kingston Cogen GP Inc. (each, a “Company” and collectively, the “Companies”). The Companies now bring this Application, by and through the Receiver (the “Receiver” or the “Applicant”).
3. By Endorsement of today’s date also made in that earlier proceeding, I granted an order authorizing a Receiver to commence an application and seek relief pursuant to the CCAA. Immediately upon granting that order, I heard submissions in what is now this proceeding as to whether the relief sought in the form of an initial order and so-called “first date relief” should be granted.
4. For the reasons set out below, I am satisfied that it should be.
5. The Service List has been served with the materials. This matter did not proceed *ex parte*. Of course, this is only the initial return of the Application.
6. The relief sought today is unopposed, and in particular is not opposed by the Companies/Respondents or by the CRA. The Respondents are represented in Court today and the CRA has received the materials and counsel have advised the Applicant of the fact that the CRA is not opposing the relief sought.
7. The Receiver relies on the First Report of the Receiver, which is also the Pre-filing Report of the Proposed Monitor (KSV in each case) dated August 23, 2023, together with Appendices thereto.
8. The Report sets out the basis for the relief sought. Defined terms in this Endorsement have the meaning given to them in the Report and/or my earlier Endorsement made in the receivership proceeding.
9. At the time I granted the receivership order on August 10, 2023, appointing the Receiver in the earlier proceeding, I was of the view that the relief sought in respect of authorizing the Receiver to commence a proceeding pursuant to the CCAA was premature and while I declined to grant that relief then, I was clear that my decision was without prejudice to the ability of the Receiver to seek that relief in the future. My view on August 10 was that affected stakeholders needed more time to absorb what would be a somewhat fundamental step.

10. As contemplated, that relief was sought and granted today in the receivership proceeding. Once authorized, the Receiver immediately commence to this Application. Accordingly, the issue in this Application is whether the relief that the Receiver has been authorized to seek, should in fact be granted.
11. The principal purpose for the CCAA application is to provide a forum for the conduct of a sale and investment solicitation process (“SISP”) in respect of the assets and operations of the Companies.
12. Obviously, a SISP could be conducted within the previously existing receivership. However, for the reasons expressed by the Applicant, fully supported and strongly recommended by the proposed Monitor (KSV, who is already the Receiver), I am satisfied that relief under the CCAA should be granted.
13. The granting of the order sought provides the maximum chance that the business of the Respondents can be preserved as a going concern, in turn maximizing the chances of continuing the employment for some of the existing employees and maximizing the outcome for all stakeholders.
14. The background to, and context for, this Application is in large part set out in my Endorsement of August 10 made in the receivership proceeding. I have not repeated those here, but incorporate them by reference.
15. The Companies own and operate for power plants in Ontario, two of which provide electricity generation capacity to Ontario’s electricity grid, controlled by the Independent Electricity System Operator (“IESO”).
16. Macquarie Equipment Finance Limited brought the receivership application on August 2, 2023 for the appointment of a receiver. It holds security in respect of obligations under a secured lease as described in my endorsement of August 10. The obligations of the Companies have not been performed and they are in default.
17. The defaults include monetary repayment defaults, operating defaults, and covenant defaults including the failure to remit HST and other taxes, maintain insurance, and the failure to maintain books and records.
18. The receivership order was granted to provide stability to the business, which included the replacement of management and the planned implementation of a SISP in an effort to preserve and maximize value for stakeholders.
19. At the time, the Companies submitted that they were making efforts to attempt to secure a refinancing commitment which, if completed, was intended to be in a quantum sufficient to pay out the significant indebtedness owed to Macquarie, and the tax arrears and other obligations outstanding. That has not occurred.
20. Since that time, the Receiver has not received any response or indication from the Respondents that the previously contemplated Refinancing would be forthcoming imminently. I pause to observe, however, that counsel for the Respondents advised the Court that they intend to participate in the proposed SISP by submitting a bid.
21. The Receiver has, however, received a proposed Offer from a Potential Purchaser which includes both a reverse vesting structure, and a proposed stalking horse bid, both to be effected within a CCAA proceeding.
22. It is the strong view of the Receiver, with no contrary view expressed by any party, that any other potential bids are expected to be structured in the same way, and similarly be proposed to be effected within a CCAA proceeding.
23. This make sense in the circumstances and given the business of the Respondents since they hold numerous permits and licenses that allow them to operate in a highly regulated energy industry. A reverse vesting structure would reduce, among other things, the uncertainty related to the transfer and transferability of those licenses and permits in any commercially reasonable time frame.

24. The Potential Purchaser has indicated that it is not prepared to pay arrears owing to the CRA in respect of HST remittances owing. I observe as noted by counsel that completion of the contemplated transaction under the CCAA will reverse the priority of the HST obligation.
25. The Receiver submits that any other purchaser will likely also require that the HST obligation be reversed with the result that the super priority status of this obligation, absent a CCAA proceeding, is very likely to be an impediment to any going concern transaction in this case.
26. Here, the HST obligations exceed approximately \$6 million. I note, as submitted by counsel for the Respondents, that there are input tax credits. It is not clear as to the extent to which those input tax credits will reduce the arrears owing, and the CRA has not conducted an HST audit. Court approval of any transaction resulting from a sales process is for another day, but it will be a factor, presumably, in such approval, how the HST obligations are treated so as to not separate those from potential benefits achieved by the application of input tax credits.
27. Granting relief pursuant to the CCAA now will permit the 10 day statutory comeback period to run, while the parties continue to negotiate terms with the Potential Purchaser and also finalize the terms of the proposed SISF.
28. I am also satisfied that there is some urgency to this matter given that the business of the Debtors is electrical power, and if there is to be participation in the IESO's capacity auction market, the bid deadline for participation is November 29, 2023. There is much to be done between now and then, with the result that the process should begin as quickly as possible.
29. I am satisfied that the CCAA applies, as the Companies are "debtor companies" or affiliated "debtor companies" where the total claims exceed \$5 million. The claims of Macquarie alone exceed \$55 million.
30. The Companies have assets in Canada and are insolvent in that they are reasonably expected to run out of liquidity within a reasonable proximity of time as compared with the time reasonably required to implement a restructuring (See *Stelco, Inc. (Re)*).
31. This Court has jurisdiction to extend the CCAA protection to limited partnerships to ensure that the purposes of the CCAA can be achieved where the operation of such partnerships are tied to the operations of the business (See, for example, *Target Canada Co. (Re)*, *Just Energy Corp. (Re)*, and *Bed Bath & Beyond Canada Limited (Re)*).
32. Kingston LP owns one of the four powerplants. It is also subject to the security held by Macquarie. To adequately market the Property, and thereby maximize recovery for stakeholders, I am satisfied that the CCAA protection granted to the Companies should also be granted in respect of Kingston LP.
33. Indeed, the Companies together with Kingston LP are insolvent and already subject to the receivership order. The Receiver has complied with the requirements set out in s. 10(2) of the CCAA and filed a 13 week projected cash flow together with financial statements to the extent they exist.
34. As noted above, no refinancing appears forthcoming from the Companies. The offer from the Potential Purchaser is conditional upon the issuance of a reverse vesting order in the context of a CCAA proceeding. A stay of proceedings will maintain the status quo while the Receiver develops a plan for the benefit of creditors.
35. I am satisfied that creditors will not be prejudiced by the grant of a stay of proceedings under an initial order. They are already aware of the receivership order and that already includes a stay. Service of the materials for this Application was effected six days in advance of the return today, so this Application is already on notice. In short, the stay sought today, for a period not exceeding 10 days, is proportionate and appropriate. It does not seek to stay the receivership order.

36. KSV has already been appointed Receiver and is an appropriate Monitor.
37. For all of these reasons, the relief is granted. I am satisfied that the form of order is appropriate and includes those provisions, and only those provisions, absolutely necessary for the initial 10 day stay period. Of note, no relief is sought or granted in respect of any charges, such as an administration charge, a directors' charge or a DIP charge.
38. Initial order to go in the form signed by me, which is effective immediately and without the necessity of issuing and entering.
39. The **10 day comeback hearing will take place before me on Friday, September 8, 2023 commencing at 8:30 AM**, given scheduling difficulties presented by the statutory Court conference next week. In the circumstances, counsel are not required to be gowned.
40. As stated above, Receiver in its capacity as Applicant intends to seek approval in respect of the proposed SISP. **That motion will proceed on September 19, 2023 commencing at 10 AM and continuing as necessary for 90 minutes.**

O'Shea, J.