

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

MACQUARIE EQUIPMENT FINANCE LIMITED

Applicant

and

VALIDUS POWER CORP., IROQUOIS FALLS POWER CORP., BAY
POWER CORP., KAP POWER CORP., VALIDUS HOSTING INC.,
KINGSTON COGEN LIMITED PARTNERSHIP AND KINGSTON COGEN
GP INC.

Respondents

IN THE MATTER OF AN APPLICATION UNDER SECTION 243(1) OF THE *BANKRUPTCY
AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED; AND SECTION 101 OF THE
COURTS OF JUSTICE ACT, R.S.O. 1990, c. C.43, AS AMENDED

**AIDE MEMOIRE OF THE RESPONDENTS
(Appointment Scheduled October 23, 2023)**

October 20, 2023

MINDEN GROSS LLP
Barristers and Solicitors
2200 - 145 King Street West
Toronto, ON M5H 4G2

Catherine Francis (LSO# 26900N)
cfrancis@mindengross.com
Tel: 416-369-4137

Lawyers for the Respondents

TO: TORYS LLP
79 Wellington St. W., 30th Floor
Box 270, TD South Tower
Toronto, ON M5K 1N2

Scott A. Bomhof (LSO#: 37006F)
Tel: 416.865.7370
sbomhof@torys.com

Jeremy Opolsky (LSO#: 60813N)
Tel: 416.865.8117
jopolsky@torys.com

Mike Noel (LSO#: 80130F)
Tel: 416.865.7378
mnoel@torys.com

Alina Butt (LSO#: 84168W)
Tel: 416.865.7973
abutt@torys.com

Lawyers for the Applicant,
Macquarie Equipment Finance Limited, the Applicant

AND TO: SERVICE LIST

AIDE MEMOIRE OF THE RESPONDENTS

1. This Aide Memoire is being filed on behalf of the Respondents, in respect of a motion by KSV¹ in its capacity as Monitor for approval of a SISP for the Validus Entities and approval of a Transaction Agreement between the Validus Entities, Macquarie and Far North as Assignee as Stalking Horse Bidder. The Monitor served its Motion Record on October 19, 2023 and seeks a return date and schedule for the delivery of material.

2. Without prejudice to any other issues, the Monitor's motion for approval of the SISP and the Transaction Agreement raises two major issues. In particular, approval of the Transaction Agreement requires the Court to:

- (a) Approve the indebtedness allegedly owing to Macquarie, as the Transaction Agreement involves Macquarie making a credit bid based on the entirety of its alleged indebtedness;
- (b) Approve a structure whereby the Validus Entities, through the Monitor, pays \$6,435,000 to Macquarie in HST for remittance to CRA, but the input tax credit generated by the HST payment is unavailable to offset outstanding HST liabilities to CRA, to the detriment of CRA and all other creditors of the Validus Entities.

3. Both these significant issues were raised by the Respondents from the inception of these proceedings. The debt issue was raised in Mr. Shortt's affidavits sworn August 7 and 10, 2023. The HST issue/concern was raised at the hearing to convert the proceedings to a CCAA proceeding and was addressed in the August 29, 2023 Endorsement:

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

¹ All terms as defined in the Monitor's Motion Record

treated so as to not separate those from potential benefits achieved by the application of input tax credits.

4. Notwithstanding that 2 ½ months have gone by since the receivership and almost two months since the CCAA, the Applicant, the Monitor and the Receiver made no attempt to adjudicate these issues prior to coming forward with a SISP and Transaction Agreement that depends on the Court summarily approving the quantum of the Macquarie debt and approving a Transaction Agreement/Reverse Vesting Order structure that provides the input tax credits to the payee rather than the payor.

5. Both these issues arise from the unusual structure of the Macquarie loan, which was structured as a Lease Agreement rather than a loan. Hence, each lease payment includes an HST component which gives rise to an input tax credit in the Validus Entities. The Stalking Horse/Reverse Vesting Order structure strips the input tax credits from the payor and instead assigns them to the benefit of the purchaser in the newly cleansed companies.

6. The Lease Agreement also includes a “Stipulated Loss Value” on default, which calculates the lost benefit to Macquarie from early payment arising from default. The problem is that Macquarie has added to its “debt” calculated using the Stipulated Loss Value formula all of the missed lease payments arising from a “lease holiday” granted to the Validus Entities. If this is a correct interpretation of the Lease Agreement, then Macquarie will receive a significant “penalty” of millions of dollars over and above its indebtedness, contrary to the Anti-Deprivation Rule.

7. These are very serious issues that cannot reasonably be resolved by way of a summary determination without representation by CRA and creditor groups who would otherwise be entitled to a distribution of surplus funds.

MINDEN GROSS LLP

Barristers and Solicitors
2200 - 145 King Street West
Toronto, ON M5H 4G2

Catherine Francis (LSO# 26900N)

cfrancis@mindengross.com

Tel: 416-369-4137

Lawyers for the Respondents

B E T W E E N

MACQUARIE EQUIPMENT FINANCE LIMITED
Applicant

-and-

VALIDUS POWER CORP., et al.
Respondents
Court File No. CV-23-00703754-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at Toronto

AIDE MEMOIRE

MINDEN GROSS LLP
Barristers and Solicitors
2200 - 145 King Street West
Toronto, ON M5H 4G2

Catherine Francis (LSO# 26900N)
cfrancis@mindengross.com
Tel: 416-369-4137

Lawyers for the Respondents